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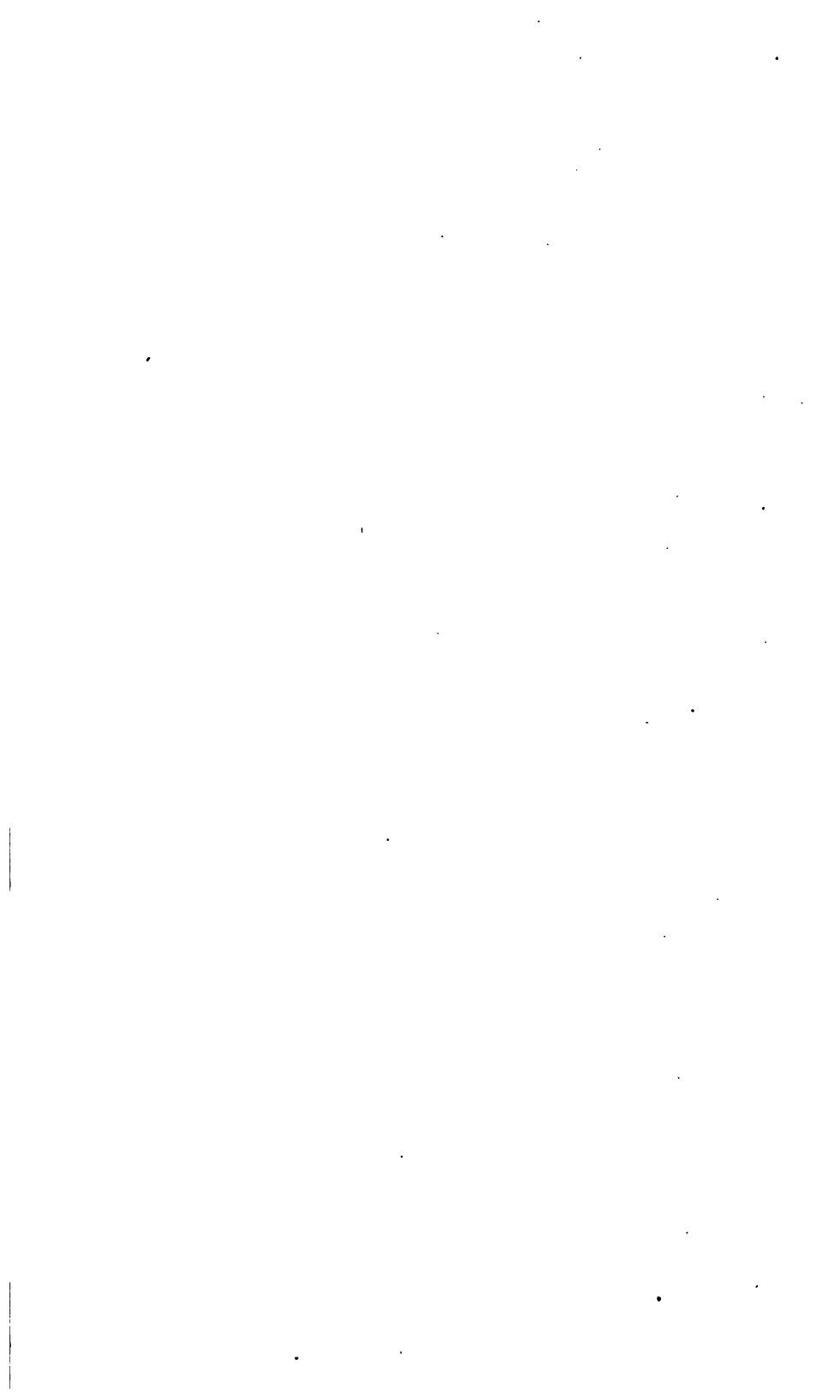
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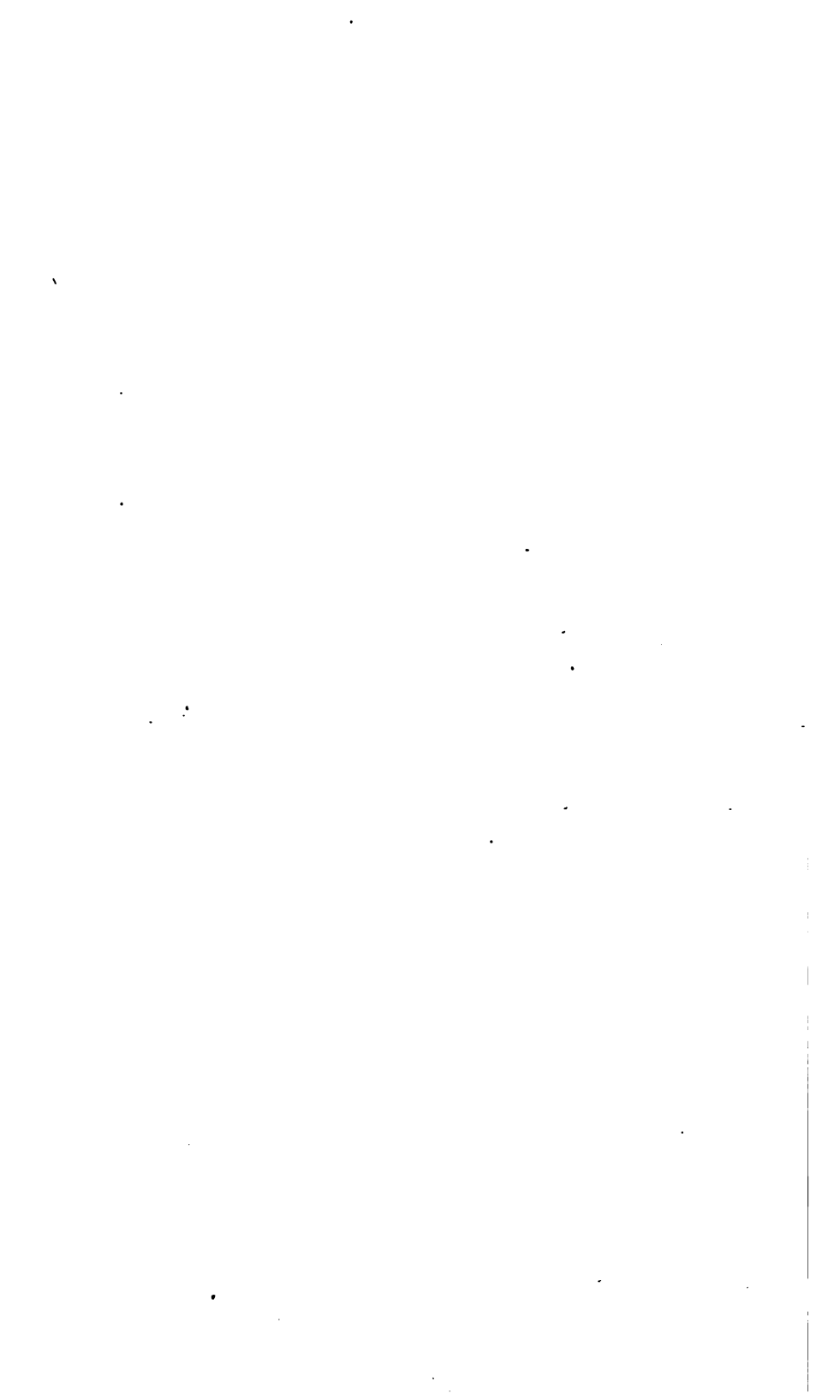
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OF THE SEVERAL STATES.

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By A. C. FREEMAN.

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VOLUME 117.

(15)

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

GEORGE v. STATE.

[145 Ala. 41, 40 South. 961.]

HOMICIDE—Evidence.—A declaration by the deceased that he was cut is admissible in evidence although he did not state who cut him. (p. 18.)

HOMICIDE—Evidence—Threats.—General threats made by a person accused of homicide having no reference to the deceased are not admissible in evidence against him. (p. 18.)

HOMICIDE—Self-defense.—A blow from the hand or fist, under ordinary circumstances, neither justifies nor excuses the use of a deadly weapon, and it is for the jury to decide in a particular case whether the facts thereof are within the ordinary reason or not. (p. 19.)

HOMICIDE.—Instruction that the jury may take into consideration the relative weight, age, size, and physical condition of two combatants terminating in a homicide, in determining whether the defendant was at the time in imminent danger of loss of his life or was exposed to great bodily harm, is erroneous as being argumentative and as giving undue prominence to certain facts. (p. 19.)

HOMICIDE—Self-defense—Threats.—If the other elements of self-defense exist and the deceased has made threats against the defendant, which have been communicated to him, he has the right to act upon any overt act or hostile demonstration which may have led to the honest belief that he was in imminent peril, although such act or demonstration may not have amounted to a felonious assault. (p. 19.)

Indictment and trial for murder by cutting with a knife. The defendant requested the court to give the following charges:

“Charge 1: ‘Gentlemen of the jury, I charge you that an assault with the hand or fist never justifies or excuses a homicide under ordinary circumstances, and it is for you to de-

cide whether the facts in this case are within the ordinary reason or not.' Charge 2: 'Gentlemen of the jury, you may look to the relative size of the defendant and the deceased, their respective ages and weight and physical condition in drawing your conclusion that the defendant was or not at the time of the fatal difficulty in imminent danger of loss of life, or was exposed to grievous bodily harm.' Charge 3: 'Gentlemen of the jury, I charge you that, if you believe the defendant was free from fault in bringing on the difficulty, and had no reasonable means of escape, and was in imminent danger of his life, or was exposed to great bodily harm, then he had the right to anticipate his assailant and strike the fatal blow.'

"At the request of the defendant the court gave the following charge: 'The court charges the jury that prior communicated threats made by the deceased against the defendant have a tendency to make the defendant take more prompt and decisive measures to protect himself.' After giving the charge, the court qualified it as follows: 'Provided, gentlemen of the jury, you believed that the deceased was making a felonious assault upon the defendant at the time he struck the fatal blow.'"

Bayles & Hybart, for the appellant.

M. Wilson, attorney general, for the state.

44 ANDERSON, J. The bill of exceptions does not disclose that an objection was made to the court's making defendant go to trial, or an exception to the action of the court: *Walker v. State*, 117 Ala. 85, 23 South. 670.

The trial court committed no error of which the defendant can complain in permitting the witness to testify that deceased told him he was cut. He did not say defendant cut him; but, had he so stated, it would have been innocuous, as the undisputed evidence showed that defendant cut the deceased.

If the threats testified to by witness Sylvester were prima facie admissible on the direct examination, they should have been excluded upon the motion of the defendant, as the witness showed by his evidence on cross-examination that the threats had no reference to the deceased or any member of his family.

The trial court, in the oral charge, stated "that a blow from the hand or fist never justified the use of a deadly

weapon." The law is that a blow from the hand or fist, under ordinary circumstances, neither justifies ⁴⁵ nor excuses the use of a deadly weapon: *Scales v. State*, 96 Ala. 69, 11 South. 121; *Davis v. State*, 152 Ind. 34, 71 Am. St. Rep. 322, 51 N. E. 928; *Strickland v. State*, 98 Ga. 84, 25 S. E. 908.

Charge 1, requested by the defendant, asserted a correct abstract proposition of law, and should have been given.

Charge 2, requested by the defendant, was properly refused. It was argumentative and emphasized certain facts: *Hussey v. State*, 86 Ala. 34, 5 South. 484; *Smith v. State*, 88 Ala. 73, 7 South. 52; *Bancroft v. Otis*, 91 Ala. 279, 24 Am. St. Rep. 904, 8 South. 286; *Gilmore v. State*, 126 Ala. 20, 28 South. 595.

Charge 3, requested by the defendant, was properly refused. If not otherwise bad, it pretermits not entering into the conflict willingly. He may have been free from fault in bringing on the difficulty; yet, if he entered into it willingly, he cannot invoke the doctrine of self-defense.

Without determining the correctness or not of charge 4, given at the request of the defendant, or sanctioning the action of the court in qualifying the same, the qualification was not a correct statement of the law. The defendant did not have to wait until a felonious assault was made upon him. If the other elements of self-defense existed, and the deceased had made threats against him, which had been communicated to him, he had the right to act upon any overt act or hostile demonstration, which may have led to the honest belief that he was in imminent peril, but which said act or demonstration may not have amounted to a felonious assault.

The judgment of the circuit court is reversed, and the cause remanded

Reversed and remanded.

Haralson, Dowdell, and Denson, JJ., concur.

The Law of Self-defense is discussed in the notes to *State v. Gordon*, 109 Am. St. Rep. 804-826; *State v. Sumner*, 74 Am. St. Rep. 717-740. As to whether an assault with the fists alone will justify taking the life of the assailant, see the note last cited at page 725, and the case of *Davis v. State*, 152 Ind. 34, 71 Am. St. Rep. 322.

The Admissibility of Threats in Evidence in prosecutions for homicide is discussed in the notes to *State v. Nelson*, 89 Am. St. Rep. 691; *Campbell v. People*, 61 Am. Dec. 53. The admissibility of general threats having no reference to the homicide is considered in the recent case of *State v. Feeley*, 194 Mo. 300, 112 Am. St. Rep. 511.

CITY OF GADSDEN v. MITCHELL.

[145 Ala. 137, 40 South. 557.]

MUNICIPAL CORPORATIONS—Waterworks Contracts.—A municipal corporation has incidental power to contract for the construction and operation of a system of waterworks for public and private use, and the making of such a contract is not a delegation of a governmental function, but an exercise by the city of its business or proprietary powers. (p. 23.)

MUNICIPAL CORPORATIONS—Waterworks Contracts—Period of Franchise.—If no limit is fixed by constitution or statute as to the length of time for which a contract made by a city for the construction and operation of a system of waterworks for public and private use shall remain in force, it cannot be said that such contract providing that it shall remain in force for thirty years is unreasonable. (p. 24.)

MUNICIPAL CORPORATIONS—Waterworks Contract—Designation of Streets to be Piped—Injunction.—A contract entered into by a city for the construction of a waterworks system which does not prescribe the order in which the work of constructing such water plant shall be begun, is not a condition precedent to maintaining a bill for a mandatory injunction to require the city to designate the streets in which pipes shall be laid and hydrants located, that the complainants shall have purchased material, located water towers and pumping stations, or otherwise have begun to perform their part of the contract. (pp. 24, 25.)

The following statement is taken from the opinion delivered by Tyson, J., in the case of *Weller v. City of Gadsden*, 141 Ala. 642, 37 South. 682:

“R. A. Mitchell and associates filed their bill for mandatory injunction to require the proper authorities of the city of Gadsden to point out and designate such streets of the said city of Gadsden as it was desired that water mains and hydrants be laid in. The bill sets up the contract . . . and ordinance under which relief is asked essentially as follows: . . .

“By section 1 of an ordinance adopted November 11, 1902, the governing board of the city of Gadsden, to obtain for the use of the inhabitants of that city a supply of water for all purposes, granted to R. A. Mitchell, his associates, successors or assigns, ‘the right and privilege to construct, maintain and operate waterworks for public and private use of water within said city, for a term of thirty years from the date of the completion of said waterworks,’ together with the right to lay pipes, erect hydrants, fountains and other structures and appurtenances, in any and all of the streets, alleys, lanes, parks and other public places of and in said city, as they then existed or might thereafter be laid out or extended, and as

might be requisite for the distribution of water or the operation of said waterworks system.

"By section 2 of the ordinance, it was provided that the condition upon which the foregoing privileges and franchises were granted were made the subject of a contract between the said city and the grantees, which formal contract was thereby made a part of and embodied in the ordinance. After inserting the contract, it was, in conclusion, ordained: 'That the city of Gadsden, Alabama, hereby approves, ratifies and confirms the above ordinance and contract in all its terms and provisions,' and it was further provided how the 'ordinance and contract' should be executed, both by the city of Gadsden and the grantees and contractees, and it was duly signed and executed by both parties, in the manner prescribed by the ordinance; R. A. Mitchell 'for himself, his associates, successors or assigns,' at the end of the ordinance, assenting in writing to all the terms of the ordinance contract, 'with all its provisions, restrictions, and requirements.' In the formal contract, embodied in the ordinance, the undertakings of Mitchell and associates are set forth in ten paragraphs.

"Briefly, and as far as now necessary, their obligations may be thus stated: (1) To supply pumping engines; (2) to lay adequate mains; (3) when ordered by the city, to extend mains, and place additional fire hydrants thereon; (4) to furnish a supply of water from a designated source or sources, sufficient for present and future needs of the city and private consumers; (5) to place upon the lines of mains or distributing pipes not less than sixty (60) hydrants, at such points as the city authorities may direct, for public use only, the city to first establish grades of the highways before pipes are laid; (6) to begin construction of the system twelve months before the expiration of the existing contract of the city with the Gadsden Waterworks Company, on or before January 1, 1905, and to complete the same, ready for use, by December 31, 1905; (7) to discharge, when required, certain streams through hydrants and to maintain a certain pressure, which test, if successfully made, will entitle them to an acceptance of the works; (8) to furnish water for domestic and manufacturing purposes, at prices not exceeding a fixed schedule, and to furnish certain quantities of water for sprinkling, for drinking fountains, and for city buildings, free of charge; (9) to deposit a certified check, for one thousand dollars, to be forfeited if the work of construction is not com-

menced and completed within the stipulated time, which check, the bill alleges, was deposited by the complainants and collected by the city.

"Thereupon, in consideration of the agreements and obligations of the other parties (having already in section 1 of the ordinance made a simple grant of the right to construct and operate the waterworks for thirty years, and to use the streets, etc., for pipes, etc.) the city of Gadsden stipulated, in four paragraphs of the formal contract, embodied in the ordinance, as follows: (1) To grant the exclusive right to construct and operate waterworks in said city for thirty years from date of acceptance, with a proviso that the franchise and contract may be revoked at the option of the mayor and aldermen, whenever the works failed to furnish a proper and adequate supply of water and such condition continued for three months; (2) to grant the right to enter upon the streets, alleys, etc., to lay pipes, erect hydrants, and to do other necessary work of construction; (3) to pay an annual rental, for thirty years, of forty-two dollars for each of the first sixty hydrants set and put in use, and forty dollars for each hydrant on the extension of mains which the city may order; (4) to grant the right to make needful rules and regulations in regard to the use and waste of water, and to collect from consumers in advance a tariff of rates, not exceeding those specified. Delays in the beginning or completion of the work, due to certain named causes, are to operate as an extension equal to the time so lost."

H. T. Davis and Bilbro, Inzer & Stephens, for the appellant.

Burnett, Hood & Murphree and Dorth, Martin & Allen, for the appellee.

¹⁵⁶ SIMPSON, J. This is an appeal from a decree overruling a motion to dismiss the bill for want of equity and demurrers to the same. In 1902 the appellant (defendant below) passed the ordinance and entered into the contract shown in the record, whereby certain rights were granted to appellee (complainant) and said complainant undertook and promised to build a system of waterworks for defendant, with stipulations as shown, and agreements on the part of defendant to pay for certain service to be given to the city. On June 1, 1903, defendant passed an ordinance by which it undertook to

repeal the first ordinance. On December 27, 1904, another ordinance was passed, reciting the fact that Justice Tyson in his opinion had declared that the contract between the complainant and defendant could not be repealed and as the mayor and aldermen thought said opinion correct, the parties had agreed on certain modifications, and the original contract was in all things ratified and confirmed and declared to be in full force. This was accepted in writing by complainant, and has never been repealed. Subsequently complainant demanded of the city authorities that the streets in which the pipes were to be laid be designated, and the location for hydrants designated, in accordance with the terms of the contract, and the board of mayor and aldermen of said city passed an ordinance appointing a committee of three aldermen ¹⁵⁷ to attend to that matter. This committee never performed the duty, and, when complainant renewed the request, a reply was received, which was signed, "Charles P. Smith, Mayor of the City of Gadsden," saying: "I am instructed to say that the mayor and board of aldermen of the city of Gadsden do not understand that they are under any obligation to comply with your request."

A considerable portion of the argument is devoted to the question as to whether the mayor and aldermen of said city could repeal the ordinance by which the contract was made, and thus absolve the city from the obligations of the contract. We do not see that this question arises at all, as the original ordinance, with the modifications, was re-enacted and the contract reaffirmed. So that the only question is whether, with the contract still in force, and unrepealed, said city can refuse to carry out its provisions. We hold that the city had the power and authority to enter into said contract, and adopt what was said by Justice Tyson in the cause of *Weller v. City of Gadsden*, 141 Ala. 642, 37 South. 682, in so far as he treats of the validity of the contract and of its several portions. The making of such a contract is not a delegation of a governmental function, but is an exercise of its business or proprietary powers: *Gregsten v. City of Chicago*, 145 Ill. 451, 36 Am. St. Rep. 496, 34 N. E. 426; 1 *Dillon on Municipal Corporations*, 3d ed., secs. 27, 66, and cases cited in note; *Western Sav. Fund Society v. City of Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730; *City of Indianapolis v. Indianapolis Gas Light etc. Co.*, 66 Ind. 396; *New Orleans Gas Co. v. Louisiana Gas Co.*, 115 U. S. 650, 6 Sup. Ct. Rep. 252, 29 L. ed. 516; *Louisville Gas*

Co. v. Citizens' Gaslight Co., 115 U. S. 683, 6 Sup. Ct. Rep. 265, 29 L. ed. 510; New Orleans Waterworks v. Rivers, 115 U. S. 674, 6 Sup. Ct. Rep. 273, 29 L. ed. 525; St. Tammany Waterworks v. New Orleans Waterworks, 120 U. S. 64, 7 Sup. Ct. Rep. 405, 30 L. ed. 563; City of Selma v. Mullen, 46 Ala. 411; City of Greenville v. Greenville Waterworks, 125 Ala. 627, 27 South. 764. The charter of the city of Gadsden confers ample powers to authorize the making of this contract: Acts 1882-83, p. 298, sec. 22. At any rate this is one of the incidental powers of a municipal corporation: 1 Dillon on Municipal Corporations, 4th ed., ¹⁵⁸ secs. 146, 443, note 1; Livingston v. Pippin, 31 Ala. 542, 550, 551.

There being no limit by constitution, or statute, as to the length of time for which such contracts may be made, the court cannot say that the time fixed by this contract is unreasonable. On the contrary, it is common knowledge that it requires a considerable outlay of money to construct a system of waterworks, and a considerable part of the material is buried under the surface of the ground, so that no arrangement could be made for the construction of such a system, unless the contract be allowed to run for a number of years, so as to offer the hope of realizing something on the enterprise. While it is true that the providing of pure and wholesome water is an important department of the duties of a municipal corporation, yet the authorities cited and many others are conclusive to the effect that the corporate authorities are intrusted with the discretion to determine how that can be best done, and if they find it to be the best public interest to enter into contracts carefully guarded for the accomplishment of that end that they have the right to do so. Without going into all of the details the contract makes all necessary provisions to secure the purity and wholesomeness of the water, the strength and quality of the mains, provides for testing to the satisfaction of the mayor and aldermen, and also reserves the power in the mayor and aldermen to revoke the franchise upon failure of appellee to comply with the requirements of the contract.

As to the objection based on the principle that one seeking injunctive relief based on a contract must show that he has performed his part of the contract, it is sufficient to say that the contract in this case does not prescribe the order in which work shall be done, nor make it necessary for complainant to purchase machinery, etc., before laying the pipes. The con-

tract being still in force, and the complainant having a right to demand that the streets be designated in which pipes are to be laid or conduits built, also to have designated the location of the sixty hydrants, and it being impossible for complainant to prosecute its work until those things are done, mandatory injunction is the proper remedy, and complainant ¹⁵⁹ is entitled to the same: 16 Am. & Eng. Ency. of Law, 2d ed., 342.

But, as to the other prayer of the bill, that the defendant be enjoined from building a system of waterworks, that part of the original contract which attempted to make the franchise granted exclusive is violative of section 22 of the constitution of Alabama, and therefore incapable of enforcement, and, in addition to that, it has been eliminated from the contract by the amendment agreed to: *Birmingham & Pratt Mines St. Ry. Co. v. Birmingham St. Ry. Co.*, 79 Ala. 465, 58 Am. Rep. 615. That portion of the contract which is valid may be enforced, while that which is not cannot be enforced: *Illinois Tr. & Sav. Bank v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518, 524; *Monroe Waterworks Co. v. City of Monroe*, 110 Wis. 11, 85 N. W. 685; *City of Quincey v. Bull*, 106 Ill. 337; *Clarksburg Elec. St. Ry. Co. v. Clarksburg*, 47 W. Va. 739, 81 Am. St. Rep. 777, 35 S. E. 994, 50 L. R. A. 142.

There is nothing in the suggestion that Weller was not a proper party. Although the contract was made with Mitchell "and his associates," etc., yet the bill alleges that the contract was made with Mitchell & Weller, and that Weller was his only associate.

The decree of the court is affirmed.

Weakley, C. J., and Tyson and Anderson, JJ., concur.

The Question of When Mandamus is the proper remedy against public officers is discussed in the note to State v. Gardner, 98 Am. St. Rep. 863.

CITY OF ENSLEY v. McWILLIAMS.

[145 Ala. 159, 41 South. 296.]

INJUNCTION to Prevent Cloud on Title.—A bill for an injunction, alleging that because of the unconstitutionality of a statute extending municipal limits the complainant's land is not therein, that the city has begun proceedings to sell such land for taxes, that such action will work injury for which there is no legal remedy, and that a tax deed issued by the city would cast a cloud on plaintiff's title, is not sufficient as a bill to quiet title, or remove a cloud therefrom, and does not justify an injunction, in the absence of extrinsic facts showing the invalidity of the proceedings. (pp. 26, 27).

INJUNCTION will not Lie to Restrain Collection of Taxes in the absence of special circumstances in the case bringing it within some recognized head of equity jurisprudence. (p. 28.)

CLOUD ON TITLE—Tax Sale.—A tax against property with no semblance of legality and a sale thereunder constitute no cloud on the title. (p. 29.)

CLOUD ON TITLE.—Tax Sale under an unconstitutional law does not constitute a cloud on the title of the land thus sold. (p. 29.)

CLOUD ON TITLE—Tax Sale—Injunction.—A threatened sale of land for unpaid and delinquent taxes, alleged to be void because of an unconstitutional law, does not put a cloud upon title, so as to justify injunction against such sale. (p. 30.)

R. Boyd, for the appellant.

J. E. Webb and Sharpe & Miller, for the appellee.

¹⁶² **DENSON, J.** The city of Ensley was incorporated as a municipal corporation by an act of General Assembly approved December 10, 1900, and the act amendatory thereto approved March 2, 1901: Acts 1900-01, pp. 247, 1940. By these acts the territory of the city was defined and marked out. The legislature at the session ¹⁶³ of 1903, enacted two acts, approved, respectively, on the twenty-eighth day of February, 1903, and the thirtieth day of September, 1903. The first of these acts is entitled: "An act to amend section one of an act approved March 2, 1901, entitled 'An act to amend section one of an act entitled "An act to establish a new charter for the city of Ensley, in Jefferson county, Alabama" '": Local Acts 1903, p. 107. The title of the other is: "An act to alter or rearrange the boundaries of the city of Ensley, Jefferson county, Alabama": Local Acts 1903, p. 692. Each of these acts extended the territory of the city, and as extended brought some of the lands of the complainant in the bill in this case within the taxing jurisdiction of the city, thereby

making his property subject to taxation by the city. The bill describes the complainant's land that was brought by said acts within the city's jurisdiction and alleges that "the city of Ensley levied a tax on said land for the year 1904, but complainant has never paid said taxes. On July 1, 1905, defendant, through its city tax collector, F. G. Fonville, gave notice in the 'Ensley Herald' that the city clerk of Ensley had issued to him an execution and he had levied on complainant's property as described (in the third paragraph of the bill) for delinquent taxes, and costs due the city of Ensley, Alabama, for the year 1904, and in the 'Ensley Herald,' " advertised defendant's said property for sale on the first day of August, 1905. It is averred in the bill that the two acts of 1903 were not constitutionally enacted, the defects in this particular being particularly pointed out. In consequence of the averred unconstitutionality of the acts, it is averred in the eighth paragraph of the bill "that the corporate limits of the city of Ensley do not embrace the complainant's land; that the exercise of the authority of the city of Ensley which the said acts purport to confer is vexatious to complainant, and if not restrained will deprive him of his just rights and subject him to unjust vexation and injury which is wholly irremedial by a court of law. Complainant further avers that the proceedings instituted by the said city of Ensley to sell complainant's property for the payment of said alleged delinquent taxes ¹⁰⁴ are void upon their face, and extrinsic facts are necessary to be proved to show their invalidity and illegality, and a tax deed, if issued by said city of Ensley, would be prima facie evidence of title, resulting in a cloud on complainant's title. Said instruments purporting to extend the corporate limits of the said city of Ensley are not efficacious for this purpose, are null and void, and do not confer on said city of Ensley jurisdiction to make said assessment or sell said lands for the payment of said taxes. If said sale is made of said property as aforesaid, there will be a cloud on complainant's title and he will suffer irreparable injury and will be without redress at law." The prayer of the bill is for an injunction "restraining the city of Ensley, its officers, agents and employés, and all of them, from selling or attempting to sell said property of complainant so advertised as aforesaid for taxes so assessed against complainant as aforesaid. Complainant further prays that upon a final hearing of this cause

the temporary injunction shall be made perpetual, and the court will set aside and forever annul said assessment as illegal and void, and perpetually enjoin and restrain the said city of Ensley from exercising or attempting to exercise any jurisdiction or authority over the said property of complainant, or dealing with said property as if it were in the corporate limits of the city of Ensley."

A motion to dismiss the bill for want of equity was overruled, and this constitutes one ground in the assignment of errors. "It is certainly the general rule that the collection of taxes will not be arrested by injunction. It has its reason in public policy, which cannot lend its sanction to any remedial proceeding which might clog the machinery of civil administration. In addition to illegality or irregularity in the imposition of the taxes or in the process of the collection, to borrow the language of Mr. High, 'there must be some special circumstances attending the threatened injury to distinguish it from a mere trespass, and thus to bring the case within some recognized head of equity jurisprudence; otherwise the person aggrieved will be left to his remedy at law'": *Town of New Decatur v. Nelson*, 102 Ala. 165 556, 15 South. 275; *Alabama Gold Life Ins. Co. v. Lott*, 54 Ala. 499; *Elyton Land Co. v. Ayres*, 62 Ala. 413; *Nat. Com. Bank v. Mayor*, 62 Ala. 284, 34 Am. Rep. 15; *Mayor v. Baldwin*, 57 Ala. 61, 29 Am. Rep. 712; *Cooley on Taxation*, p. 760. The attempt is made in this case to show that the tax proceedings, if permitted to culminate in a sale and conveyance, would operate as a cloud on the complainant's title; and this is the recognized head of the equity jurisprudence that it is sought to rest the bill on and withdraw it from the influence of the principle stated in the preceding paragraph. It is manifest from the averments of the bill that it does not contain equity as a bill filed with respect of the sections embraced in article 13 of chapter 16 of the Code, though an intimation might be gathered from some of its averments that the draftsman had those sections in mind when framing the bill: *Meyer v. Calera Land Co.*, 133 Ala. 554, 31 South. 938; *Parker v. Boutwell*, 119 Ala. 297, 24 South. 860; *Weaver v. Eaton*, 139 Ala. 247, 35 South. 647.

The question then arises, Can the bill be maintained as an ordinary bill to remove a cloud from title? The whole theory of the bill is that the acts of the legislature extending the territory of the city, and under which the city claims the right

to tax complainant's land, are invalid as having been enacted in violation of the constitution; that they are unconstitutional. "A cloud upon one's title is something which constitutes an apparent encumbrance upon it, or an apparent defect in it; something that shows *prima facie* some right of a third party, either to the whole or some interest in it. An illegal tax may or may not constitute such a cloud. If the alleged tax has no semblance of legality, if upon the face of the proceedings it is wholly unwarranted by law, or for any reason totally void, so that any person impeaching the record and comparing it with the law is at once apprised of the illegality, the tax, it would seem, could neither constitute an encumbrance nor an apparent defect of title, and therefore in law could constitute no cloud": *Cooley on Taxation*, 552. Under the facts in this case, if, as the bill alleges, the acts of the legislature are unconstitutional, ¹⁶⁶ a sale and conveyance under the tax proceedings could not constitute a cloud upon the complainant's title, because from an inspection of the conveyance, which would recite the proceedings, and of the record, it would appear that the assessment was wholly unwarranted by law and totally void. The complainant and every other person is presumed to know the law. The courts take judicial knowledge of the acts prescribing the limits of towns.

It has been frequently held that a sale of land for taxes laid under an unconstitutional law does not constitute a cloud upon the title: *Detroit v. Martin*, 34 Mich. 170, 22 Am. Rep. 512; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Newell v. Wheeler*, 48 N. Y. 486; *Marsh v. City of Brooklyn*, 59 N. Y. 280; *Ewing v. St. Louis*, 5 Wall. (U. S.) 413, 18 L. ed. 657; *Wells v. Buffalo*, 80 N. Y. 253; *Mayor of Birmingham v. McCormack*, 145 Ala. 685, 40 South. 111. If the tax proceedings should finally culminate in a sale and conveyance, and an action of ejectment should be brought by the grantee in the conveyance against complainant in possession, it cannot be doubted that to authorize a recovery valid tax proceedings would have to be shown by the plaintiff in ejectment to support the conveyance. As has been stated, the court takes judicial knowledge of the acts chartering towns and cities, and of the territorial limits of towns and cities as fixed by such charters: *Lord v. Mobile*, 113 Ala. 360, 21 South. 366; *Ross v. Reddick*, 2 Ill. 73; *State v. Jackson*, 39 Me. 291. So upon a comparison by the court of the description of the

property in the conveyance with the territorial limits as given in the charter as granted by the original act, it would be seen that the property as described in the deed, if described as the land is in the bill, would fall outside the city limits as defined in that charter, but would come within the limits as fixed by the acts of 1903 that are alleged to be unconstitutional. Therefore, in the action of ejectment the plaintiff, if the amendatory acts are void, would fail, and that, too, without the defendant offering any evidence. And in such state of the case, under the test fixed by this court, the conveyance would ¹⁶⁷ not be a cloud on defendant's title: *Rea v. Longstreet*, 54 Ala. 291; *Parker v. Boutwell*, 119 Ala. 297, 24 South. 860; *Mayor v. McCormack*, 145 Ala. 685, 40 South. 111. If the acts of 1903 are valid enactments, confessedly the bill in this case cannot be maintained. The tax proceeding would be valid, and would not be a cloud on complainant's title: *Shults v. Shults*, 159 Ill. 654, 50 Am. St. Rep. 188, 43 N. E. 800.

Our conclusion is that the bill is without equity, and the city court erred in overruling the motion to dismiss it for want of equity. A decree will be here rendered dismissing the bill.

Reversed and rendered.

Weakley, C. J., and Haralson and Dowdell, JJ., concur.

An Assessment for Taxes Void on Its Face does not create a cloud on the title to the land, and equity will not interfere to cancel it: See the note to *Helden v. Hellen*, 45 Am. St. Rep. 377. Hence where the illegality of a municipal assessment or tax is apparent on the record of the proceedings, and requires no extrinsic evidence to show it, the assessment is not a cloud upon title, and the remedy of the owners is by an action at law, and not by a suit in equity: *Murphy v. Mayor etc. of Wilmington*, 6 Houst. (Del.) 108, 22 Am. St. Rep. 345. But a suit may be maintained to remove as a cloud upon title a street assessment valid upon its face, but void because of informalities in proceedings preceding it: *Bolton v. Gilleran*, 105 Cal. 244, 45 Am. St. Rep. 33.

An Injunction does not Lie to restrain the collection of taxes unless the assessment is void or levied for an illegal purpose: *Philadelphia Mtg. etc. Co. v. Omaha*, 63 Neb. 280, 93 Am. St. Rep. 442. And an injunction will not issue to restrain the collection of taxes merely because of illegality or irregularity appearing upon the face of the assessment, but the complainant will be left to his remedy at law: *Hibernian Ben. Society v. Kelley*, 28 Or. 173, 52 Am. St. Rep. 769. For other authorities denying injunctions against the collection of taxes, see *Buck v. Miller*, 147 Ind. 586, 62 Am. St. Rep. 436; *Bloxham v. Consumers' Elec. Light etc. Co.*, 36 Fla. 519, 51 Am. St. Rep. 44; *Kuhn v. Port Townsend*, 12 Wash. 605, 50 Am. St. Rep. 911; *Hayes v. Douglas*, 92 Wis. 429, 53 Am. St. Rep. 926.

TILLIS v. FOLMAR.

[145 Ala. 176, 39 South. 913.]

PARTNERSHIP—Sale of Interest—Suretyship—Liability of Purchaser.—If one partner in a firm sells his interest to a stranger, who assumes as part of the consideration to pay the partnership debts, he thereby becomes the principal debtor as to such debts and the seller his surety, and if such debts become due and remain unpaid, the seller may maintain a bill in equity to compel the purchaser to pay such debts. (p. 32.)

STATUTE OF FRAUDS.—Partnership Lands in equity and for partnership purposes are to be treated as personality within the meaning of the statute of frauds. (p. 34.)

STATUTE OF FRAUDS—Sale of Land—Part Performance.—A contract of sale of several lots of land is not within the statute of frauds, if one of the parcels has been taken into the possession of the purchaser. In such case taking possession of one parcel is equivalent to taking possession of them all. (p. 35.)

Lomax, Crum & Weil, Mulkey & Carmichael and H. Stringfellow, for the appellants.

J. M. Chilton and Foster, Samford & Carroll, for the appellee.

¹⁸⁰ HARALSON, J. 1. It must be admitted that where one partner sells his interest in the firm to another partner, ¹⁸¹ and the same thing is true when a stranger buys out the interest of one of the partners, such purchase, unless it is otherwise provided by the contract of sale, operates such a change in the position of the seller that he no longer has any claim based on the partnership relation, which would justify an accounting between the partners; and the compensation agreed to be paid must be enforced at law, equity having no jurisdiction to enforce the agreement: *Brown v. Burnum*, 99 Ala. 114, 12 South. 606.

By the terms of the contract of sale, Tillis, who was a stranger to the partnership, together with Byrd, who was a member of the firm, bought out the interest of complainant Folmar, and J. C. Walden, another one of the firm. The purchase involved the entire stock of goods, wares and merchandise and office fixtures of said firm, located at different points, and all notes, mortgages, books, accounts, and choses in action of said firm at the places specified; also all the real estate belonging to said firm, the intent being, as stated, to convey to the purchasers the entire interest of said firm in and

to the partnership property, real, personal and mixed, of every character. The purchase price was twenty-five thousand dollars: five thousand dollars in cash, which was paid, and two notes of ten thousand dollars each of the Henderson Boyd Lumber Company, payable respectively, on the 1st of October, 1902, and 1903, which notes were delivered, the purchasers agreeing also, as a part consideration of the sale, to pay "all the debts, notes and accounts and liabilities of the firm of Folmar, Walden & Byrd, as shown by the books of the firm, together with any accounts that may be due the local merchants for monthly bills."

By such a contract, while the old firm was primarily liable to its creditors, yet, as between the sellers and purchasers, Folmar & Walden and Tillis & Byrd, the former became the guarantors of said debts to the creditors, and their sureties, for the payment of the same. As between Folmar & Walden and Tillis & Byrd, the latter were primarily liable to the creditors: *Mason v. Hall*, 30 Ala. 599. This agreement to pay these debts by Tillis & Byrd was not a covenant for indemnity, merely, ¹⁸² but bound them, Tillis & Byrd, as purchasers, to discharge Folmar & Walden from all liability for the debts. This meant that they would pay them as they accrued and exonerate complainant from paying the same; *Peacey's Creditors v. Peacey's Admr.*, 27 Ala. 683. The bill avers that the debts were all past due, and the failure of defendant to pay, the promise to pay being an affirmative one, gave, it is true, the complainant an immediate right of action on the contract, for the debts he had already paid, and also for all such as he was liable for, but this did not operate to deprive him of his right to file his bill to compel the purchasers to pay the debts and exonerate him from the payment of the same. The prayer of the bill is for a specific performance of the covenant, and for damages for its violation.

As to the right of a surety to file his bill to compel his principal to pay the debt in exoneration of the surety, Mr. Brandt observes: "After the debt for which the surety or guarantor is liable has become due, he may, without paying the debt, and without being called upon by the creditor, file a bill in equity to compel the principal to pay the debt, it being unreasonable that a surety or guarantor should always have a cloud hanging over him even though not molested for the debt. The principle is universally recognized, and

has been applied to a great variety of circumstances": Brandt on Sureties and Guarantors, 3d ed., sec. 245; Baylies on Sureties and Guarantors, 301.

In 1 Story's Equity Jurisprudence, section 327, it is said: "Sureties, also, are entitled to come into a court of equity, after a debt has become due, to compel the debtor to exonerate them from their liability, by paying the debt."

In the case of *Thomas v. St. Paul's M. E. Church*, 86 Ala. 138, 5 Souh. 508, this court, recognizing this doctrine, employs this language: "No principle in equity is more familiar, or more firmly established, than that a surety, after the debt for which he is liable has become due, without paying or being called on to pay it, may file a bill in equity to compel the principal debtor to exonerate him from liability by its payment, provided no rights of the creditor are prejudiced thereby." The demurrer so far as it questioned the equity of the bill on ¹⁸³ this ground was properly overruled. See, also, the case of *West v. Chasten*, 12 Fla. 315, where many decisions are collated.

2. The respondents pleaded the statute of frauds—that the agreement in said bill alleged and sought to be enforced was ineffective, in that a part of the property agreed to be purchased by respondents, and for which an entire and indivisible consideration was agreed to be paid, consisted of considerable real estate situated in various places in Geneva county; that said agreement was not in writing, nor was any note or memorandum thereof in writing signed by respondents or by anyone thereunto authorized, etc.

The bill alleges, in substance, that while Walden was not a party himself to said contract of sale, except as complainant represented his interest and undertook to dispose of the same, the complainant has placed the respondents in the full possession, ownership and enjoyment of the property and choses in action sold them, and said Walden has affirmed and ratified his said action and is satisfied to look to complainant for his share of the proceeds of the sale of said property; that a portion of the property purchased was real estate, and that an entire and indivisible consideration was to be paid for it, and the real estate was situated in different places in Coffee county; that said agreement was not in writing, signed by complainant; that Walden never executed any written agreement to convey, and that Folmar had no authority in writing

in the premises from Walden; that a part of the consideration was then and there paid and respondents put in possession of a part of the land, but not in possession of the entire lands. The bill alleges, as stated, that the purchasers were put in possession of the entire lands.

The language of the prayer of complainant's bill is, after requesting a reference to ascertain and report the sum due said several creditors by the firm of Folmar, Walden & Byrd, which the defendants in the contract bound themselves to pay, that the court would "render a decree, requiring the said Tillis & Byrd to specifically perform their said contract by paying the amounts due ¹⁸⁴ each of said creditors respectively, and upon their failure to do so, judgment be entered against the said Richard Tillis and Robert E. Byrd for said amount, and that they be also compelled to refund and repay to your orator the debts already paid by him, for which they are liable under said contract." There was no prayer that the legal title to the lands be divested out of Folmar & Walden and be invested in Tillis & Byrd. Indeed, Walden was not a party to the bill.

"Partnership lands in equity and for partnership purposes are to be treated as personalty: 4 Mayfields' Digest, p. 397, sec. 301. Real estate acquired with partnership funds, or on partnership credit, and for partnership purposes, in a court of equity is esteemed partnership property, subject to the payment of partnership debts, in priority of the separate debts of the several partners, and it is not material whether the legal title resides in the partnership or in the several partners as tenants in common, or in the name of one partner only": 4 Mayfields' Digest, p. 398, sec. 321.

It is said in Browne on the Statute of Frauds, fifth edition, section 259, that "where land is owned by a partnership, each partner, of course, is entitled to his proper share of it. And here must be remarked an important exception (for so it seems we are forced to regard it) to the operation of the statute as it affects interests in land. Where two men are found jointly occupying a piece of land, incurring equal expenditures upon it, and enjoying equal profit from it, the relation which from such facts would be presumed to be existing between them is that of joint tenancy, and, as incident to that joint tenancy, upon the death of either the whole would go to the other by right of survivorship. . . . But

when the parties are really partners, and the land has been brought into and actually held and used by the partnership for partnership purposes, the courts have dealt with it as partnership property, although the ownership has not been apparently in all the members of the firm, or, if in all, not apparently as partners, but under some other title. . . . It seems that the earlier authorities to the effect that real estate used for partnership ¹⁸⁵ purposes maintains its character of realty, and goes to the heirs of the partners respectively, have been overruled, and that all property, whether real or personal, involved in a partnership concern, is now, upon the dissolution of the partnership, distributable as personalty, and generally is to be, for ordinary purposes, regarded as stock in trade," to which the statute of frauds is not applicable.

The contract being entire, and the purchaser having gone into possession of a part of the property, there was such part performance, if that were important, as satisfied the statute of frauds. The effect of the act of taking possession of a part is as applicable to entering into the whole as if the whole had been actually entered upon: *Smith v. Underdunk*, 1 Sand. 579, 581.

"Possession of a tract of land must generally be, from the nature of the case, a possession of a part only as representing the whole. So long, therefore, as the contract under which possession is claimed to have been taken or delivered is an entire contract, though the land consists of several parcels, it would seem more reasonable to hold that possession of one of such parcels was equivalent to possession of the whole," etc.: *Browne on Statute of Frauds*, 5th ed., sec. 475. The exceptions to the plea of the statute were properly sustained.

Under the facts alleged, Walden was not an indispensable party defendant.

Let the decree be affirmed.

Tyson, Anderson and Denson, JJ., concur.

**PROCEEDINGS BY SURETY TO COMPEL PRINCIPAL TO DIS-
CHARGE HIS OBLIGATION.**

I. Right to Proceed in Equity After Maturity of Debt, 36.

II. Right to Compel Creditor to Sue Principal, 37.

III. Insolvency of Principal or Surety, 38.

IV. Receivership Against Principal, 38.**V. Right to Compel Payment Out of Principal's Estate, 39.****VI. Right to Set Aside Principal's Fraudulent Transfer, 39.****VII. Right to Foreclose Indemnity Mortgage, 40.****VIII. Dissolution of Partnership, 41.****I. Right to Proceed in Equity After Maturity of Debt.**

When the liability of a surety has attached in consequence of the default of the principal, the surety may apply to a court of equity to compel the principal to relieve him from his liability before he discharges the debt. Or, in other words, a surety, after the debt has become due, without having made payment himself, may come into a court of equity and compel the principal to pay the debt, making the creditor a party, that he may be at hand to receive the money. In such case, the surety stands in the position of an equitable assignee, and may use the remedies of the creditor at his own risk and cost: *Moore v. Topliff*, 107 Ill. 241. The rule that when the debt has become payable the surety may file a bill in equity to compel payment by the principal before payment of the debt, in order that he may be relieved from liability, is supported by a long line of cases, among which are the following: *West v. Chasten*, 12 Fla. 315; *Roberts v. American Bonding etc. Co.*, 83 Ill. App. 463; *Meador v. Meador*, 88 Ky. 247, 10 S. W. 651; *Whitridge v. Durkee's Exrs.*, 2 Md. Ch. 442; *Irick v. Black*, 17 N. J. Eq. 189; *Delaware etc. Co. v. Oxford Iron Co.*, 38 N. J. Eq. 151; *Allen v. Smitherman*, 41 N. C. (6 Ired. Eq.) 341; *Stamp v. Rogers*, 1 Ohio, 533; *McConnell v. Scott*, 15 Ohio, 401, 45 Am. Dec. 583; *Pride v. Boyce*, Rice Eq. 275, 33 Am. Dec. 78; *Norton v. Reid*, 11 S. C. 593; *Henell v. Cobb*, 2 Cold. 104, 88 Am. Dec. 591; *Miller v. Speed*, 9 Heisk. 196; *Bishop v. Day*, 13 Vt. 81, 37 Am. Dec. 582; *Harris v. Newell*, 42 Wis. 687; *Dobie v. Fidelity etc. Co.*, 95 Wis. 540, 60 Am. St. Rep. 135, 70 N. W. 482. There can be no doubt of the right of a surety, after a debt has become due, to file a bill to compel the principal debtor to pay, whether the surety has himself been sued or not: *Whitridge v. Durkee*, 2 Md. Ch. 442; *Norton v. Reid*, 11 S. C. 593. Or a surety against whom and the principal separate judgments have been obtained may come into equity for aid in subjecting the property of the principal to the payment of the debt, without first advancing or paying the money: *Stamp v. Rogers*, 1 Ohio, 533. And he may invoke such aid to reach credits of the principal although the principal is insolvent: *McConnell v. Scott*, 15 Ohio, 401, 45 Am. Dec. 583. The only case found in conflict with the above doctrine is an ill-considered case in Michigan, where the court laid down the rule that a surety is presumed to assume his responsibility deliberately, and if his principal fails to meet his own obligations with due diligence, he cannot appeal to a court of equity for protection, but must first perform his

obligation as surety, and may then sue at law for indemnity: *McElroy v. Hatheway*, 44 Mich. 399, 6 N. E. 867.

The right of the surety to proceed against his principal to compel him to pay his overdue obligation before such surety pays any part of it seems to be purely equitable, as a surety can have no relief at law against his liability, unless he has made some payment on account of it; but he can proceed in equity to compel his principal to make payment and the creditor to receive it: *Hannay v. Pell*, 3 E. D. Smith, 432; *Taylor v. Miller*, 62 N. C. 365.

A surety may apply to a court of equity for protection as soon as he is endangered: *Taylor v. Heriot*, 4 Desaus. 227; and upon a bill by the surety to compel the payment of the debt by the principal, neither notice to the creditor of the suretyship nor an allegation of irreparable injury, if the surety is compelled to pay the debt, constitute an essential element of the surety's right to equitable relief: *Irick v. Black*, 17 N. J. Eq. 189. And a bill by a surety to compel the principal to pay the debt need not allege an attempt by the creditor to enforce such liability against the plaintiff: *Alley v. Cooley*, 53 S. C. 414, 31 S. E. 634.

If a creditor neglects or refuses to enforce his demand by proper legal proceedings, a surety for such demand or debt may come into a court of equity, and bring in both the debtor and the creditor before the court, may have a decree to compel the debtor to make payment, and thus exonerate the surety from liability: *Croone v. Bivens*, 39 Tenn. (2 Head) 337; *Gilliam v. Esselman*, 5 Sneed (37 Tenn.), 86, Either with or without making part payment, the surety may, when the debt is due, sue in equity both the creditor and the principal debtor to compel such debtor to pay the debt out of his own property in exoneration of the surety, and may have enforced for his relief any liens which the creditor has on the estate of his principal: *Neal v. Buffington*, 42 W. Va. 327, 26 S. E. 172.

II. Right to Compel Creditor to Sue Principal.

It may be stated as a general rule, that a surety may resort to equity if he apprehends danger from the creditor's delay, after the maturity of the obligation, and compel such creditor to sue the principal debtor, though he would probably be required to indemnify the creditor against the consequences of risk, delay, and expense: *Nunemacher v. Ingle*, 20 Ind. 133; *Whitridge v. Durkee's Exrs.*, 2 Md. Ch. 442; *Sasscer v. Young*, 6 Gill & J. 243; *King v. Baldwin*, 2 Johns. Ch. 554, 17 Johns. 384, 8 Am. Dec. 415; *Hayes v. Ward*, 4 Johns. Ch. 123, 8 Am. Dec. 554. But a surety can require the creditor to proceed first against the principal only when his suretyship appears on the face of the instrument, or when he offers to indemnify the creditor in his proceedings against the principal, and to pay whatever the principal fails to pay: *In re Babcock*, 3 Story, 393, Fed. Cas. 696.

This doctrine is repudiated entirely in some jurisdictions and has only a limited application in others. Thus it has been maintained that a surety cannot require the creditor to exhaust his remedies against the principal, before resorting to the surety, except under very special circumstances: *Abercrombie v. Knox*, 3 Ala. 728, 37 Am. Dec. 721; *Brooks v. Carter*, 36 Ala. 682. In Louisiana it is maintained that a surety cannot require the creditor, before resorting to him, to sue the principal debtor. His remedy is to pay the debt and exercise the creditor's rights against his principal to which he is subrogated: *Wood v. Fitz*, 10 Mart., O. S., 196; *Bryan v. Cox*, 3 Mart., N. S., 574; *Boutte v. Martin*, 16 La. 133; *Bonny v. Brashear*, 19 La. 383; *Griffing v. Caldwell*, 1 Rob. 15; *Gengot v. Fournier*, 4 Rob. 435. The same rule is maintained in Minnesota repudiating the doctrine of *King v. Baldwin*, 17 Johns. 384, 8 Am. Dec. 415, and other cases of similar holdings: *Huey v. Pinney*, 5 Minn. 310.

III. Insolvency of Principal or Surety.

Chancery will entertain a suit by a surety to reach credits of the principal and apply them to a judgment obtained against them jointly, where the principal is insolvent, although the surety has not paid the judgment: *McConnell v. Scott*, 15 Ohio, 401, 45 Am. Dec. 583. Or if a principal becomes insolvent after the debt is due and before it is paid, his surety has an immediate equity against him either before or after paying the debt: *Crafts v. Mott*, 5 Barb. 305; *Egerton v. Alley*, 6 Ired. Eq. 188. Actual payment need not be made by a surety to enable him to sustain an action against his insolvent principal to compel payment of the debt out of his principal's assets: *Polk v. Gallant*, 2 Dev. & B. Eq. 395, 34 Am. Dec. 410; *Allen v. Cooley*, 53 S. C. 414, 31 S. E. 634.

The insolvency of the surety at the time the debt becomes due is no obstacle to his maintaining a bill in equity to enforce his exoneration and compel his principal to pay the debt before he has himself paid it: *Fener v. Barrett*, 4 Jones Eq. 455.

IV. Receivership Against Principal.

In Michigan, it is maintained as before noted, contrary to the general rule, that a surety is presumed to assume his responsibility deliberately, and if his principal fails to meet his obligation with due diligence, the surety cannot appeal to a court of equity for protection and thereby compel his principal to pay the debt, but must first perform his obligation as surety, and thereafter sue at law for indemnity. Hence it is also maintained in that state that the surety cannot, by proceedings in equity or otherwise, compel his principal to turn his property over to a receiver to secure a debt past due, or satisfy it, before obtaining judgment and exhausting his remedy at law: *McElroy v. Hatheway*, 44 Mich. 399, 6 N. W. 867; *Nash v. Benchard*, 87 Mich. 85, 49 N. W. 492. The contrary rule, however,

obtains in South Carolina, and a surety is there entitled to have a receiver appointed for the purpose above set out, without first paying the debt or obtaining judgment against the principal: *Allen v. Cooley*, 53 S. C. 414, 31 S. E. 634.

V. Right to Compel Payment Out of Principal's Estate.

There is an implied stipulation in usual unconditional contract of suretyship that the principal will pay the debt at maturity and thus protect the surety, and upon his failure to do so, the surety has the right to compel payment of the debt out of the principal's estate, although the surety has made no payment before the commencement of his suit: *Conley's Heirs v. Boyle's Exrs.*, 6 T. B. Mon. 637; *Thigpen v. Price*, Phill. Eq. (62 N. C.) 146; *Henderson etc. Co. v. John Shellito Co.*, 64 Ohio St. 236, 83 Am. St. Rep. 745, 60 N. E. 295. A surety against whom and his principal separate judgments have been obtained may come into equity for aid in subjecting the estate of the principal to the payment of the debt, without first advancing or paying the money: *Stump v. Rogers*, 1 Ohio, 533. A surety is entitled, without paying the debt, to have the estate of his principal, so far as applicable, applied to the payment of such debt, and where on a creditor's bill there is shown to be assets belonging to the estate of the principal debtor, deceased, an account of such assets should be ordered: *Paxton v. Rich*, 85 Va. 378, 7 S. E. 581, 1 L. R. A. 639.

VI. Right to Set Aside Principal's Fraudulent Transfers.

As a surety has an equitable right to have the property of his principal exhausted before resort is had to him, he has a right after the maturity of the obligation to maintain an action to set aside a fraudulent conveyance made by his principal without having paid any money for him.

The surety is a creditor within the meaning of the statute of frauds from the time he signs the obligation, and may set aside a fraudulent conveyance executed by his principal after becoming so liable and before payment of the debt: *Loughridge v. Bowland*, 52 Miss. 546; *Taylor v. Heriot*, 4 Desaus. 227.

The administrator of a deceased surety on an official bond may join in an action to set aside a fraudulent conveyance of his intestate's principal without first having paid out any money for him: *Strong v. Taylor School Township*, 79 Ind. 208. And the fact that the estate of a deceased principal has insufficient assets to pay a debt on which plaintiff is surety is a sufficient showing of equity to sustain a creditor's bill to subject the principal's property fraudulently conveyed to the payment of the debt, and for the appointment of a receiver: *Wesborn's Admr. v. Kahn*, 93 Ala. 201, 9 South. 729. It has also been decided that a surety cannot, without having paid the debt or sustained loss, before any judgment has been rendered against him,

maintain a bill to set aside a fraudulent conveyance by his principal and have the property subjected to the payment of the overdue debt, without bringing the creditor into court as a party: *Oneal v. Smith*, 10 Lea (78 Tenn.), 340.

VII. Right to Foreclose Indemnity Mortgage.

Although there is some conflict of authority, the great weight thereof tends to firmly establish the rule that a surety secured by collateral mortgage given by his principal may foreclose it before paying the principal's debt, and for the whole amount of his liability. In such case it is generally only necessary that the principal debt be due and remain unpaid to enable the surety to foreclose such mortgage: *De Cottes v. Jeffers*, 7 Fla. 284; *Constant v. Matteson*, 22 Ill. 546; *Wells v. Merritt*, 17 Ind. 255; *Reynolds v. Shirk*, 98 Ind. 480; *Bates v. Wiggin*, 37 Kan. 44, 1 Am. St. Rep. 234, 14 Pac. 442; *Iberia Cypress Co. v. Christen*, 112 La. 448, 36 South. 490; *Thurston v. Prentiss*, 1 Mich. 193; *Kramer v. Mechanics' Bank*, 15 Ohio, 253; *Rodgers v. Jones*, 1 McCord Eq. 221; *Beasley v. Newell*, 40 S. C. 16, 18 S. E. 224. Thus sureties on a note after the principal debtor makes default may enforce a mortgage given to secure them, and have the money applied to the payment of the note, though they have not been required to pay anything on it: *McDaniel v. Austin*, 32 S. C. 601, 11 S. E. 350; and a surety may, after maturity of debt, for the payment of which he is liable, replevy goods mortgaged to secure him as surety, and may foreclose such mortgage, although he has not actually paid such debt: *Bates v. Wiggin*, 37 Kan. 44, 1 Am. St. Rep. 234, 14 Pac. 442. If such mortgage of indemnity contains an express covenant of the mortgagor to pay the debt therein described upon his failure to pay and when his liability is ascertained and fixed by the debt becoming due, the surety who holds the mortgage may at once, without having paid the debt or any part thereof, maintain an action for the foreclosure of the mortgage and recover therein, as damages, actual compensation for his total probable loss: *Gunel v. Cue*, 72 Ind. 34; *Malott v. Goff*, 96 Ind. 496; *Reynolds v. Shirk*, 98 Ind. 480; *Goff v. Hedgecock*, 144 Ind. 415, 43 N. E. 644.

After the creditor has obtained judgment against the surety, the latter has a right in equity to appropriate any security given him by his principal as indemnity for his liability and may immediately foreclose a mortgage given him as indemnity without first paying the judgment: *Kramer v. Mechanics' Bank*, 15 Ohio, 253. And a surety secured by collateral mortgage may foreclose it before paying the debt of his principal, and for the whole amount of his liability, although the creditor has obtained judgment for less: *Hellams v. Abercrombie*, 15 S. C. 110, 40 Am. Rep. 684.

When a debtor gives his surety a mortgage to indemnify him against loss, the property mortgaged can only be applied when the

surety has paid the debt, or has become immediately liable for its payment, and until then a court of equity will not interfere: *Constant v. Matteson*, 22 Ill. 546; *Iberia Cypress Co. v. Christen*, 112 La. 448, 36 South. 490.

In some jurisdictions, on the other hand, the doctrine is maintained that a surety who has taken a mortgage from his principal for his indemnity is not entitled to a foreclosure until he has paid all or some part of the debt of his principal or, in other words, until actual damages have been sustained by him: *Shepard v. Shepard*, 6 Conn. 37; *Forbes v. McCoy*, 15 Neb. 632, 20 N. W. 17; *Lewis v. Duane*, 141 N. Y. 302, 36 N. E. 322; *Maloney v. Nelson*, 144 N. Y. 182, 39 N. E. 82. It has been decided that an indorser of a note, who has received indemnity against such indorsement by deed of trust from the maker, cannot proceed to subject the property conveyed to the payment of the note until he has paid it and taken a reassignment of it: *Lewis v. Starke*, 10 Smedes & M. 120. Also that if the condition of a mortgage executed by the principal debtor to his surety is to indemnify the latter against loss or damage arising from the payment of the debt, such condition is not broken until actual payment made by the surety, and that his right to foreclose the mortgage does not accrue until that time: *M'Lean v. Ragsdale*, 31 Miss. 701.

VIII. Dissolution of Partnership.

In cases similar to the principal case the rulings of the courts have uniformly been in accord with the rule laid down in the principal case. Thus on the dissolution of a partnership, a partner who receives property of the firm and assumes the firm debts, is, as to the other partners, the principal debtor, and they are his sureties, and may sue in equity after the maturity of such debts to compel such principal to pay them without having paid them themselves: *Croone v. Bivens*, 2 Head (39 Tenn.), 339.

McLEOD v. McLEOD.

[145 Ala. 269. 40 South. 147.]

DEEDS—Consideration.—A deed from a parent to his child will not be set aside upon the ground of mere inadequacy of consideration. (p. 42.)

DEEDS—Parent and Child—Presumption of Undue Influence.—A deed of gift from parent to his child alone and of itself raises no presumption of undue influence, as the parent is presumed to be the dominant party. (pp. 42, 43.)

DEEDS—Parent and Child—Undue Influence—Burden of Proof.—In an action by a parent against his child to set aside a conveyance made by the former to the latter, on the ground that it was

executed under undue influence, the burden of proof is upon the former to establish that fact. (p. 43.)

DEEDS—Undue Influence—Confidential Relations.—If the donor and the donee stand in confidential relations, a presumption of undue influence affecting the validity of the gift arises only where the donor is the weaker party. (p. 43.)

G. L. Comer and S. H. Dent, Jr., for the appellant.

A. H. Merrill, for the appellee.

272 DOWDELL, J. The bill in this case is one by the father against his daughters, and is for the purpose of setting aside and annulling a certain paper writing, whereby he had transferred or assigned all of his interest in the estate of his deceased son to his said daughters. The relief sought by the bill is based upon charges of fraud and undue influence, and inadequacy of consideration is alleged. Mere inadequacy of consideration is not a sufficient ground for setting aside and annulling a contract. As was said in *Judge v. Wilkins*, 19 Ala. 765: "I follow the language of the authorities in saying that inadequacy of price, or other inequality in the bargain, is not within itself a sufficient ground to avoid a contract in a court of equity, on the ground of fraud; for courts of equity, as well as courts of law, must act upon the ground that every person, who is not under some legal disability, may dispose of his property in such manner and upon such terms as he sees fit; and whether his bargains are discreet or not, profitable or unprofitable, are considerations, not for courts of justice, but for the party himself": 1 Story's Equity, 244; Adams' Equity, 392; *Bolling v. Munchus*, 65 Ala. 558; *Goodlett v. Hansell*, 66 Ala. 151; *Malone v. Kelley*, 54 Ala. 532.

The appellee, the complainant in the court below, seeks to invoke the doctrine that in transactions inter vivos, where the parties stand in confidential relations, and the grantee, who is the beneficiary, is the dominant spirit in the transaction, that the law raises up the presumption of undue influence and casts upon the opposite party the burden of repelling such presumption by satisfactory evidence whenever the transaction is assailed. In a case like the one before us, the question as to who is the dominant spirit in the transaction is one of fact, and becomes one of vital importance in the application **273** of the doctrine above stated. A donation from the parent to the child, alone and of itself, would

raise no presumption of undue influence, since, in the absence of evidence to the contrary, the parent is presumably the dominant party. If undue influence is charged in such a case, the burden is on the parent to show it. Every person who is sui juris and under no legal disability has an unquestionable right of disposition of his property, whether by gift or otherwise. Where the donor and donee stand in such confidential relations as parent and child, and the donor is the dominant party, whether he be parent or child, no one would for a moment question the validity of the gift on the ground of undue influence, as such presumption in law arises only where the weaker party is the donor. The question in this case is one of fact, to be determined from the evidence, and under section 3826, subdivision 1 of the Code of 1896, in our determination of the case on the evidence, we cannot consider the findings of facts by the chancellor. The evidence is quite voluminous. Testimony of witnesses was taken by both sides on the questions of undue influence, exercised by the respondents over the complainant, and of the complainant's mental condition before and at the time of the alleged transaction. There was no pretense of fraud in the transaction other than that as charged in the exercise of undue influence.

We have carefully considered all the evidence, and after disregarding such as is illegal, we are clearly of the opinion that the weight of the evidence establishes the fact that the complainant was of sound mind, capable of entering into the contract assailed, and that the respondents were not the dominant spirit or spirits in the transaction. We are, furthermore, satisfied that the transfer by the complainant of his interest in the estate of his deceased son to the respondents, his daughters, was not induced by, nor was it the result of, any undue influence exerted by the respondents over him. It therefore follows that the decree appealed from must be reversed, and one will be here rendered dismissing the complainant's bill.

Reversed and rendered.

Tyson, Simpson and Anderson, JJ., concur.

A Gift from a Father to His Child, though improvident, may be valid and irrevocable: *James v. Allen*, 68 N. J. Eq. 666, 111 Am. St. Rep. 654; *Barnes v. Banks*, 223 Ill. 352, 114 Am. St. Rep. 331; *Second Nat. Bank v. Merrill*, 81 Wis. 142, 29 Am. St. Rep. 870.

FARLEY NATIONAL BANK v. POLLOCK.

[145 Ala. 321, 39 South. 612.]

BANKS AND BANKING—Collections.—A bank undertaking to collect a claim may by custom be allowed to employ subcollecting agents, but it is bound to select such agents with judgment and care. (p. 45.)

BANKS AND BANKING—Collections—Custom.—A bank, or person who is to pay paper, is not the proper person to whom the paper should be sent for collection by the collecting bank, and a custom to that effect is unreasonable and void, rendering the collecting bank liable for damages to the payee of the paper, if damages result from acting on such custom. (p. 45.)

Steiner, Crum & Weil, for the appellant.

R. Rushton, for the appellee.

³²⁶ **SIMPSON, J.** The vital question raised by the pleading in this case is, Can a bank, to which is intrusted a check for collection, send that check to the bank upon which it is drawn, receive its check on New York in payment, and, when the latter check is protested on account of the failure of the bank drawing it, shield itself behind a custom to transact business in that way? It may be admitted that a party committing a paper to a bank for collection may be bound by a custom which is reasonable and sufficiently general to presume that it is known. The point has not been directly decided in this state. In the case of *Lowenstein v. Bresler*, 109 Ala. 326, 19 South. 860, Chief Justice Brickell said: "It may be the drawee of a check is not a suitable agent to be intrusted with ³²⁷ its collection; and it may be that the Bank of Commerce, in selecting the banking company as the agent to collect the check and remit the collection, rendered itself liable to the plaintiffs for whatever loss might result to them from the unsuitable selection." And he cites several authorities supporting this proposition. The proposition seems to be generally recognized. Undoubtedly, an agent who undertakes to collect a claim, although by custom he may be allowed to employ subagents, yet is certainly bound to select his subcollecting agents with judgment and care, and one of the first elements of care is to select a subagent who is not adversely interested in the subject matter. What would be the use of a party placing his claim in the hands of a bank for collection, if that duty could be performed by merely indorsing the paper

by mail to the party who is obliged to pay it and receive his check on New York? The owner of the paper could send it directly, and receive his New York exchange in much less time. A custom must be reasonable, and the best considered cases hold, not only that the bank or party who is to pay the paper is not the proper person to whom the paper should be sent for collection, but also that a custom to that effect is unreasonable and bad: 1 Morse on Banking, sec. 236; Drovers' Nat. Bank v. Anglo A. Packing Co., 117 Ill. 100, 57 Am. Rep. 855, 7 N. E. 601; First Nat. Bank of Chicago v. Citizens' Sav. Bank, 123 Mich. 336, 82 N. W. 66, 48 L. R. A. 583; Minneapolis Sash etc. Co. v. Metropolitan Bank, 76 Minn. 136, 77 Am. St. Rep. 609, 78 N. W. 980, 44 L. R. A. 504; German Nat. Bank v. Burns, 12 Colo. 539, 13 Am. St. Rep. 247, 21 Pac. 714; Wagner v. Crook, 167 Pa. 259, 46 Am. St. Rep. 672, 31 Atl. 576; Merchants' Nat. Bank v. Goodman, 109 Pa. 422, 58 Am. Rep. 728, 2 Atl. 687.

The judgment of the court is affirmed.

Haralson, Dowdell and Denson, JJ., concur.

The Duty and Liability of Banks in the matter of collections where they forward the paper to another bank are discussed in the notes to Minneapolis etc. Co. v. Metropolitan Bank, 77 Am. St. Rep. 623; Allen v. Merchants' Bank, 34 Am. Dec. 313. A bank receiving notes for collection is not liable in respect thereto for the negligence of its correspondent whom it exercises due care in selecting: Second Nat. Bank v. Merchants' Nat. Bank, 111 Ky. 930, 98 Am. St. Rep. 439.

FIRST NATIONAL BANK v. FIDELITY AND DEPOSIT COMPANY.

[145 Ala. 335, 40 South. 415.]

PRINCIPAL AND SURETY—Building Contracts—Discharge of Surety.—If a building contract between the contractor and owner is made part of a contract of suretyship between the contractor and his surety and specifies that payment shall be made as the work progresses upon the certificate of the architect, and estimates for material when delivered, reserving ten per cent to be paid only when the work is completed, and the owner undertakes to pay in a different way, without the consent of the surety, the latter is thereby released. (p. 46.)

PRINCIPAL AND SURETY—Building Contracts—Rights of Surety.—If a contractor enters into a building contract to do certain work on certain terms, and procures a surety to guarantee the faith-

ful performance of the work, the surety necessarily contracts with reference to the contract as made, and its terms become a part of the terms of the bond, and he has a right to insist upon the performance of the terms of the contract as written, and if the principal does something else without his consent, he is released, although the thing actually done is more beneficial to him. (pp. 46, 47.)

PRINCIPAL AND SURETY—Building Contracts—Waiver by Surety.—If the obligation of a surety in a building contract is to secure the owner against certain mechanic, materialmen and other liens of like character, and hold him harmless against all such demands, and to release him from the necessity of inquiring into such matters and from the payment of such claims, such obligation does not operate as a waiver by the surety of so much of the building contract as requires payment thereon to be made in a particular manner. (pp. 50, 51.)

Watts & Son and H. Stringfellow, for the appellant.

Steiner, Crum & Weil and J. M. Chilton, for the appellee.

³⁴³ **SIMPSON, J.** This was an action by appellant against appellee, based on a bond which appellee executed March 7, 1901, as surety for John W. Hood & Co. to secure the faithful performance of a contract by which said Hood & Co. had agreed to furnish materials and erect a certain building in Montgomery, Alabama.

The first point raised by the pleadings, and strenuously and ably argued in the briefs of both the appellant and appellee, is whether or not, in a case like this, where the building contract specifies that payment shall be made as the work progresses upon certificate of the architect, and estimates for material when delivered, reserving ten per cent to be paid only when the work is completed, and the owner undertakes to pay in a different way, as by advancing money to the contractor to be repaid as the estimates and certificates are made, and paying for lumber before it is delivered, without regard to the ten per cent reduction, the surety is released. The appellant relies upon the case of *Fidelity & Deposit Co. of Maryland v. Robertson*, 136 Ala. 379, 34 South. 933, and especially the remark of the court, on page 409 of 136 Ala., page 943 of 34 South., to the effect that the provision of the contract, authorizing the temporary reservation from payments of fifteen per cent of estimated earnings, was solely for the benefit of the original contractor, and one which, in the absence of any prohibition in the bond, the original contractor might waive without the consent of the surety. It is a maxim of the law that all parties, whether principal or surety, who reduce their

contracts to writing, have a right to insist upon the terms of the contract as written, and it does not lie in the power of the courts to say that, although a party has contracted to do one thing, yet he has done something else, which is more beneficial to the other party, and is therefore entitled to the enforcement of the contract. ³⁴⁴ When a party enters into a contract to do certain work and on certain terms, and procures a surety to guarantee the faithful performance of the work, the surety necessarily contracts with reference to the contract as made. The terms of the contract become a part of the terms of the bond. Otherwise the surety could never know what obligation he was assuming. The contracts were made at the same time. The surety's bond recites that, whereas the building contract has been made, etc. Then, in the absence of any explicit declaration to that effect, it is difficult to see how a court can undertake to say that certain provisions are made for the benefit of the principal alone, and can be waived or changed by him, without the consent of the surety. This is a matter, however, that has been so thoroughly discussed by the courts in England and in this country, and the trend of the best authorities is so evident, that it seems useless to go over the arguments of the courts.

The leading case in England is that of *Calvert v. London Dock Co.*, 2 Keen, 638. And the supreme court of the United States, in an able opinion by Justice White, in which he reviews the decisions of that court and others, plants itself squarely on the English doctrine, declaring that "the rulings of this court have been equally emphatic in upholding the right of the surety to stand upon the agreement, with reference to which he entered into this contract of suretyship, and to exact compliance with its stipulations": *Prairie State Bank v. United States*, 164 U. S. 227, 17 Sup. Ct. Rep. 142, 41 L. ed. 412. Equally emphatic are the cases of *Simonson v. Grant*, 36 Minn. 439, 31 N. W. 861; *United States v. American B. & T. Co.*, 89 Fed. 925, 32 C. C. A. 420; *Backus v. Archer*, 109 Mich. 666, 67 N. W. 913, and cases cited; *Stearns on Suretyship*, sec. 79, and note; 27 Am. & Eng. Ency. of Law, 495. See, also, *Manatee County State Bank v. Weatherly*, 144 Ala. 655, 39 South. 988. It is unnecessary to extend this opinion by citing all the cases that could be produced, or by going over the arguments in those here cited. The declaration of the principle is clear and the reasoning satisfactory. We are

compelled to hold that the court below committed no error in overruling the demurrers to the ³⁴⁵ several pleas setting up the defense mentioned. The case of Fidelity & Deposit Co. of Maryland v. Robertson, 136 Ala. 379, 34 South. 933, in so far as it conflicts with this opinion, is overruled. The case of Saint v. Wheeler & Wilson Mfg. Co., 95 Ala. 362, 36 Am. St. Rep. 210, 10 South. 539, is not in conflict with this opinion, as in that case it is distinctly stated that the claim sued on was not in any way connected with the additional duties which had been placed on the agent, and which were distinct from the duties guaranteed; that, although the agent's salary had been reduced, yet the settlement in question was based on the original contract at the original salary; also that the allowing the agent to retain his wages out of weekly collections was not an alteration of the contract, as it did not provide the manner in which he was to be paid. Nor is there any conflict in the case of White's Admr. v. Life Association of America, 63 Ala. 319, 35 Am. Rep. 45; for that case announces the doctrine in all its strictness in regard to the discharge of the surety by an alteration of the terms of the contract, but merely states that mere indulgence does not constitute such a change. In the case of Perrine v. Fireman's Ins. Co., 22 Ala. 575, the defendant was surety on a note given by a stockholder to the bank, and the only point decided by the court was that the fact that the corporation had the power, under its charter to prohibit the transfer of the stock of the stockholders, who were indebted to it, did not make it obligatory on it to do so in order to protect the surety. The case of Stephens v. Elver, 101 Wis. 392, 77 N. W. 737 (referred to in the brief of appellant), really indorses the general doctrine hereinbefore stated and places its decision distinctly upon the ground that "the alleged advances were so inconsiderable and trifling in amount as not to constitute a material variation of the contract, and upon the further fact that the plaintiff is not in a position to insist upon release, because it was at his suggestion that Pickering made the request for an advance": Page 740. Without passing upon the question as to whether that court was right in undertaking to say that the alteration was not material, we only cited it to show that it does not militate against the position taken ³⁴⁶ in his opinion. We do not say that there may not be some slight deviation, so clearly immaterial as not to affect the liabilities of the parties, but that

is not this case. In the case of *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669, which is greatly relied upon by appellant, the decision was really based on the construction of the contract; the court holding that, in making payments, the value of the stone, which had been quarried, but not placed in the building, should be taken into consideration, and under that construction there had been no overpayment. The court affirms the doctrine that the surety "has the right to insist upon the strict performance of any condition for which he has stipulated, whether others would consider it material or not": Page 670, second column. Allusion is also made to the special provisions in that contract to the effect that the owner was "at liberty to make any alterations, deviations, additions, or omissions from the said contract," but the court says "it is not important to consider the real scope of this clause."

Without subscribing to any intimations of the court on that point, it may be remarked that the corresponding provision in the contract now before this court differs from that in the important particular that, after referring to the alteration, etc., it goes on to state that it shall not "make void the contract, but the difference shall be added to or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation," showing clearly that the allusion is not to the manner of payment, but to the alteration in the work. While, as between the original parties to the contract, either party may waive any of its provisions, yet when a third party becomes interested in the contract by binding himself to its faithful execution, the contract becomes a part of his obligation, and its provisions cannot be waived so as to affect his interest without his consent. We hold that under the contract and bond in this case, which constitute one transaction, if the plaintiff did not pay for the work and the material in the manner provided by the contract, but instead thereof, by an arrangement made either at the time the contract was²⁴⁷ made, or afterward, with the contractor, without the consent of the surety, permitted the contractor to overdraw his account, so that considerable amounts of money were paid to him before any certificates were issued by the architect, and the material was paid for, without any estimate and before delivery, and without any regard to the retention of the percentage required, trusting to the certificates and estimates to be credited on said general account, then this was such a de-

parture from the terms of the original contract as to release the obligation of the surety. The cases referred to by appellant's counsel, which hold that, where a collateral security has been released or lost, without the consent or fault of the surety, said surety is released only pro tanto, do not apply to a case like this, even as to the ten per cent reserve. Said provision in this case is one of the conditions of the contract, and it cannot be said that it is a mere security for the payment of such money; but it is reserved as much as a stimulus to insure the completion of the work by the contractor, as for a mere security of the amount of money.

Appellant next insists that by the terms of the bond the appellee waived so much of the construction contract as required payments to be made upon certificates and estimates, and he bases that construction on that part of the bond which recites that "whereas, under article 1 of chapter 71 of the Code of Alabama of 1896, certain liens are provided," etc., and concludes with these words, to wit: "But any such sum may be retained and paid such mechanic, laborer, or materialman, by the owner or proprietor, if he wishes, and shall be a credit on this contract as if paid to the contractors." Appellant claims that this was an authorization to the appellant to pay all said bills, without any regard to certificates or estimates and without reserving any per cent. We do not construe the bond in this way. The clause in question is really the conclusion of the first preamble, in which the writer of the bond is stating what he understands to be the statutes on the subject of liens of mechanics and materialmen. He goes on with another preamble, and then comes to the obligation of the appellee ³⁴⁸ to appellant, which is to "secure and hold it harmless" against all these demands, and to release it of the necessity of inquiring into these matters entirely, and from paying any such claims. It does not present a case where the parties have perfected their liens, which were guaranteed against, and where the appellant had to pay them to save his property. Again, the contract and the bond being one contract, all the guaranties in the bond were conditioned on conformity to the requirements of the contract, with regard to the manner of payments, and if appellant had disregarded these it could not claim anything of the surety. Even if the expression could bear the interpretation put upon it by appellant, authorizing appellant to pay such claims, it refers to

claims presented and brought forward in the manner provided by the statute; but the further provision of the bond shows clearly that the intention of it was that appellant was not to concern itself about these matters, but was simply to make payments to Hood & Co., in accordance with the contract, leaving it to the surety to hold it harmless against these.

In this connection appellant further insists that the words in the bond, "And to pay any claims of mechanics," etc., are a waiver of the requirements as to the particular manner of making payments, and an authorization to appellant to pay said items, without regard to certificates or estimates. The grammatical construction of the sentence will not admit of such an interpretation. The infinitive "to pay" is the object of the verb "agree" in the first line of the paragraph. In other words, the surety company (with Hood & Co.) "agree" to hold appellant harmless from all these contracts, claims, etc., to exempt it from making demands for lists of materialmen, "and to pay any claims of mechanics, laborers, and materialmen," etc. It is just as if it had read, "And we agree to pay," etc., and, as if to make it clearer still, they exempt appellant "from any demands or liability whatever to any other person than John W. Hood & Co." In other words, it is clear that the intention was that appellant was not to pay anything to anyone, except Hood & Co. If the materialmen said that they were not willing ³⁴⁹ to furnish material on the responsibility of Hood & Co., they could have secured themselves by perfecting their liens, or appellant could have notified the surety company that the work was in danger of being delayed by these matters, and then the surety company would have been obliged to make some provision for securing the parties. Appellant did not choose to resort to its surety, but undertook to attend to the matter itself, contrary to the provisions of the contract. It is not for the court to say why the parties provided for the manner of payment and the reservation of the ten per cent, though it is easy to suppose that it was for the purpose of having a continuous stimulus to the contractors to finish the work, thus operating as a security to the surety as well as for the security of the owner. However that may be, it would be utterly futile to make these requirements, and then provide in another clause that the owner might disregard it and pay for all the material furnished, without inspection or estimate.

Coming to the facts of the case: While it is true that the president of the bank denies that there was any agreement, at the time the contract was made, that the business should be conducted as it was, which is contradicted by two witnesses on the other side, yet the fact remains that it was conducted in that way, that the contract was not complied with in the manner of payment, nor in the reservation of the ten per cent, and the circumstances make it very evident that there was an understanding between the parties that the money should be advanced and that the certificates and estimates should be credits (as they were) on the general accounts. The transaction bears none of the earmarks of a separate, independent loan. There was no separate account, but merely the general account. We can judge of the intention of the parties only by their acts; and the manner in which the advancements were made, in excess of the certificates and estimates and of the ten per cent reserve, and the estimates subsequently credited thereon, changed the contractual relations of the parties, deprived the surety of the security which it had bargained for and released it from its obligations. It is ^{also} not for the court to say why these stipulations were valuable to the surety company, though very good reasons readily occur to the mind, and the result in this case illustrates them. It is sufficient that they were a part of the contract, and according to the authorities heretofore cited the surety company had a right to demand that they be complied with before it could be made liable on the bond.

The books show that the account was frequently overdrawn to the amount of several thousand dollars over the entire amount due. President Baldwin, in his letter of November 30, 1901, tells the contractors that at that time the bank had paid them more than the entire contract price. He testified that not a single estimate was paid in accordance with the contract, but that they were merely used in paying the checks drawn on said deposit account. He testified, also, that he does not know whether the items in any of the various accounts, which were paid for before the abandonment of the contract, had in fact been delivered before that time; also that all the payments for material, etc., were charged to Hood & Co. on the general account at the bank, on which the estimates were also credited as they came in. The payrolls were paid without any certificate, estimates or reservation.

All these facts show clearly that the parties made and carried out arrangements in regard to payments entirely different from the provisions of the contract.

The appellant next raises the point that President Baldwin had no authority under the proof in the case to make the agreement for the bank to pay otherwise than according to the provisions of the contract. The president's testimony shows that the matter was in his hands on the part of the bank. It is also shown that, where orders came in, they were taken to him, and he gave a slip to the teller, and that when he was not in the teller or other officer paid them; and it shows also, that all these payments appeared on the books of the bank, many of them showing on their face what the payments were for; and in addition to all this the bank is here suing under the contract and claiming credit for ³⁵¹ these payments. From these facts the court had a right to infer that the entire transaction was with the knowledge and consent of the bank: *Bibb v. Hall*, 101 Ala. 79, 14 South. 98; *Talladega Ins. Co. v. Peacock*, 67 Ala. 253.

The judgment of the court is affirmed.

Tyson, Anderson and Denson, JJ., concur.

McClellan, C. J. (sick), and Haralson, J. (disqualified), not sitting.

Dowdell, J., dissents.

If the Oblige in a Bond, given by sureties for the faithful performance of a building contract pays the contractors the entire amount of the contract price, when more than twenty per cent thereof is not due, there is such a material alteration of the contract, without the consent of the sureties, as to discharge them from liability: *Cowdery v. Hahn*, 105 Wis. 455, 76 Am. St. Rep. 923.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY
v. QUARLES.

[145 Ala. 436, 40 South. 120.]

CARRIERS—Liability for Loss by Delay—Negligence.—A carrier is not permitted to invoke the act of God which destroys goods while in transportation, as an excuse for unreasonable delay and failure to deliver, when, if the carrier had discharged his duty, the goods would not have been destroyed. (pp. 55, 56.)

CARRIERS—Loss of Goods by Delay—Negligence—Act of God.—If a carrier is intrusted with goods for transportation and they are lost, he is responsible therefor unless the loss was caused by the act of God or the public enemy, and to avail himself of such exemption he must show that he was free from fault at the time. If there is an unreasonable delay on the part of the carrier in forwarding the goods and they are destroyed by the act of God during this delay, or such delay causes their destruction, the carrier is liable. (pp. 55, 56.)

A. G. and E. D. Smith, for the appellant.

De Graffenreid & Evins, for the appellee.

⁴³⁶ TYSON, J. Only one question is presented by the record in this case. It is this: Whether the defendant,
⁴³⁷ as a common carrier, can avail itself of the defense of the act of God under the facts upon which the case was tried. The facts may be stated as follows: The plaintiffs were cotton buyers, doing business in Eutaw, Alabama. On January 11, 1904, they bought at Moundville, Alabama, six bales of cotton from one Findlay, which he delivered to defendant at that place on that day, for shipment, and received from the defendant's agent a bill of lading therefor, consigning the cotton to plaintiffs at Eutaw. The defendant was at that time and at the time of the trial a common carrier, operating between Moundville and Eutaw, stations on its line, situated twenty miles apart. The cotton was never delivered by the defendant to the plaintiffs. On the morning of the twenty-second day of January, 1904, a cyclone of great violence passed through the town of Moundville, practically destroying it, killing and wounding many people, and destroying the cotton, but did not pass through Eutaw. It will be noted that the delay in shipping the cotton was about eleven days after it was received by the defendant, and this is the fact relied upon as precluding the defendant from asserting that the cyclone, which confessedly was an act of God, was the cause

of the loss in order thereby to relieve itself of all liability for its failure to safely deliver the cotton at Eutaw.

As a general rule, the undertaking of a common carrier to transport goods to a particular destination includes the obligation of a safe delivery of them, within a reasonable time, to the consignee. And the contract of carriage is one of insurance against every loss or damage, except such as may be occasioned by the act of God, or the public enemy, or the fault of the owner of the goods or his agent. And in this state the shipper makes a prima facie case against the carrier when he shows the goods were not delivered, and, in order for the carrier to relieve itself of the absolute liability for their loss as an insurer, it must bring itself within the exception relied upon as an excuse for its failure to deliver: *Grey's Exr. v. Mobile Trade Co.*, 55 Ala. 387, 28 Am. Rep. 729, and cases there cited. Has the defendant done this, when it appears that it was in default in not carrying out its contract ⁴²⁸ by not shipping the cotton within a reasonable time, as it obligated itself to do, and which if it had done the cotton would not have been destroyed by the cyclone? In other words, will it be allowed to invoke the act of God, which destroyed the cotton, as an excuse for the failure to deliver it, when, if it had discharged its duty, the cotton would not have been destroyed?

The precise question has arisen and been adjudicated in other states. In some of them, the question has been answered in the affirmative, and in others in the negative. The appellate courts of New York and Pennsylvania were the first to lead off on this question. The New York court held the carrier liable, and the Pennsylvania court held that it was not. When the question arose in other jurisdictions, some of the courts followed the lead of the New York court, and others that of the Pennsylvania court, so that the decisions of these two states may be regarded as the leading ones, pro and con, upon the question here presented. The cases in New York are *Michaels v. New York C. R. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415, and *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426. The Pennsylvania case is *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695. The New York cases held, and we think correctly, that, where a carrier is intrusted with goods for transportation, and they are lost, the law holds him responsible for the loss unless exempted by showing that the loss was

caused by the act of God or the public enemy. And to avail himself of such exemption he must show that he was free from fault at the time. In other words, when there is an unreasonable delay on the part of the carrier in forwarding the goods and they are destroyed by the act of God during this delay, that he is not excused for the reason that it was by his fault that they were exposed to the peril. Says the court in *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426, quoting the language of Gould, Jr., in *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235: "It is a condition precedent to the exoneration of the carriers that they should have been in no default, or, in other words, that the goods of the bailee should not have been exposed to the peril or accident, by their own misconduct, neglect, or ignorance. For, though the immediate ⁴⁸⁹ or proximate cause of the loss, in any given instance, may have been what is termed the act of God, or inevitable accident, yet, if the carrier unnecessarily exposes the property to such accident, by any culpable act or omission of his own, he is not excused." In line with this holding may be found the courts of Kentucky, Missouri, Illinois, and Tennessee: *Hernsheim Bros. & Co. v. Newport News etc. Co.*, 18 Ky. Law Rep. 227, 35 S. W. 1115; *Armentrout v. St. Louis etc. Ry. Co.*, 1 Mo. App. 158; *Pruitt v. Hannibal etc. R. Co.*, 62 Mo. 527; *Wald v. Pittsburg etc. R. Co.*, 162 Ill. 545, 53 Am. St. Rep. 332, 44 N. E. 888, 35 L. R. A. 356; *Southern Exp. Co. v. Womack*, 1 Heisk. (Tenn.) 256.

On the other hand, as approving the doctrine of *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695, may be found the courts of Michigan, Mississippi, Ohio, Massachusetts, and the supreme court of the United States: *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6; *Merchants' Wharfboat Assn. v. Wm. Wood & Co.*, 64 Miss. 669, 60 Am. Rep. 76, 2 South. 76; *Yazoo etc. R. Co. v. Millsaps*, 76 Miss. 855, 71 Am. St. Rep. 543, 25 South. 672; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Denny v. New York Cent. R. Co.*, 13 Gray (Mass.), 481, 74 Am. Dec. 645; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Memphis & Charleston R. Co. v. Reeves*, 10 Wall. (U. S.) 176, 19 L. ed. 909. It must be admitted that in all these cases, except the cases reported in 13 Gray (74 Am. Dec.), and 64 Miss. (2 South., 60 Am. Rep.), the principles declared in the *Morrison-Davis* case (20 Pa. 171, 57 Am. Rep. 695), were direct-

ly involved, and that they were in direct conflict with our views and with our own case of Louisville etc. R. Co. v. Gidley, 119 Ala. 523, 24 South. 753. In those two cases (13 Gray, 74 Am. Dec., and 64 Miss., 60 Am. Rep., 2 South.), the defendants were bailees, and their liability was, of course, predicated upon negligence. And while the Massachusetts court in that case approved what was said in Morrison v. Davis upon the point that the delay in the transportation of the goods was not the proximate cause of their injury, it cannot be held to have approved the proposition that a defendant, when ⁴⁴⁰ liable as an insurer, being at fault at the time the act of God caused the loss, could invoke that act as a defense. That case, therefore, cannot be regarded as authority on the point under consideration. For the same reason the case in 64 Miss. cannot be regarded as authority. And in our opinion the fallacy of the doctrine in Morrison v. Davis, 20 Pa. 171, 57 Am. Dec. 695, is made apparent, when we view the liability of the carrier from the standpoint of an insurer, and not that of the bailee for hire.

Adverting again to our case of Louisville etc. R. R. Co. v. Gidley, 119 Ala. 523, 24 South. 753, we need only to state what was there held to see that it supports the position we have taken. In that case the plaintiff delivered to the defendant, a common carrier, on Saturday, at Gadsden, some leather to be shipped to Philadelphia, and received from it a bill of lading limiting defendant's liability to due care and reasonable diligence in protecting it from loss by fire. The leather was received in time for shipment on the same day over a line connecting with defendant's road, five miles from Gadsden, but it was held for shipment over defendant's usual route, by way of Calera, on Monday morning following, no freight train running on Sunday. It was held that as a matter of law defendant was not justified in delaying the shipment, and its failure to ship on the day the leather was received rendered it liable for its loss by fire which occurred on the night of the day the leather was received. This holding, it seems to us, clearly put this court in line with the New York cases. For undoubtedly the principle which must control is the same, whether the carrier undertakes to exempt itself from liability as an insurer by the act of God or the public enemy, or by contract against fire not occasioned by its own neglect: Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49. In this case

(*Steele v. Townsend*), on page 256 of 37 Ala. (79 Am. Dec. 49), will be found the quotation, which seems to be approved, from 1 Smith's Leading Cases, directly on the point here involved: "The true view is not that the carrier discharges his liability by showing an act of God and is then responsible, as an ordinary agent, for negligence, but that the intervention of negligence breaks the carrier's ⁴⁴¹ line of defense, by showing that the injury or loss was not directly caused by the act of God, or, more correctly speaking, was not the act of God."

While this may be dictum, it is in accord with our views and those expressed in cases upon which we rely, and clearly indicates the views of this court at that time upon the question here under consideration.

Affirmed.

Dowdell, Simpson and Anderson, JJ., concur.

While an Act of God will Excuse a Common Carrier for a loss of goods, yet where his negligence concurs in or contributes to the case, he is nevertheless liable therefor: Jones v. Minneapolis etc. R. R. Co., 91 Minn. 229, 103 Am. St. Rep. 507; Central of Georgia Ry. Co. v. Hall, 124 Ga. 322, 110 Am. St. Rep. 170. Hence unnecessary delay on his part, subjecting the goods to loss by an act of God, which would not have happened had he been diligent, is of itself negligence that makes him liable for the loss: Wald v. Pittsburg etc. R. R. Co., 162 Ill. 545, 53 Am. St. Rep. 332; Richmond etc. R. R. Co. v. Benson, 86 Ga. 203, 22 Am. St. Rep. 446; Green-Wheeler Shoe Co. v. Chicago etc. R. R. Co., 130 Iowa, 123, 106 N. W. 498, 5 L. R. A., N. S., 882; Bibb Broom Corn Co. v. Atchison etc. Ry. Co., 94 Minn. 269, 110 Am. St. Rep. 361, and see the authorities cited in the cross-reference note thereto.

CENTRAL OF GEORGIA RAILWAY COMPANY v. MONTMOLLEN.

[145 Ala. 468, 39 South. 820.]

CARRIERS—Delay in Delivery—Conversion.—A failure by the carrier to deliver goods within a reasonable time does not establish a conversion but is a mere breach of contract, and the consignee cannot refuse to accept the goods on the ground of the delay and recover their full value, unless the delay destroyed the value of the goods entirely, or caused what is equivalent to a total loss. A mere delay being no conversion, the consignee must receive the goods, although he at that time has no use for them, and he cannot refuse to accept and recover their full value. (p. 59.)

CARRIERS—Delay in Delivery—Missing Goods.—Although there has been a delay in delivery of goods by a carrier, the mere

fact that some of the articles shipped are missing does not justify the consignee in refusing to receive, nor entitle him to maintain an action for failure to deliver. (p. 59.)

CARRIERS—Delay in Delivery—Damage to Goods—Burden of Proof.—In an action to recover for failure to deliver goods offered to be delivered by the carrier and delivery refused, the damages recoverable are limited to those sustained to the goods together with those arising from the delay in making delivery. (p. 60.)

CARRIERS—Delivery at Unusual Place—Waiver.—If a carrier fails to deliver goods after the consignee has absolutely refused to receive them, although delivery is sought to be made at an unusual place, the consignee by such refusal waives the right to insist upon delivery at the usual place. (p. 60.)

C. P. Jones, for the appellant.

C. H. Roquemore, for the appellee.

400 ANDERSON, J. "A failure by the carrier to deliver goods within a reasonable time does not establish a conversion, but is a mere breach of contract; and the consignee cannot refuse to accept the goods on the ground of the delay and recover their full value, unless the delay destroyed the value of the goods entirely or caused what is equivalent to a total loss": 5 Am. & Eng. Ency. of Law, 221; Hutchinson on Carriers, sec. 775; Galveston R. R. Co. v. Watson, 1 White & W. Civ. Cas. Ct. App., sec. 813; Shaw v. South C. R. R., 5 Rich. 462, 57 Am. Dec. 768. A mere delay being no conversion, the consignee must receive the goods, although he at that time has no use for them. He cannot refuse to accept and recover the full value of the goods: Baumbach v. 470 Gulf etc. Ry. Co., 4 Tex. Civ. App. 650, 23 S. W. 693. And the mere fact that some of the articles shipped are missing does not justify the consignee in refusing to receive: Gulf etc. Ry. Co. v. Booton (Tex.), 4 White & W. Civ. Cas. Ct. App., sec. 67, 15 S. W. 502.

In the case at bar, the defendant at the trial proved an offer to deliver the box of tools personally to the plaintiff in the law office of Charles P. Jones, which the plaintiff admitted, but claimed that the box had been broken and some of the tools were missing, and that he refused to accept what was offered, but gave no reason for the refusal. The plaintiff offered no proof as to the damage to the box, or of the articles missing and the value thereof, and which was incumbent upon him. The defendant proved a delivery of what it received, and if in a damaged condition, or some of the articles were missing, it devolved upon the plaintiff to

prove these facts as well as any damage for delay. The defendant by the delivery attempted to relieve itself of the breach set up in the complaint and which had been denied by the plea of the general issue, and it had the right to do this without a special plea.

Plaintiff contends that there was no lawful delivery, in that it was not at the usual place of delivery, and cites a modification of the common-law requirement as to delivery. We think the modification is intended to relieve the carrier of making a personal delivery; but whether it could relieve itself by a delivery at a place other than its freight depot we need not decide, for the plaintiff by his unqualified refusal of the box waived the right to have it delivered elsewhere.

It appears from the record that the trial judge included in the judgment the full value of the box and tools, which we think was error.

Reversed and remanded.

McClellan, C. J., and Tyson and Simpson, JJ., concur.

The Conversion of Goods by a Carrier is discussed in the note to *Bollings v. Kirby*, 24 Am. St. Rep. 815. A carrier may be held as for a conversion where he delivers freight to a person not entitled to it, or where he wrongfully sells it for the charges of transportation: *Marshall etc. Co. v. Kansas City etc. R. R. Co.*, 176 Mo. 480, 98 Am. St. Rep. 508; *Central Ry. Co. v. Chicago Portrait Co.*, 122 Ga. 11, 106 Am. St. Rep. 87.

The Owner of Goods Shipped by a Carrier cannot accept part of them and abandon the residue, on account of a loss by leakage, and recover of the carrier the value of the goods abandoned: *Shaw v. South Carolina R. R. Co.*, 5 Rich. 462, 57 Am. Dec. 768.

ALABAMA CONSOLIDATED COAL AND IRON COMPANY v. TURNER.

[145 Ala. 639, 39 South. 603.]

WATERS AND WATERCOURSES—Riparian Rights—Nuisance.—Every riparian proprietor has an equal right to have the stream flow through his land in its natural state without material diminution in quantity or alteration in quality, and any diversion or obstruction of the water which substantially diminishes the volume of the stream, or which dingles or corrupts it to such a degree as essentially to impair its purity and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, creates a continuous actionable nuisance. (p. 64.)

WATERS AND WATERCOURSES—Riparian Rights—Pollution.—If one owns land on a stream and uses the water to wash ore taken from his land, allowing the water to return to the stream so polluted as to be unfit for watering stock or for domestic use, for which it was formerly used by a lower riparian owner and from which there is a deposit of mud or refuse ore on the land of the lower riparian owner impairing its fertility, he is liable to an action for damages to such lower owner. (p. 64.)

WATERS AND WATERCOURSES—Appropriation—Adverse Use.—The exclusive enjoyment of water by a riparian owner in a particular way for the length of time which is the period of the statute of limitations, enjoyed without interruption, is sufficient to raise a presumption of title as against a right in any other person which might have been, but was not, asserted. (p. 65.)

WATERS AND WATERCOURSES—Riparian Rights—Nuisance—Negligence.—If the foundation of a suit by a lower proprietor is the active creation of a private nuisance in maintaining waterways and polluting the stream, and not merely a wrong arising from negligence, the degree of care used by the upper riparian owner in the construction of such waterways is immaterial in determining the right of the lower owner to recover actual damages. (pp. 65, 66.)

WATERS AND WATERCOURSES—Riparian Rights—Diversion—Defense.—A defense by an upper riparian owner that he has used the water of a stream for manufacturing purposes in a reasonable manner, returning the water to the stream with no material diminution, is good as against demurrer, in an action by a lower riparian owner for a diversion of the water of the stream. (p. 66.)

WATERS AND WATERCOURSES—Riparian Rights—Construction of Dam—Liability for Freshets.—A riparian owner who constructs a dam so as to hold water coming down in usual and customary freshets is not liable to a lower riparian owner for injury resulting from the failure of such dam to hold the water in time of extraordinary flood. (p. 66.)

EVIDENCE—Opinions—Value of Property.—The market value of property may be proved by the opinions of witnesses based on hearsay. (p. 66.)

Action for damages for taking water from a running stream and the pollution thereof. Plaintiff, a lower riparian owner, claimed that defendant, an upper riparian owner, had con-

structed and was operating a pumping plant on his land, whereby he diverted large quantities of water from such stream, thus preventing it from flowing as it was accustomed to do, to the great injury and damage of plaintiff. Plaintiff also claimed that defendant had constructed a dam and constantly allowed it to collect large quantities of mud, filth and debris, and that such dam, within the last year prior to this suit, had frequently broken and discharged its accumulated contents of mud, filth and debris into such stream and upon plaintiff's land, to his great injury. That all of said acts were done by defendant, wrongfully and negligently, and that in addition thereto defendant operated ore-washers upon his land and willfully opened the floodgates of his dam, and thereby let down on plaintiff's land mud, filth and debris, rendering his land less valuable and to his great injury and inconvenience.

"Defendant's plea 4 alleged that the defendant for more than ten years prior to the bringing of plaintiff's suit has used the waters of said Cheaha creek in the same manner as alleged in the complaint that it was used by the defendant to the injury of the plaintiff, and defendant avers that such user was continuous, adverse and under a claim of right, and for more than ten years before the bringing of this suit, and was so used with the knowledge of the plaintiff, and that by virtue of such user defendant has acquired the right to continue such use. Plea 5 was a short plea of the statute of ten years. Plea 8, interposed to the first and fourth counts, alleged 'that the water diverted by its pumping station was pumped out of Cheaha creek at a pumping station owned by it to its ore-washers and furnaces at Iron-ton; that the water so pumped, after passing through its washers, was returned to Cheaha creek through Fane's creek; and that no water was used from that pumped, except that is necessary for the purpose of operating its plant, and that all the water so used is used with due care to the rights of the lower riparian owner, and that there is no material diminution of the amount returned from that diverted, the same being used in a reasonable manner for the manufacturing purposes above set forth.'

"Demurrers were interposed to these pleas, and sustained by the lower court.

"Charge 12, requested by the defendant and refused, was: 'The court charges the jury that if the mud dams constructed

by the defendant were constructed in the usual manner, and that such mud dams so constructed were properly constructed, and were so constructed as to be able to hold and resist all the water coming from the ordinary, usual and expected freshets, then the defendant would not be liable for damages resulting from the breaking of such dams on account of any extraordinary and entirely unexpected floods.' "

Judgment for plaintiff and defendant appealed.

Knox, Dixon & Burr, for the appellant.

Brown, McElderry & Harrison, for the appellee.

648 HARALSON, J. The principles of law involved in the decision of this case have been the subject of repeated decisions in this and other courts. We may refer to these, especially from our own court, as furnishing a guide for the determination of questions presented.

649 In the old case of *Stein v. Burden*, 29 Ala. 127, 65 Am. Dec. 394, it was held that a riparian proprietor has no property in the water itself which flows through his land, but a simple usufruct while it passes along; that he may use the water passing through his land as he pleases, subject, among other things, to the condition that after using it, he return the water to its ancient channel; that where a proprietor has diverted water from its accustomed channel, to the injury of a land owner on the stream below him the water should be returned into the ancient channel, at the cost of the defendant. Many authorities are referred to as sustaining these principles. It was again said: "Diversion of the water of the stream is an act continuous in its character, and each effluence of water, resulting from the unauthorized act of another, is a wrong done to the proprietor below, if thereby the flow of the stream is materially diminished. It is a continuing nuisance, and an action lies for the damages, toties quoties. Each successive flow being a new wrong, a nuisance continued, imposes a corresponding contemporaneous obligation to return such water to the stream."

In the later case of *Tennessee Coal etc. R. R. Co. v. Hamilton*, 100 Ala. 252, 46 Am. St. Rep. 48, 14 South. 167, the same principles are declared and emphasized. It was said: "The old maxim, 'Aqua currit, et debet currere, ut currere solebat,' is familiar to all. It means in practical

application that water is the common and equal property of everyone through whose domain it flows, and that the right of each to its use and consumption, while passing over his possession is the same. He must so use it as not to destroy or unreasonably impair the equity rights of others."

The general rule is often stated to be that "every riparian proprietor has an equal right to have the stream flow through his land in its natural state, without material diminution in quantity, or alteration in quality. . . . Any diversion or obstruction of the water which substantially diminishes the volume of the stream, so that it does not flow ut currende solebat, or which defiles and corrupts it to such a degree as essentially to impair its purity and prevent the use of it for any of the reasonable ^{uses} and proper purposes to which running water is usually applied, such as irrigation, the propulsion of machinery, or consumption for domestic use, is an infringement of the rights of the owner of land through which a watercourse runs, and creates a nuisance for which those thereby injured are entitled to a recovery."

In *Gould on Waters* it is declared that actions may be maintained for the following causes: "The casting upon one's own land of dirt and foul water, or substances which reach the stream by percolation; . . . the letting of water made noxious by precipitation of minerals, . . . or rendering the water unfit for domestic, culinary or mining purposes, or for cattle to drink of; or fish to live in, or for manufacturing purposes."

In one aspect of the case, still another authority is pertinent: "Where one who owns land on a stream uses the water to wash ore taken from his land, and then allows the water to return to the stream so polluted as to be unfit for watering stock or for domestic uses, for which it was formerly used, by a lower riparian owner, and from which there is a deposit of mud or refuse ore on the land of the lower riparian owner impairing its fertility, he is liable to an action for damages to the lower riparian owner": *Drake v. Lady Ensley etc. R. Co.*, 102 Ala. 501, 48 Am. St. Rep. 77, 14 South. 749, 23 L. R. A. 64.

From the foregoing principles, it appears to be manifest that the demurrers to the different counts in the complaint were properly overruled.

The first and second pleas were the general issue—the third was the statute of limitations for one year. On these issue was joined.

The fourth and fifth set up the statute of limitations of ten years, that defendant commenced the use of the water in Cheaha creek in the manner complained of in plaintiff's complaint more than ten years before plaintiff's suit was commenced, and defendant has used the water in substantially the same manner continuously since that time, with the knowledge of the plaintiff, and for this reason has acquired the right, as against the plaintiff, to use the water, the use of which is the basis of plaintiff's action.

⁶⁵¹ A demurrer to these pleas was sustained, and in this we apprehend the court erred. The question seems to have been definitely settled in *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 543, and approval by other adjudications of the court. As was then said: "It is the established doctrine that the exclusive enjoyment of water, or any other easement, in a particular way, for the length of time which is the period of the statute of limitations, enjoyed without interruption, is sufficient to raise a presumption of title, as against a right in any other person, which might have been, but was not, asserted": *Ulbricht v. E. W. Co.*, 86 Ala. 592, 11 Am. St. Rep. 72, 6 South. 78, 4 L. R. A. 572; *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep. 424; *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Dec. 412; *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731.

Angell on the Law of Watercourses, section 205, holding to the doctrine that any man has the right to have the advantage of a flow of water on his own land, without diminution or alteration, lays down the doctrine that an adverse right may exist founded on the occupation of another, stating: "And although the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking and using it has existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream subject to such adverse right": 1 Am. & Eng. Ency. of Law, 2d ed., 875; 22 Am. & Eng. Ency. of Law, 2d ed., 1187.

The sixth plea was erroneous and subject to demurrer. The foundation of the suit being the active creation of a

private nuisance, and not merely a wrong arising from negligence, the degree of care used by defendant in the construction of waterways is immaterial in determining the right of plaintiff to recover actual damages from it: *Central of Georgia R. R. Co. v. Windham*, 126 Ala. 560, 28 South. 392.

The eighth plea to the first and fourth counts was good, and not open to the grounds of demurrer interposed to them. But it affirmatively appears from the bill of exceptions that the defendant had the benefit of ⁶⁵² the defense made by said plea under the general issue, and at most it was error without injury: *Louisville etc. R. R. Co. v. Hall*, 131 Ala. 161, 32 South. 603; *Tutwiler v. McCarty*, 121 Ala. 356, 25 South. 828.

Charge 12, requested by defendant, should have been given. If the facts hypothesized in said charge were shown to be true, under the decisions of this court, the conditions referred to in said charge exempted defendant from liability on account of the breaking of said dams: *Columbus & W. R. Co. v. Bridges*, 86 Ala. 448, 11 Am. St. Rep. 58, 5 South. 864; *Arndt v. City of Cullmann*, 132 Ala. 540, 90 Am. St. Rep. 922, 31 South. 478; 24 Am. & Eng. Ency. of Law, 1st ed., 948; 10 Am. & Eng. Ency. of Law, 245; 10 Am. & Eng. Ency. of Law, 2d ed., 695.

There was no error in allowing the witness, Lackey, to state what in his opinion was the market value of this mill property June, 1902. The market price of property, being a conclusion which is largely made up of presumptions, may always be proved by the opinions of witnesses based, of necessity even in fact, on hearsay: *Burks v. Hubbard*, 69 Ala. 379; *East Tennessee etc. R. R. Co. v. Watson*, 90 Ala. 44, 7 South. 813.

Reversed and remanded.

Dowdell, Simpson and Denson, JJ., concur.

Every Riparian Owner has a right to make a reasonable use of the waters flowing by or through his premises; what is a reasonable use in any particular presents a question of fact: Meng v. Coffee, 67 Neb. 500, 108 Am. St. Rep. 697; *Lawrie v. Silsby*, 76 Vt. 240, 104 Am. St. Rep. 927; *Pierson v. Speyer*, 178 N. Y. 270, 102 Am. St. Rep. 499; *People v. Hurlbert*, 131 Mich. 156, 100 Am. St. Rep. 583. As to the right of a riparian owner to construct a dam in a stream to obtain power for a mill or the like, see *Hazard Power Co. v. Somerville Mfg. Co.*, 78 Conn. 171, 112 Am. St. Rep. 144, and cases cited in the cross-

reference note, thereto; and as to the care which he must exercise to guard against overflows to the injury of other proprietors at periods of high water, see *Allen v. Thornapple Elec. Co.*, 144 Mich. 370, 115 Am. St. Rep. 453; note to *Mizell v. McGowan*, 85 Am. St. Rep. 711.

Prescriptive Title to Waters is discussed in the note to *Oregon etc. Co. v. Allen Ditch Co.*, 93 Am. St. Rep. 711.

CASES

IN THE

SUPREME COURT

OF

ARKANSAS.

AMES v. AMES.

[80 Ark. 8, 96 S. W. 144.]

DEED—Revesting of Title by Cancellation.—The title to land cannot be revested in the grantor by a surrender and cancellation of the deed. (p. 70.)

DEED.—The Acceptance of a Deed by the grantee is essential to the passage of title. (p. 70.)

DEED—Estoppel to Claim Under After Cancellation.—If a grantee, a short time after the execution of the deed, goes to the grantor and, asserting that he has destroyed the deed and never accepted it because not executed in accordance with his wishes, demands the execution of a new deed to his wife and children, which is done, he and his grantees are estopped to claim under the original deed. (p. 71.)

McGill & Lindsey, for the appellant.

J. A. Rice, for the appellee.

* McCULLOCH, J. Appellee, Clara Ames, an infant suing by next friend, instituted an action in ejectment against appellant, Lina Ames, to recover a tract of land containing forty acres situated in Benton county. The cause was by consent of parties transferred to equity, and the chancellor rendered a decree in favor of the plaintiff, canceling the defendant's claim of title and awarding the land to the plaintiff. The plaintiff, Clara Ames, is the daughter of one D. D. Ames and his former wife, Sophronia, and the defendant, Lina Ames, is the divorced wife of D. ¹⁰ D. Ames. Ames has been married three times, and as many times divorced. Sophronia, the mother of Clara, was his second wife, and defendant, Lina, was his last or third wife. In 1893 he purchased the land in controversy from H. A. Gramling and Elizabeth Gramling, and they executed and delivered to him a deed con-

veying the land to him. A few weeks later he went back to the Gramlings, and represented to them that the deed was not satisfactory to him because he wanted and expected them to convey the land to his wife, Sophronia, and children by her, and that he had not accepted it. He represented to them that he had destroyed the former deed, and thereby induced them to execute a new deed, conveying the land to Sophronia for life, or as long as she remained his wife or widow, with remainder over to the issue of their marriage. Subsequently the plaintiff, Clara, was born. Ames obtained a divorce from his wife, Sophronia, on account of her misconduct, and intermarried with the defendant, Lina Ames. This marriage occurred in 1897, more than four years after the execution of said deeds. In January, 1898, D. D. Ames and his wife, Lina, joined in the execution of a deed to one Cross, purporting to convey the land, and on the same day Cross executed a deed to Lina, purporting to convey the land to her, and she now claims title under said deed. Prior to the commencement of this suit, D. D. Ames obtained a divorce from defendant Lina.

The deed executed by the Gramlings to D. D. Ames was not recorded until about the time that he executed the deed to Cross. The deed from the Gramlings to Sophronia Ames for life with remainder over to her children was recorded shortly after its execution.

The case turns upon the question whether or not the title passed to D. D. Ames under the first deed executed by the Gramlings. Appellant claims that the deed was delivered, that the title passed thereby, and that the subsequent agreed surrender of the deed to the Gramlings did not reinvest them with the title so as to enable them to convey it to Sophronia and her child. D. D. Ames testified that he did not accept the deed. He stated, on examination as a witness, that he intended to have the conveyance made to his wife, Sophronia, but that the notary public who prepared the deed and took the acknowledgment left it at his house ¹¹ with his wife during his absence; that on his return home the same day he read it and told his wife to destroy it, as the title was not conveyed in accordance with his wishes; that he left home the next day, and was absent on business for about a month; that immediately upon his return he saw H. A. Gramling and told him the deed was destroyed, and that he wanted them to execute a new deed in accordance with his wishes, which they (the

Gramlings) agreed to execute, and did execute, as before stated; that he thought his wife had destroyed the old deed until several years afterward, when the defendant, Lina, found it and induced him to join in the conveyance to Cross. He also testified that he told the defendant of the deed to Sophronia and the child, but that she recorded the old deed and insisted on his joining in the deed to Cross, which he says he did "for the sake of peace."

Mr. George, the notary public, testified in contradiction of Ames' statement that the first deed was prepared in accordance with Ames' instructions, and that the latter accepted it in that form without objection. The chancellor found that the first deed was delivered to and accepted by Ames, but that he elected to cause the land to be conveyed to his wife, Sophronia, and daughter, and that, though the last deed executed by the Gramlings was ineffectual to convey the legal title, D. D. Ames held the legal title as trustee for his wife, Sophronia, and child, Clara, the plaintiff.

It is settled by repeated decisions of this court that where the title to land passes by delivery and acceptance of a deed of conveyance the same cannot be revested in the grantor by surrender or cancellation of the deed: *Strawn v. Norris*, 21 Ark. 80; *Cunningham v. Williams*, 42 Ark. 170; *Diver v. Friedheim*, 43 Ark. 203; *Campbell v. Jones*, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783; *Watters v. Wagley*, 53 Ark. 509, 22 Am. St. Rep. 232, 14 S. W. 774.

It is equally well settled that an acceptance of the deed by the grantee is essential to the passage of the title: 13 Cyc. 50, and cases cited.

The evidence is conflicting as to whether or not D. D. Ames ever in fact accepted the first deed when it was executed and delivered to him, but it is undisputed that in a short time thereafter he went to the grantor and, asserting that he had destroyed the deed and had never accepted it because it had not been executed ¹² in accordance with his wishes and directions, demanded the execution of a new deed to his wife and her children. The grantor accepted his statement as true, and executed and delivered the new deed. Can he or his grantee, where no rights had intervened between the dates of the two deeds, be heard to assert now that he had in fact accepted the deed, and that the title had passed to him thereunder? We think not. His statement which induced the exe-

cution of the new deed must now be conclusively held to have been true. He and his grantee are estopped to deny its truth.

There are many cases to the effect that where a grantee surrenders his deed to the grantor, and induces him to execute a new deed to another purchaser for value, he is estopped to assert title under the old deed, because to do so would be to perpetrate a fraud. This court has so held: *Strawn v. Morris*, 21 Ark. 80; *Neal v. Speigle*, 33 Ark. 63; *Taliaferro v. Rolton*, 34 Ark. 503.

In those cases there was no claim on the part of the grantee, as an inducement to the grantor to execute another deed, that he had not accepted the deed. The surrender was for the sole purpose of revesting the title in the grantor to enable him to make a new deed. In the case at bar the facts are much stronger. Though the second deed was not made to a purchaser for a new consideration, the grantee, Ames, represented to the grantor that he had never accepted the first deed. Now, the acceptance or nonacceptance of a deed by a grantee is, under doubtful circumstances, a matter largely within the knowledge of the party himself; and where he afterward plainly and unequivocally manifests his nonacceptance, and thus influences the conduct of his grantor, it ought to close the door to further inquiry on the subject, whether the rights of innocent purchasers for value have been built up under the new deed or not. Neither he nor his grantee should be permitted to say thereafter that he had in fact accepted the deed, and that the title passed to him thereunder.

The decree must, therefore, be affirmed. It is so ordered.

The Destruction and Cancellation of a Deed after its delivery does not revest title in the grantor: Potter v. Adams, 125 Mo. 118, 46 Am. St. Rep. 478; Watters v. Wagley, 53 Ark. 509, 22 Am. St. Rep. 232; Brown v. Westerfield, 47 Neb. 399, 53 Am. St. Rep. 532.

AMERICAN BONDING COMPANY v. MORROW.

[80 Ark. 49, 96 S. W. 613.]

FIDELITY INSURANCE—Construction Against Insurer.—The bond of a surety company, like any other insurance policy, must, when doubtful or ambiguous, be given the strongest interpretation against the insurer that it will reasonably bear. (p. 75.)

FIDELITY INSURANCE—Extent of Liability in Case of Renewals.—If a bond stipulates that it shall not, if renewed, lapse at the end of the period for which it is executed, but that the liability of the surety shall not be cumulative, the total liability of the surety, after several renewals, is the amount named in the original undertaking. (p. 75.)

FIDELITY INSURANCE—Auditing Accounts.—When an application for the renewal of a cashier's bond stipulates that his accounts shall be audited monthly, the examination need not be made on precisely the same date of each month, but only at some time during each month. (p. 76.)

FIDELITY INSURANCE—Examination of Accounts.—A provision in the application for a cashier's bond that his accounts shall be examined monthly by the auditing committee of the bank directors does not call for an examination by a committee of expert accountants. (pp. 76, 77.)

FIDELITY INSURANCE—Warranty as to Employment.—A statement in an application for a cashier's bond that he is not "engaged in other business or employment than the bank's service," which is made a warranty by the terms of the bond, will be deemed to refer to important and material matters calculated to affect the risk, not to unimportant ones that have no effect or bearing on the risk. (p. 77.)

Ratliffe & Fletcher, for the appellant.

M. J. Manning, for the appellee.

⁵⁰ McCULLOUGH, J. The American Bonding Company of Baltimore is a foreign corporation doing business in the state of Arkansas as a surety company, and on August 31, 1900, executed to the Bank of DeVall's Bluff, of DeVall's Bluff, Arkansas, a surety bond in the sum of \$5,000, undertaking to indemnify said bank against any loss sustained on account of any larceny or embezzlement committed by its cashier, G. C. Strong, during the term of one year commencing on the first day of September, 1900. The bond contained the following, among other, conditions and stipulations, viz.:

"This bond shall not lapse at the end of the above if it shall be continued in force by a renewal receipt or receipts executed by the surety, but shall continue in force for the term or terms

of such renewal. The liability of the surety, however, shall not be cumulative.

"That all the representations made by the employer, his or its officers, to the surety are warranted by the employer to be true; that the employ  has not, to the knowledge of the employer, his or its officers, been in arrears or a defaulter in the position covered by this bond, or in any other position, and that the employer, his or its officers, upon becoming aware of the employ  gambling, speculating or committing any disreputable, lewd or unlawful act will immediately notify the surety in writing.

"That the surety's liability hereunder shall cease immediately as subsequent acts of the employ  from and after discovery by the employer, his or its officers, if any default hereunder on the part of the employ ."

This bond was issued upon a written application signed by officers of the bank, containing various statements in response to questions propounded, the truth of which were declared to be warranties by the applicant.

Renewal receipts were subsequently issued by the surety, extending the period of the suretyship from September 1, 1901, for one year, and from September 1, 1902, for another year.

⁵¹ The renewal receipts were in the following form (omitting caption): "In consideration of the sum of twenty-five dollars, the American Bonding & Trust Company, of Baltimore City, hereby guarantees the fidelity of George C. Strong in favor of Bank of DeVall's Bluff from the first day of September, 1901, to the first day of September, 1902, in the same amount, in the same position, and subject to all the covenants and conditions set forth and expressed in the surety bond No. 44228 of this company, heretofore issued on the first day of September, 1900."

The last renewal receipt extending the bond for one year from September 1, 1902, was issued upon a written application signed by the president of the bank and containing the following among other questions and answers, viz.: "4. (a) Has applicant uniformly given satisfaction in his personal conduct and habits?" Answer: "Yes."

"(b) Has he kept his accounts correctly and made proper settlements of all cash and securities intrusted to his care?" Answer: "Yes."

"(c) Have you any knowledge or any information or are you aware of any habit of the applicant or of any circumstances unfavorably affecting the risk to the surety on the bond applied for? If so, state particularly." Answer: "No."

"5. Is he now or has he been from any cause indebted to the bank or its officers? If so, give particulars, stating amount, how incurred, and how payment is secured." Answer: "Does not owe the bank or its officers."

"6. Is he now or about to be engaged or intrusted in any other business or employment than the bank's service?" Answer: "No."

"11. In case of applicant handling cash or securities, how often will the same be examined and compared with the books, accounts and vouchers and by whom?" Answer: "The auditing committee, monthly."

"12. (a) At what date and by whom were the applicant's books and accounts (including cash, securities and vouchers, if any) inspected and examined?" Answer: "August 15, by auditing committee, W. J. Wilkins and J. I. Booe."

"(b) Were they at that time in every respect correct and proper, securities and funds on hand to balance?" Answer: "They were."

The plaintiff, W. H. Morrow, as receiver of the bank of DeVall's Bluff, brought suit against said company to recover the sum of \$11,038.56, alleged to have been misappropriated⁵² and used by the cashier Strong (which said misappropriation, it is alleged, amounted to larceny or embezzlement) during the said three years covered by said bond and the several renewals thereof. The defendant answered, and the cause was transferred to the chancery court upon the motion of defendant, alleging "that the transactions and defalcations, if any, as charged against said Strong in the complaint embraced money and various items of account extending over a period of three years, and are of such an intricate nature and so intermingled upon the books and among the papers of the said bank that it is impossible to ascertain accurately the amount of defalcation, if any, or the amount due from said Strong to said bank without the aid of a master in chancery."

Said defendant, in its answer, denied that Strong, by its acts amounting to larceny or embezzlement, had appropriated the funds of the bank; alleged untruthfulness of the answers

to questions in the several applications for the bond, and renewal receipts were set forth as breaches of the contract which released the surety from liability. It is also set forth as a defense that, according to the terms of the bond, the surety is in no event liable for an amount in excess of \$5,000.

On final hearing the chancellor found that Strong's defalcation during the period named in the bond was \$1,150.50; during the period named in the first renewal receipt, \$4,066.72, and during the period of the second renewal receipt, \$5,851.34, and rendered a decree against the surety company for \$10,068.06, from which decree an appeal is prosecuted.

⁵³ 1. The initial question for determination is as to the amount of appellant's liability, if any, on the bond and the two renewal receipts—whether said writings constituted three separate obligations to indemnify the assured in the sum of \$5,000 each against loss accruing during the respective years, or whether they constituted a single liability for the sum of \$5,000 extending over the periods ⁵⁴ covered thereby, and indemnifying the assured against loss only to the extent of that sum for the whole period.

It is now well settled that the bond of a surety company, like any other insurance policy, is to be most strongly construed against the insurer. The language of the bond is that selected and employed by the insurer, and, when doubtful or ambiguous, must be given the strongest interpretation against the insurer which it will reasonably bear: *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *American Surety Co. v. Pauly*, 10 U. S. 133, 18 Sup. Ct. Rep. 552, 42 L. ed. 977; *Guarantee Co. v. Mechanics' etc. Co.*, 183 U. S. 402, 22 Sup. Ct. Rep. 124, 46 L. ed. 253; *Supreme Council etc. v. Fidelity etc. Co.*, 63 Fed. 48, 11 C. C. A. 96; *Remington v. Fidelity etc. Co.*, 27 Wash. 429.

The language of these instruments is not susceptible of any reasonable interpretation other than that it was intended to extend the liability over the period of the renewal, but to limit the total liability for the whole period of the renewal contract to the amount named. It is so expressly stipulated in the bond. There is no ambiguity about it. It is plainly stipulated that the bond shall not lapse at the end of the time if renewed, but that "the liability of the surety, however, shall not be cumulative." What else can this stipulation mean? This construction is strengthened when we consider all the

other terms and conditions of the bond, and it is obvious that only a total liability of \$5,000 was contracted. The supreme court of Tennessee placed this construction upon a similar bond: *First Nat. Bank v. United States Fidelity etc. Co.*, 110 Tenn. 10, 100 Am. St. Rep. 765, 75 S. W. 1076. The learned chancellor held that the bond and renewal receipts constituted three separate bonds, covering three separate and distinct periods. In this he erred.

2. Was there a breach, on the part of the bank, of any of the conditions of the bond which released the surety?

The application for the last renewal contained the following question and answer, viz.: "In case of applicant handling cash or securities, how often will the same be examined and compared with the books, accounts and vouchers, and by whom?" Answer: "The auditing committee, monthly." It is claimed that this condition was not performed during the period covered by the renewal. We think the evidence is sufficient to sustain a finding that the examinations were made by the auditing committee ⁵⁵ monthly during that period. It is not claimed by the members of the committee that the examinations were made at precise intervals of one month. On the contrary, some of them state that it was deemed advisable to examine at irregular intervals, or rather upon irregular dates in each month. We do not think that the terms of the warranty, fairly and reasonably construed, required any more than that. Certainly it was not meant that an examination should be made on precisely the same date of each succeeding month, but that an examination should be made at some time during each month. We think this is shown to have been done during the last year.

It is argued that the examinations made by the auditing committee from time to time were not sufficiently searching and accurate to discover defalcations which ought to have been discovered, and that for this reason the surety company was released from liability. The members of the committee were not expert accountants, and appear to have made examinations in good faith with the purpose of fulfilling their duty to the bank. The terms of the bond and the alleged warranty in the application do not call for an examination to be made by a committee of expert accountants. It was only provided that the examinations should be made by the auditing committee of the bank directors. This provision contemplated no

more than just what was done—an examination by a committee of men selected from the ordinary business avocations, reasonably capable of comprehending the condition of the accounts of the bank. It appears that the cashier, Strong, successfully secreted his defalcations from these men, notwithstanding the fact that they made a reasonably diligent investigation from month to month. The fact that he did succeed in thus hiding his wrong-doing for a time does not demonstrate that the members of the committee failed to perform their duty. If that process of reasoning should be followed out, it would necessarily defeat the objects of the bond. It was from just such a condition of affairs that the bank sought indemnity. As has been well said, “an employer would need no insurance against that close and relentless vigilance which makes stealing impossible”: *Hammond, J., in Guarantee Co. v. Mechanics’ Bank*, 80 Fed. 766, 26 C. C. A. 146.

It is shown by proof that, during the life of the bond and ⁵⁶ renewals, Strong acted as secretary of a building and loan association, and also that he was engaged in the fire insurance business, and this is put forth by appellant as grounds of forfeiture on account of the negative answer to the question in the application whether the employé was “now or about to be engaged in other business or employment than the bank’s service.” The proof shows that he wrote a little fire insurance, and was secretary of the local board of directors of a Little Rock building and loan association doing business at DeVall’s Bluff, but that none of those engagements interfered with his work at the bank—that he attended to that work before or after banking hours. The parties to an insurance or indemnity contract may, by express stipulation, declare warranties of things apparently trivial and unimportant to be material, but such things will not be deemed to be material unless made so by express stipulation. Unless otherwise expressly provided, warranties will be deemed to refer to important and material matters calculated to affect the risk, not to unimportant ones which have no effect or bearing upon the risk: *Franklin Life Ins. Co. v. Galligan*, 71 Ark. 295, 100 Am. St. Rep. 73, 73 S. W. 102; *Providence Life Assur. Soc. v. Reutlinger*, 58 Ark. 528, 25 S. W. 835; *Home Mutual Life Assn. v. Gillespie*, 110 Pa. 84, 1 Atl. 340; *Cushman v. United States Life Ins. Co.*, 70 N. Y. 72; *Wilkinson v. Connecticut Mutual Life Ins. Co.*, 30 Iowa, 119, 6 Am. Rep. 657. The question

propounded in the application manifestly had reference to some business or employment calculated to interfere with Strong's duty to the bank or to increase the risk. It had no reference to the trivial or incidental duties of some other business or employment which did not impose a tax upon the time due the bank or call for the investment of some capital. The other engagements of Strong were too trivial and unimportant to be deemed to have been in contemplation of the parties when the truth of the answers were warranted.

Upon consideration of the whole case, we are of the opinion that the proof does not establish any grounds of forfeiture or breach of warranties or conditions on the part of the assured, and that the appellant is liable for the defalcation which occurred during the period of the last renewal, to the extent of the amount of penalty of the bond. Those occurring during the preceding periods need not be discussed.

The decree is therefore reversed, and a decree will be entered ⁵⁷ here against appellant for the sum of \$5,000, with interest from August 21, 1903, together with the costs of the court below.

It is so ordered.

Fidelity Insurance is discussed in the note to *First Nat. Bank v. Fidelity and Guaranty Co.*, 100 Am. St. Rep. 774. A statute declaring that no misrepresentation or warranty by an insured shall be deemed material or affect the contract of insurance, unless made with an intent to deceive, or unless the matter represented increases the risk, applies to fidelity insurance contracts: *First Nat. Bank v. Fidelity and Guaranty Co.*, 110 Tenn. 10, 100 Am. St. Rep. 765; *Champion Ice etc. Co. v. American Bonding etc. Co.*, 115 Ky. 863, 103 Am. St. Rep. 356.

When a Bond Guaranteeing the Fidelity of an Employé is renewed, there is still only one contract and one penalty, the renewal certificate being a new bond only in extending the indemnity provided by the original bond to a new period of time: *First Nat. Bank v. Fidelity and Guaranty Co.*, 110 Tenn. 10, 100 Am. St. Rep. 765.

EOFF v. KENNEFICK-HAMMOND COMPANY.

[80 Ark. 138, 96 S. W. 986.]

TAXATION.—The Personal Property of a Nonresident while in use in this state in the construction of a railroad is here subject to taxation. (p. 84.)

G. J. Cramp and Garner Fraser, for the appellant.

Pace & Pace, for the appellees.

159 **BATTLE, J.** The assessor of Boone county listed and assessed for taxation for 1903 the following property of Kennefick-Hammond Company: Fourteen horses, eighty-eight mules, seventy-five wagons, seventeen boilers, two light plants, two air compressors, harness and blacksmith tools, valuing the boilers, light plants, air compressors, harness and blacksmith tools, in the aggregate, at twenty thousand six hundred and seventy dollars. This property was situated in Boone county on the first Monday in June, 1903; how long before and how long after does not appear. It was used by Kennefick-Hammond Company in the construction of a roadbed for a railroad through a portion of Boone county, about fifteen miles in length. How long it required to complete the roadbed was not shown at the hearing of this cause. The taxes of 1903 were levied upon it, and the collector of Boone county was proceeding to collect the same when he was restrained from so doing by an order made by the chancellor of the Boone chancery court, upon application of Kennefick-Hammond Company, which was afterward made perpetual by the court.

Kennefick-Hammond Company was a partnership composed of William Kennefick and F. S. Hammond, and they were citizens and residents of the state of Missouri before, on and after the first Monday in June, 1903.

In *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. Rep. 876, 35 L. ed. 613, Mr. Justice Gray, speaking for the court, said: "No general principles of law are better settled, or more fundamental, than that the legislative power of every state extends to all property within its borders, and that only so far as the comity of that state allows can such property be affected by the law of any other ¹⁴⁰ state. The old rule, expressed in the maxim, 'Mobilia sequuntur personam,' by which personal property was regarded as sub-

ject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used. For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and may be taxed on its account, at the place where it is although not the place of his own domicile, and even if he is not a citizen or resident of the state which imposes the tax."

The statutes of this state provide that "all property, whether real or personal, in this state . . . shall be subject to taxation," except property exempted by the constitution, of which the property in question is not a part. Personal property must be assessed in the name of the person who was the owner on the first Monday in June in the year in which the assessment was made: Kirby's Digest, secs. 6873, 6913. And in all cases in which it is necessary for the assessor, "in consequence of the sickness or absence of the person whose duty it is to make out a statement of personal property" or his refusal to do so, "to ascertain the several items and the value thereof," the assessor may do so and make return thereof from the best information he can get: Kirby's Digest, secs. 6966, 6968.

But plaintiffs insist that the property was in the state, at the time it was assessed, temporarily; that it had not been incorporated in and become a part of the property of the state; had not gained a *situs* here, but was in transitu, and not subject to taxation in this state. Tangible personal property of a nonresident in transit is not subject to local taxation in the state in which it may be temporarily. But when does property cease to be in transit and become of such permanency as will justify taxation in its new *situs*? It cannot always be in transit.

In *Kelley v. Rhoads*, 7 Wyo. 237, 75 Am. St. Rep. 904, 51 Pac. 593, 39 L. R. A. 594, the "plaintiff, who was a resident and citizen of the state of Kansas, was the owner of ¹⁴¹ certain sheep, numbering about ten thousand head, which, on or

about October 29, 1895, were in the county of Laramie, in the state of Wyoming, in charge of an agent, who was driving and transporting them through the state of Wyoming from Utah to Nebraska. In driving the sheep it was the practice to permit them to spread out at times in the neighborhood of a quarter of a mile, and while being so driven to graze over land of that width," and they were maintained solely in that way. They were driven across Wyoming for the purpose of shipment, and were not brought into the state for the purpose of being maintained permanently therein. The time consumed in driving the sheep through Wyoming was from six to eight weeks, and the distance traveled was about five hundred miles. "For shipment purposes, it was not necessary that the sheep should be driven into Wyoming, and the railroad over which they were shipped could be reached from the point from which they were first driven by traveling a less distance than was required to drive them to any point" in Wyoming. The question was, Were the sheep subject to taxation while in Wyoming? The supreme court of Wyoming held that they were. The court said: "We are of the opinion, therefore, that in determining the purpose and the situs, the course and method of travel is a proper subject, and one of the elements for consideration. We do not dispute the proposition that an owner of livestock, if not otherwise disobedient to the law, and observant of the police regulations of the state, has the right to transport them to market by driving on foot as well as by rail. Strictly speaking, they will be in transit by the one method as much as by the other. If, however, the purpose of such owner is not alone that of transportation, but comprehends also that of grazing and feeding them upon the natural grasses, which is their natural source of sustenance, not as a mere necessary incident of the travel, but as one of the purposes of such movement, they would not come within the rule which exempts personal property in transit from taxation."

This case, *Kelley v. Rhoads*, was taken to the supreme court of the United States, and the judgment therein was reversed on the ground that the sheep were property engaged in interstate commerce: *Kelley v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. Rep. 259, 47 L. ed. 359. The supreme court of the United States said: "The question to be determined, then, is whether the stock of the plaintiff was brought into the

state ¹⁴⁸ for the purpose of being grazed at the time it was assessed for taxation. . . . Had the state court found directly the ultimate fact that these sheep were brought into the state for the purpose of being grazed, such finding might have bound us, but, under the facts actually found or agreed upon, we are at liberty to inquire whether they support the judgment.

"The law upon this subject, so far as it concerns interference with interstate commerce, is settled by several cases in this court, which hold that property actually in transit is exempt from local taxation, although, if it be stored for an indefinite time during such transit, at least for other than natural causes or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities."

Again it says: "The question turns upon the purpose for which the sheep were driven into the state. If for the purpose of being grazed, they are expressly within the first section of the act (that is, subject to taxation in Wyoming). But if for the purpose of being driven through the state to a market, they would be exempt as a subject of interstate commerce, though they might incidentally have supported themselves in grazing while actually in transit."

After repeating a part of the facts, it says: "It thus appears that the only purpose found for which this herd of sheep was being driven across the state was for shipment, and the agreed statement (of facts) wholly fails to show that they were detained at any place within the state for the purpose of grazing or otherwise. As they consumed from six to eight weeks in traveling about five hundred miles, or, as the supreme court found, at the rate of about nine miles per day, it does not even appear that they loitered unnecessarily on the way. As they required sustenance on the journey, and could obtain it only by grazing, it would appear, though there is no testimony upon that point, that they could hardly have been driven more rapidly without a loss of flesh during the transit."

The doctrine of the Wyoming court is not questioned by the supreme court of the United States, but the difference of the two courts is in its application to the facts in the case. As interpreted by the latter court, it is applicable, and should control in the case before us.

¹⁴³ In *Fennell v. Pauley*, 112 Iowa, 94, 83 N. W. 799, the plaintiff was a resident of the state of Missouri in 1905-06. In December, 1905, he brought into Freemont county, in Iowa, two hundred and two head of cattle for feeding purposes, and kept them upon land owned by him. In April, 1896, the cattle were taken back to the state of Missouri. The court said: "The contention is that this property, belonging to a non-resident and being only temporarily in this state, was not taxable here. Section 812 of the Code of 1873 provides that all personal property shall be taxed in the name of the owner on the first day of January. That property of this nature is taxable is fixed by sections 797-801; and section 817 requires personal property in the hands of an agent to be listed by the assessor. Section 823 requires the assessor to return all personal property found in his township. We understand that property in transit through the state cannot be taxed

nor can such as belongs to a nonresident, which is here only an incident of its transfer elsewhere. To give the right to assess the personal property of a nonresident found within this state, it must be located here with something like permanency, or for some purpose other than merely aiding its transit. . . . These cattle were here to be fed, in order to increase their weight and value for market. In principle, it was the same as the investment of money in this state, and we cannot see why they should not be taxed here." To the same effect, see *Waggoner v. Whaley*, 21 Tex. Civ. App. 1, 50 S. W. 153; *Hardesty v. Fleming*, 57 Tex. 395.

Grigsby Construction Co. v. Freeman, 108 La. 435, 32 South. 399, 58 L. R. A. 349, is a case like this. In Louisiana all property in that state is subject to taxation, except that expressly exempted from taxation by law. The statutes provide that in case the taxpayer fails or refuses to furnish a list of his property within the time prescribed, the assessor "shall himself fill out the list from the best information he can obtain." "In making his assessment for the year 1901 the assessor of the parish of Natchitoches called upon the plaintiff's agent to furnish, as required by law, a list of its property situated in the parish and subject to taxation. The plaintiff is a Texas corporation, having its domicile at Dallas, Texas. It operates in that state and adjoining states in the construction of dams, dikes, levees, railroad beds, and other earth work, and for that purpose has outfits, consisting of

mules, ¹⁴⁴ scrapers, wagons, commissary store goods, tents, etc., which it sends to the places where work is to be done. At the time when its agent was thus called upon by the assessor, plaintiff was doing grading work for the Texas and Pacific Railroad in the parish of Natchitoches, and the property sought to be assessed was a construction outfit and other movables necessary or convenient in the doing of that work. The agent questioned whether said property was liable to taxation in Louisiana, and asked for time to consult counsel. A second attempt was made to get from the agent a list of the property of plaintiff, and, this second attempt proving equally fruitless, the assessor, as required by law, made out a list of the property as best he could, and put the same on his roll. Plaintiff failing to pay the tax thus assessed, the tax collector proceeded to enforce payment by seizure of some of the mules assessed, and plaintiff brought suit, enjoining the seizure." Supreme court of Louisiana held that the property was subject to taxation and said: "In the instant case the property was not in course of transportation, but was here for use likely to be of some duration—possibly a full year—and for the time being was incorporated in the bulk of the property of the state. It was distinguishable from the rest of the property of the taxing district in no respect except the intention of the owner to remove it at some future time more or less distant. Under these circumstances its situs approached nearer to permanency than did that of the sheep in the Wyoming case or that of the coal in the Brown-Houston case" (114 U. S. 622, 5 Sup. Ct. Rep. 1091, 29 L. ed. 257): 1 Wharton on Conflict of Laws, 3d ed., sec. 80a, and cases cited.

The property of plaintiff in this case was not in transit, but was here chiefly, if not solely, for use and profit, and was subject to taxation.

Decree is reversed, and the complaint of appellees is dismissed for the want of equity.

The Situs of Personal Property for the Purpose of Taxation is the subject of a note to Buck v. Miller, 62 Am. St. Rep. 448. Personal property is generally taxable where the owner resides, but it may be taxable wherever it is found, regardless of his domicile: Hall v. American Refrigerator etc. Co., 24 Colo. 291, 65 Am. St. Rep. 223; Buck v. Miller, 147 Ind. 586. As to the taxation of migratory livestock, see Nathan v. Spokane County, 35 Wash. 26, 102 Am. St. Rep. 888; Kelley v. Rhoads, 7 Wyo. 237, 75 Am. St. Rep. 904.

BANK OF COMMERCE v. LAWRENCE COUNTY BANK.

[80 Ark. 197, 96 S. W. 749.]

CORPORATIONS—Preferred Claims Against by Subrogation.—One who advances money to a going corporation to pay off claims of its laborers is not entitled, upon its subsequent insolvency, to any preference over other creditors, by way of subrogation to the liens of the laborers. (p. 86.)

Morris M. Cohn, for the appellants.

H. L. Ponder, for the appellee.

¹⁹⁷ McCULLOCH, J. The Culver Lumber and Manufacturing Company, a corporation, was placed in the hands of a receiver by order of the chancery court of Lawrence county in a suit brought in that court by a stockholder, alleging, amongst other things, fraud and mismanagement of its affairs and insolvency, and asking for the sale and distribution of proceeds of its assets. The receiver took possession and administered the assets of the concern under orders of the court.

In course of the proceedings a master in chancery was appointed to pass upon and allow claims of creditors of the corporation, and he allowed the claim of appellee, Lawrence County ¹⁹⁸ Bank, in the sum of four thousand five hundred and fifty-four dollars and fifty-five cents, and made it a preferred claim. His report on that claim, which was confirmed by the court, is as follows: "I took the evidence of H. A. Culver and D. Sloan in regard to the claim of the Lawrence County Bank, and found from their evidence that the indebtedness was for acceptances given by the Culver Lumber and Manufacturing Company to the Lawrence County Bank, and were used by the said lumber company in paying the labor claims due the men for the manufacture of lumber, working in timber, etc. That by a former order of this court, made by the Honorable F. D. Fulkerson, the then acting chancellor, all claims for labor or debts arising therefrom, or debts incurred on this account, were made preferred claims. The master on account of this fund being used in the payment of labor claims just prior to the receivership, is of the opinion that it should be a preferred claim, and he hereby makes it one."

Appellant, whose claims as creditor were allowed without preference, appealed to this court from the decree of the chancellor making the claim of appellee preferred.

¹⁹⁹ The facts are undisputed. The Lawrence County Bank advanced money upon acceptances to the Culver Lumber and Manufacturing Company, while yet a going concern, which was used by the latter in paying off labor claims constituting liens upon lumber manufactured. The court decreed the debt to be a claim against the assets of the corporation with priority over the claims of other creditors. Was it proper to do so?

The indebtedness to appellee was created before the assets of the corporation passed into the hands of a receiver—how long before it does not appear. It was no more nor less than a loan to the corporation, and, regardless of the use made of the money, created no higher grade of indebtedness than that of any other creditor of the concern. The statutes of this state give no lien for money so advanced; and, if it be conceded that enough is shown to have entitled the alleged claims of the laborers to priority as liens, by no stretch of equitable principles can appellee enjoy the right of subrogation because the funds so advanced were used in discharging laborer's liens. Being a voluntary loan of money, it affords no grounds for application of the equitable doctrine of subrogation.

If appellee's contention be sound, then all claims against corporations for advances of money used in necessary operating expenses would be preferred, and the payment of equally meritorious claims prior in point of time would be postponed—the last coming first and the first last. We are not unmindful of the doctrine enforced by many courts in suits against railroad corporations to foreclose mortgages securing payment of bonds where preference is given to claims for operating expenses recently incurred: *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339. This doctrine, even as applied to suits to foreclose mortgages on railroad property, is not without its limitations (*Kneeland v. American Loan etc. Co.*, 136 U. S. 89, 10 Sup. Ct. Rep. 950, 34 L. ed. 379; *Thomas v. Western Car Co.*, 149 U. S. 95, 13 Sup. Ct. Rep. 663, 37 L. ed. 663), but it has no application to the facts of this case, and will not warrant the giving of preference to appellee's claim against the corporation for money loaned.

Reversed and remanded with directions to enter a decree not inconsistent with this opinion.

The Right to Subrogation is the subject of a note to American Bonding Co. v. National etc. Bank, 99 Am. St. Rep. 474.

Preferred Claims for Labor against insolvent corporations are discussed in Michigan Trust Co. v. Grand Rapids Democrat, 113 Mich. 615, 67 Am. St. Rep. 486; note to Green v. Coast Line R. R. Co., 54 Am. St. Rep. 418.

MOORE v. CAMDEN MARBLE AND GRANITE WORKS.

[80 Ark. 274, 96 S. W. 1063.]

STATUTE OF FRAUDS—Contract for Work or of Sale.—An agreement by one person to construct a tombstone especially for or according to the plans of another, whether or not at an agreed price, although the transaction is to result in a sale of the article, is a contract for work and labor, not for a sale, and is not within the statute of frauds. (p. 89.)

Thornton & Thornton, for the appellant.

George W. Hays, for the appellee.

275 McCULLOCH, J. Appellant gave a verbal order to appellee for a tombstone to be made and set up in the burial ground, but refused to accept it when complete and ready for delivery. In this action against him brought by appellee to recover forty dollars, the agreed price of the tombstone, he pleads the statute of frauds, Kirby's Digest, section 3656.

The sole question for our determination is, whether the contract in question was one for the sale of goods, wares and merchandise, and therefore within the statute of frauds, or one for work and labor to be done and materials to be furnished, which is not within the statute.

In England and Canada the rule seems to be settled that where, under the contract, the title to a chattel is to be transferred from one person to another, it is a contract for sale of goods within the meaning of the statute, regardless of the previous condition of the product or the amount of labor and talent to be expended in producing or constructing it. In *Lee v. Griffin*, 1 Best & S. 272, which is the leading English case on the subject, the rule is laid down by Blackburn, J., as follows: "If the contract be such that, when carried out, it

would result in the sale of a chattel, the party cannot sue for work and labor; but, if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered." The learned judge, by way of illustration, said: "If a sculptor were employed to execute a work of art, greatly as his skill and labor, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel."

In that case the suit was for the price of a set of artificial teeth which the plaintiff, a dentist, had especially prepared for defendant after measurement of his mouth, and the latter died before delivery or acceptance of the teeth. The court held that ²⁷⁶ the contract was one for sale of the completed chattel, and was within the statute of frauds.

The doctrine announced in *Lee v. Griffin* has not been generally adopted by the American courts, but a majority have followed the rule declared in substance by the supreme court of Massachusetts that "an agreement by one to construct an article especially for or according to the plans of another, whether at an agreed price or not, although the transaction is to result in a sale of the article, is a contract for work and labor, and not within the statute; but if the article to be made and delivered is of a kind which the producer usually has for sale in the course of his business, it is a contract for sale, and must be in writing": 20 Cyc. 241, 242; *Browne* on the Statute of Frauds, sec. 309a; *Mixer v. Howarth*, 21 Pick. 205, 32 Am. Dec. 256; *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112; *Lamb v. Crafts*, 12 Met. (Mass.) 353; *Cason v. Cheely*, 6 Ga. 554; *Hight v. Ripley*, 19 Me. 137; *Crockett v. Scribner*, 64 Me. 447; *Forsyth v. Mann*, 68 Vt. 116, 34 Atl. 481, 32 L. R. A. 788; *Bird v. Muhlinbrink*, 1 Rich. (S. C.) 199, 44 Am. Dec. 247; *Bagby v. Walker*, 73 Md. 239, 27 Atl. 233; *Pratt v. Miller*, 109 Mo. 78, 32 Am. St. Rep. 656, 18 S. W. 965; *Higgins v. Murray*, 73 N. Y. 252; *Parker v. Schenck*, 28 Barb. 38; *Mead v. Case*, 33 Barb. 202; *Meinke v. Falk*, 55 Wis. 427, 42 Am. Rep. 722, 13 N. W. 545; *Allen v. Jarvis*, 20 Conn. 38.

There is some little apparent conflict in the decisions of the American courts in their application of the law to the facts of the various cases, but it is found that the principle

announced in nearly all of them may be harmonized upon the Massachusetts rule just stated.

Now, in the case at bar, the facts, as found by the jury upon conflicting testimony, were that the plaintiff operated a marble yard, and took orders for completed tombstones according to patterns and designs displayed in a catalogue. It is not shown by the evidence the precise condition the material out of which plaintiff constructed the tombstone was in when the order was given, but the plaintiff and another witness introduced by him testified in general terms that he made the tombstone after defendant gave the order for it according to the design selected, and cut the inscription upon it which the defendant selected. It was constructed in accordance with the design selected by defendant, and the names and dates were inscribed thereon as he directed. This brought the case within the rule announced, and the court ²⁷⁷ properly refused to instruct the jury that the contract was within the statute of frauds.

Affirmed.

A Contract to Manufacture ironwork upon a special order and according to a particular design, and not such as is manufactured for the general trade in the ordinary course of the manufacturer's business, is not within the statute of frauds: Hientz v. Burkhard, 29 Or. 56, 54 Am. St. Rep. 777. See, also, Warren etc. Mfg. Co. v. Halbrook, 118 N. Y. 586, 16 Am. St. Rep. 788; Pratt v. Miller, 109 Mo. 78, 32 Am. St. Rep. 656.

MITCHELL v. YOUNG.

[80 Ark. 441, 97 S. W. 454.]

LANDLORD AND TENANT—Subletting by Lessee.—If there is no covenant in a lease against subletting, the lessee has a right to sublease all or any part of the premises; and when he does so, he cannot, by a surrender to the lessor, defeat the rights of the under-tenant. (p. 90.)

APPEAL—Bringing Up the Evidence.—A bill of exceptions is not open to objection because it does not show affirmatively that it contains all the evidence; if it shows inferentially and by natural implication from the language used that it contains all, this is sufficient. (p. 91.)

APPEAL—When It is Contended that the Appellant did not except to the overruling of a motion for a new trial, it is sufficient that the record shows the exception. (p. 91.)

James A. Comer, for the appellant.

Bradshaw, Rhoton & Helm, for the appellee.

⁴⁴³ HILL, C. J. Appellee Young, as lessee of the Metropolitan Hotel in the city of Little Rock, brought an action of unlawful detainer against Mitchell, the appellant, to obtain possession of a room in the lobby of said hotel occupied by Mitchell as a barber-shop. On the trial before a jury the court directed a verdict for the plaintiff in said action, and Mitchell appealed.

The evidence develops these facts: The Metropolitan Hotel was owned by one Young, and at his death passed to his heirs and was probably controlled by the administrator. Torrey had a lease upon it, and during his lease he subleased the barber-shop to Mitchell. This was in writing, and stipulated that, should Torrey get a renewal of his lease, it would carry a like renewal of Mitchell's lease of the barber-shop. Torrey did obtain a renewal, and recognized Mitchell's renewed lease. Mitchell held for about two years under the renewed lease, and Torrey died in possession of the leased premises. Thereafter Torrey's administrator and the Young heirs and the administrator of Young consented to an order of probate court canceling the Torrey lease, which still had some time to run. After this agreed cancellation of the Torrey lease the hotel was leased to Roger Young, the appellee, who had knowledge of Mitchell's occupancy of the barber-shop and his lease thereof under Torrey. Mitchell was not a party to the surrender to the Torrey lease, and was not notified of the proceedings in the probate court, and has not consented thereto.

Where there is no covenant against subletting, a lessee has a right to sublease all or any part of the leased premises; and when he does so, he cannot, by a surrender of the leased premises to the lessor, defeat the rights of his undertenant. The interests of the undertenant will continue as if there had been no surrender, the owner of the property becoming the direct landlord ⁴⁴⁴ of the undertenant. The lessee could only surrender what belonged to him, and, having sublet part of the property, it is not his to surrender. The owner takes back the premises subject to the existing rights growing out of the original lease. These principles are found stated and applied in the following authorities: *Krider v. Ramsey*,

79 N. C. 354; *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910; *Adams v. Goddard*, 48 Me. 212; *Eten v. Luyster*, 60 N. Y. 252; *Jones on Landlord and Tenant*, sec. 429.

It is urged that the bill of exceptions does not affirmatively show that it contains all of the evidence, but it does show inferentially and by natural implication from the language used that it contains all the evidence, and this is sufficient: *Legett v. Grimmett*, 36 Ark. 496; *Overman v. State*, 49 Ark. 364, 5 S. W. 588.

It is said appellant did not except to overruling the motion for new trial, but that objection is removed by correction of the record by nunc pro tunc entry. It is sufficient if the record shows the exception: *Carpenter v. Dressler*, 76 Ark. 400, 89 S. W. 89.

Reversed and remanded.

SUBLETTING OF LEASED PREMISES.

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- b. When Forbidden by Statute, 92.

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I. Right of Tenant to Sublet.

When Unrestrained by Terms of Lease.—In the absence of any restriction in the lease or in the statutes, a tenant has the right, without the consent of his landlord, to sublet the leased premises, to be used for any purpose not inconsistent with the terms of the original lease: *Crommelin v. Thiess*, 31 Ala. 412, 70 Am. Dec. 499; *Martin v. Sexton*, 112 Ill. App. 199; *Goldsmith v. Wilson*, 68 Iowa, 685, 28 N. W. 16; *Weatherly v. Baker*, 25 La. Ann. 229; *Gould v. Eagle Creek School Dist.*, 8 Minn. 427; *Simpson v. Moorhead*, 65 N. J. Eq. 623, 56 Atl. 887; *Phelps v. Erhardt*,

53 Hun, 630, 5 N. Y. Supp. 540; *Schenkel v. Lischinsky*, 45 Misc. Rep. 423, 90 N. Y. Supp. 300. And it is not essential to the exercise of his right that he should be in possession: *Beck v. Minnesota etc. Grain Co.*, 131 Iowa, 62, 107 N. W. 1032, 7 L. R. A., N. S., 930.

b. *When Forbidden by Statute.*—In some jurisdictions the common-law rule has been modified, so that a tenant has no right to sublet without the consent of his landlord: *Dodd v. Ozburn* (Ga.), 57 S. E. 701. The statutes of several states expressly forbid subletting without the lessor's consent: *Gartrell v. State* (Tex. Cr. Rep.), 61 S. W. 487; *Brown v. Pope*, 27 Tex. Civ. App. 225, 65 S. W. 42; *Waggoner v. Snody*, 36 Tex. Civ. App. 514, 82 S. W. 355, 85 S. W. 1134. Under this rule, a subletting without the consent of the lessor gives him the right to forfeit the lease: *Markowitz v. Greenwall Theatrical Co.* (Tex. Civ. App.), 75 S. W. 74. Since subletting leased premises and assigning the lease are very different transactions, a statute forbidding a lessee for a term not exceeding two years from assigning his lease without the lessor's consent does not forbid him from subletting: *Moore v. Guardian Trust Co.*, 173 Mo. 218, 73 S. W. 143. And the consent to assign the lease is not included in the consent to sublet the premises: *Morrow v. Camp* (Tex. Civ. App.), 101 S. W. 819; although it has been thought that authority to sublet carries with it authority to assign the lease: *Menger v. Ward* (Tex. Civ. App.), 28 S. W. 821.

II. Covenants Against Subletting.

a. *In General.*—Independently of statute, however, it is of course competent for the parties to a lease to stipulate against subletting; and when the terms of a lease prohibit subleasing without the consent of the lessor, a valid sublease of the premises cannot be made unless such consent is obtained or waived: *Meyer v. Rothchild*, 46 La. Ann. 1174, 15 South. 383. If a lease gives the lessor the right to declare the term ended and to re-enter upon default of any of the covenants of the lessee, his covenant not to assign or sublet constitutes a condition upon which the leasehold is held: *Kew v. Trainor*, 150 Ill. 150, 37 N. E. 223.

In *Pend v. Holbrook*, 32 Minn. 291, 20 N. W. 232, the parties prepared a lease upon a printed form, in which form was a covenant not to sublet without the written consent of the lessor. Following the covenants were conditions, one of which reserved the right to re-enter in the event of a subletting without the lessor's consent. Before executing the instrument they erased the clause containing the covenants, but left unchanged the clause containing the condition. It was decided, on these facts, that such erasure did not raise an inference that they intended the condition to be of no effect.

In *Walker v. Wadley*, 124 Ga. 275, 52 S. E. 904, a covenant in a lease that the lessee should not sublet during the term without the

consent of the lessor was held not confined to the first year, but extended during the continuance of the lease, when the term had been extended at the election of the tenant.

b. Construction of Covenant.—Covenants in leases against subletting and assigning without the consent of the lessor are usually construed strictly against the lessor and liberally in favor of the lessee (*Boyd v. Fraternity Hall Assn.*, 16 Ill. App. 574; *Livingston v. Stickle*, 7 Hill, 253; *Spencer v. Commercial Co.*, 30 Wash. 520, 71 Pac. 53), unless a different rule is prescribed by statute: *Cordevoille v. Redon*, 4 La. Ann. 40. "Such covenants are restraints which the courts do not favor. They are construed with the utmost jealousy, and very easy modes have always been countenanced for defeating them": *Presby v. Benjamin*, 169 N. Y. 377, 62 N. E. 430, 57 L. R. A. 317. "The extent and meaning of the covenant or condition, and the fact of a breach, are questions strictissimi juris, and a plaintiff, to defeat an estate of his own creation by means of such a condition, must bring the defendant clearly within its letter": *Lynde v. Hough*, 27 Barb. 415.

c. Persons Entitled to Benefit of Covenant.—A covenant in a lease not to sublet without the consent of the lessor is for the benefit of the lessor and his assigns and privies; and if they do not take advantage of it, others cannot: *Montecon v. Faures*, 3 La. Ann. 43; *Cordevoille v. Redon*, 4 La. Ann. 40; *Shumway v. Collins*, 72 Mass. (6 Gray) 227. A clause in a lease that no assignment thereof shall be valid, without the assent in writing of the lessor cannot be urged by the assignee of the lease against the landlord, who objected to the assignment: *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 16 Am. St. Rep. 274, 21 N. E. 920. And where a lessee mortgages his lease, a purchaser at a sale under the mortgage is an assignee of the lessee, and a subletting by him is a violation of a covenant in the lease against the lessee or his assigns letting the premises: *West Shore R. R. Co. v. Wenner*, 70 N. J. L. 233, 103 Am. St. Rep. 801, 57 Atl. 408.

d. Breach of the Covenant.

1. What Constitutes in General.—Where a person takes possession of a stock of goods in a leased building under an arrangement with the tenant, whereby the goods were purchased by him under an execution sale against the tenant, and managed for the benefit of the tenant, this does not constitute a breach of a covenant in the lease against subletting: *Munkwitz v. Uhlig*, 64 Wis. 380, 25 N. W. 424. And a contract between a lessee and another person whereby the latter agrees to erect specified structures on the demised premises, and is given a lien for the contract price, and the right to the possession of the premises, to manage them, and receive the rents thereof until his expenditure is repaid, does not amount to a subletting in violation of the conditions of the lease: *Boston El. Ry. Co. v. Grace & Hyde Co.*, 112 Fed. 279, 50 C. C. A. 239. For a lessee to

permit a railway company to lay tracks and run its trains over the leased premises, partly for the lessee's accommodation, is evidence of a license rather than a subletting: *Pence v. St. Paul etc. R. R. Co.*, 28 Minn. 488, 11 N. W. 80. But in *Aveline v. Bidenbaugh*, 2 Idaho, 168, 9 Pac. 601, it is affirmed that where a tenant sells all the wood on the leased premises to wood merchants, and gives them until the expiration of the lease to remove the wood, which has been cut and placed there, with the right to enter and remove it cord by cord as their business requires, this constitutes a subletting and a breach of the covenants of the lease. Where a tenant on a farm employs a third person to work thereon, and gives him possession of a house on the premises, this does not amount to a subletting: *Vincent v. Crane*, 184 Mich. 700, 97 N. W. 34. And a lessee's agreement to allow a third person to place a sign upon the outside wall of the leased building, in consideration of an annual payment, creates a license merely, and is not a breach of a covenant not to underlet: *Lowell v. Straham*, 145 Mass. 1, 1 Am. St. Rep. 422, 12 N. E. 401.

The underletting of only a part of the leased premises is not a breach of a covenant in the lease that the lessee shall not underlet the whole premises without the lessor's written consent: *Roosevelt v. Hopkins*, 33 N. Y. 81; *Noble v. Becker*, 3 Brewst. (Pa.) 550; *Spencer v. Commercial Co.*, 30 Wash. 520, 71 Pac. 53. In *Ledcke v. Barnett*, 47 Mich. 158, 10 N. W. 152, a condition not to assign or sublease was held not broken by allowing a third person to occupy one room in the leased building for a short time; and in *Presby v. Benjamin*, 169 N. Y. 377, 62 N. E. 430, 57 L. R. A. 317, it was held that a tenant does not, as a matter of law, violate a stipulation of his lease not to sublet, by placing one in charge of his apartment as a caretaker to look after it during his absence against the landlord's consent.

A lessee of a three-story building cannot sublet the roof, under a right in the lease to sublet the second and third floors: *Gude Co. v. Farley*, 28 Misc. Rep. 184, 58 N. Y. Supp. 1036.

If a lessee covenants not to sublet for more than one year and sublets a part of the premises for nine months, covenanting to renew the lease on the same terms from year to year for the remainder of the term, such subletting is a violation of his lease: *Cordevoille v. Redon*, 4 La. Ann. 40.

2. **Change in Partners of Lessee Firm.**—A covenant in a lease against subletting is not broken by a change of partners in the lessee firm: *Roosevelt v. Hopkins*, 33 N. Y. 81. Nor is a condition against subletting violated by the tenant, without license from the landlord, taking into partnership with him a third person: *Boyd v. Fraternity Hall Assn.*, 16 Ill. App. 574.

3. **Involuntary Transfer of Leasehold.**—The forfeiture of a lease does not result from an involuntary transfer of the leasehold, as by sale under execution or the like, although the lease contains a

covenant that the lessee shall not underlet any part of the premises nor assign the lease without the written consent of the landlord. If the lessor desires to avoid such involuntary transfers, he may expressly stipulate in the lease that they shall work a forfeiture: *Farnum v. Hefner*, 79 Cal. 575, 12 Am. St. Rep. 174, 21 Pac. 955.

4. **Assignment of Lease.**—Since assigning a lease and subletting for a part of the term are distinct transactions, covenant against one does not include the other: *West Shore R. R. Co. v. Wenner*, 70 N. J. L. 233, 103 Am. St. Rep. 801, 57 Atl. 408. Therefore underletting is not a violation of a covenant not to assign: *Bockover v. Post*, 25 N. J. L. 285; *Jackson v. Harrison*, 17 Johns. 66; and assigning is not a violation of a covenant not to underlet: *Field v. Mills*, 33 N. J. L. 254 (rejecting *Greenaway v. Adams*, 12 Ves. 395); *Lynde v. Hough*, 27 Barb. 415.

a. **Consent of Lessor to Subletting.**—If a lease stipulates that the lessee shall not sublet the premises without the consent of the lessor, he must show that such consent has been given if he would justify a subletting: *Farr v. Kenyon*, 20 B. L. 376, 39 Atl. 241. And he cannot prove a local custom of lessors permitting tenants to sublet during the summer months: *Spota v. Hayes*, 36 Misc. Rep. 532, 73 N. Y. Supp. 959. In case the lease provides that the premises shall not be sublet without the consent of the lessor expressed in writing on the back thereof, the lease, showing an absence of such written consent, is *prima facie* evidence that no consent has been given: *Berryhill v. Healy*, 89 Minn. 444, 95 N. W. 314.

Permission to a lessee to sublet "the premises to any responsible party in the same line of business, or in any line of business agreeable to the lessor," does not confer a general power to sublet, but is a personal trust given to the lessee: *Boone v. First Nat. Bank*, 17 Tex. Civ. App. 365, 43 S. W. 594. But where the permission of a landlord to sublet authorizes the subtenant to pursue a particular business, he cannot complain that the rates of insurance on his adjoining property may be advanced on account of the use to which the demised tenement is put: *Dodd v. Ozburn* (Ga.), 57 S. E. 701.

The fact that a lessor gives his consent to a subletting does not render him answerable for a breach by the lessee of his contract, when the tenant has no authority to act as his agent: *Purdon v. Brussels*, 23 Ky. Law Rep. 1796, 66 S. W. 22.

When a landlord occupies a part of a building and lets another part with a covenant by the tenant not to sublet without his consent, which is not to be "unreasonably withheld," it is reasonable for the landlord, before consenting to an underletting, to inquire for what purpose the portion to be underlet is to be used, and to stipulate for a similar covenant between the undertenant and himself: *In re Spark's Lease* [1905], L. R. 1 Ch. D. 456. And when a lease provides generally against underletting without the consent

of the lessor, it has been held not ground for cancellation that the lessor refuses his consent to an underletting: *Hill v. Budd*, 99 Ky. 78, 35 S. W. 270. The fact a tenant breaks the covenant through forgetfulness, or because he thinks it unimportant, is not a ground for equitable relief against a forfeiture of his lease: *Eastern Tel. Co. v. Dent*, [1899] L. R. 1 Q. B. D. 835.

f. **Waiver of Consent or of Breach of Covenant.**—A provision in a lease against subletting without the written consent of the lessor may be waived by him orally: *Weisbrod v. Dembosky*, 25 Misc. Rep. 485, 55 N. Y. Supp. 1. But if the lessor relies on a contemporaneous parol agreement that it may sublet, the burden is on him to establish it: *Zeigler v. Litchen*, 205 Pa. 104, 54 Atl. 489. An express waiver or agreement to waive a condition against subletting, however, is not necessary. The lessor may, by silent acquiescence in a subletting, either before or after the sublease is executed, waive his right to object thereto: *Wertheimer v. Wayne Circuit Judge*, 83 Mich. 56, 47 N. W. 47; *Knoepker v. Redel*, 116 Mo. App. 62, 92 S. W. 171; *The Elevator Case*, 3 McCrary, 463, 17 Fed. 200.

It has been said that the fact that a lessor receives the rent stipulated in a lease cannot be construed as a waiver of his right to object to a subletting without his consent: *Meath v. Watson*, 76 Ill. App. 516. This is hardly true, as a general rule. If a lessor permits his tenant to retain possession, and accepts the rent as it becomes due, after a violation of a covenant against subletting, this amounts to a waiver of any forfeiture of the lease, but does not bar the lessor's right to recover any damages he has suffered from the breach: *Rouinaie v. Simpson*, 84 N. Y. Supp. 875. The acceptance of rent by a lessor after the breach of a covenant against subletting does not constitute a waiver of the breach, unless at the time of receiving the rent the lessor had full knowledge of the facts. Where the rent is payable annually, knowledge by the lessor that there has been a breach of the covenant during the year for which the rent is received will amount to a waiver of the covenant so far as that year is concerned, but cannot be treated as an acquiescence in the assignment for the full term of the lease, when the lessor has no knowledge that the assignment has been made: *Walker v. Wadley*, 124 Ga. 275, 52 S. E. 904.

In *Moore v. Graham*, 29 Tex. Civ. App. 235, 69 S. W. 200, it is held that where the owner of land claims a part of the gathered crop as rent, after a sublessee has entered and cultivated it, this is a sufficient ratification of the subletting; and in *Wright v. Henderson* (Tex. Civ. App.), 86 S. W. 799, it is held that where a sublessee pastures cattle on the demised land, and the original lessor demands of his lessee a portion of the money paid by the sublessee, he cannot thereafter recover damages from the sublessee for injuries to the land by the cattle. It is no answer to a breach of covenant not to underlet, that the lessor had waived another and distinct

breach of such covenant in the same lease: *Seaver v. Coburn*, 64 Mass. (10 Cush.) 324.

III. What Constitutes a Subletting.

a. **In General.**—What constitutes a subletting has already been considered to some extent under the head of "Breach of Covenant" not to sublet. A sublease may be generally defined as a transaction whereby a tenant grants an interest in the demised premises less than his own, retaining to himself a reversion; and a subtenant is a person who rents all or a portion of leased premises from the lessee for a term less than the original one, leaving a reversionary interest in the first lessee: *Wheeler v. Hill*, 16 Me. 329; *Mahew v. Hardesty*, 8 Md. 479; *Hicks v. Martin*, 25 Mo. App. 359; *Austin v. Thomson*, 45 N. H. 113; *Bedford v. Terhune*, 30 N. Y. 453, 86 Am. Dec. 394; *Fulton v. Stewart*, 2 Ohio, 215, 15 Am. Dec. 542; *Shannon v. Grindstaff*, 11 Wash. 536, 40 Pac. 123; *Mulligan v. Hollingsworth*, 99 Fed. 216. "The relation of landlord and tenant strictly does not exist unless there be a reversionary interest in the former, and out of this arises the distinction between assignments and underleases. If a lessee parts with his whole term in all the rented premises, no reversionary interest remains in him, and a person taking through him is an assignee, liable to pay rent to the landlord as the original lessee contracted to pay. If he rents parts of it to different persons for the entire term, then such persons, to the extent of their several holdings, are also assignees, and in so far liable to the lessor, just as was the original lessee. A subtenant is one who leases all or a part of rented premises from the original lessee for a term less than that held by the latter, and in that case the lessee retains a reversionary interest": *Forrest v. Durnell*, 86 Tex. 647, 26 S. W. 481.

b. **As Distinguished from Assignment.**—It is essential to a sublease, as already indicated, that a reversionary interest be retained by the original lessee. This requirement has been deemed satisfied by the reservation of a mere fragment of the term. Thus, where a lessee conveys his estate, reserving a different rent and also a right of entry on the breach of certain covenants, and providing for the surrender of the premises to him at the end of the term, the right to possession on the last day has been thought a technical reversion sufficient to characterize the transfer a sublease and not an assignment: *Collamer v. Kelley*, 12 Iowa, 319; *Collins v. Hasbrouck*, 56 N. Y. 157, 15 Am. Rep. 407; *Townsend v. Read*, 15 Abb. N. C. 285; *Schumer v. Hurwitz*, 96 N. Y. Supp. 1026, 49 Misc. Rep. 121.

We understand the supreme court of Illinois to reject this doctrine, and to hold that if a lessee transfers all his estate to another, the transfer is not converted into a sublease by the fact that the lessee reserves a different rent, the right to declare the transfer void for nonperformance of its covenants, and to re-enter for such breach, or at the end of the term, and the instrument of transfer also con-

tains a covenant on the part of the transferee to surrender at the end of the term, or upon the forfeiture of the term for a breach of covenant: *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 16 Am. St. Rep. 274, 21 N. E. 920.

This decision of the Illinois court has been approved in *Craig v. Summers*, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236, where the court holds: "Whenever a lessee grants or transfers the whole term for which the premises were leased to him, leaving no reversionary interest in himself, it amounts to an assignment, and is not a sublease. A mere reservation of rent, or of a right of re-entry for a breach of any of the conditions of the lease, will not change the legal relations of the parties, and the introduction of covenants into the instrument, whatever may be their effect between the immediate parties thereto, does not change the legal effect of giving up the reversion."

Where a lessee leases a part of the premises to another, for the remainder of the term, with easements in the other part, this constitutes an underlease and not an assignment: *McNeil v. Kendall*, 128 Mass. 245, 35 Am. Rep. 373.

The language of the New York court of appeals is so instructive on the distinction between subletting and assigning that it is here stated at length: "Where a lessee assigns his whole estate, without reserving any reversion therein in himself, a privity of estate is at once created between his assignee and the original lessor, and the latter has a right of action directly against the assignee on the covenant to pay rent, or any other covenant in the lease which runs with the land; but if the lessee sublets the premises, reserving or retaining any such reversion, however small, the privity of the estate is not established and the original landlord has no right of action against the sublessee, there being no privity of contract nor of estate between them. Where a lessee of land leases the same land to a third party, the question has often arisen whether the second lease is in legal effect an assignment of the original lease, or a mere sublease. The question has frequently, and probably most generally, arisen between the lessee and his transferee, and much confusion will be avoided by observing the distinction between these cases and cases where the question has been between the transferee and the original landlord. In the latter class of cases the rule is well settled that if the lessee parts with his whole term or interest as lessee, or makes a lease for a period exceeding his whole term, it will, as to the landlord, amount to an assignment of the lease, and the essence of the instrument as an assignment, so far as the original lessor is concerned, will not be destroyed by reserving a new rent to the assignor with a power of re-entering for nonpayment, nor by assuming, by the use of the word 'demise' or otherwise, the character of a sublease; and the assignee, so long as he continues to hold the estate, is liable directly to the original lessor on all covenants in the original lease which run with the land, including the

covenant to pay rent. But as between the original lessee and his lessee or transferee, even though the original lessee demises his whole term, if the parties intend a lease, the relation of landlord and tenant, as to all but strictly reversionary rights, will arise between them: *Mansert v. Feigenspan* (N. J. Eq.), 64 Atl. 801. The effect, therefore, of a demise by a lessee for a period equal to or exceeding his whole term is to divest him of any reversionary right and render his lessee liable, as assignee, to the original lessor, but at the same time the relation of landlord and tenant is created between the parties to the second demise, if they so intended": *Stewart v. Long Island R. R. Co.*, 102 N. Y. 601, 55 Am. Rep. 844, 8 N. E. 200.

IV. Rights, Liabilities and Remedies of Parties.

a. *As Between Subtenant and First Landlord.*—It has already been noted that the assignee of a tenant is in privity with the landlord, and is therefore bound by the covenants in the lease which run with the land, including a covenant to pay rent: See the note to *Washington Natural Gas Co. v. Johnson*, 10 Am. St. Rep. 560; *Hogg v. Reynolds*, 61 Neb. 758, 87 Am. St. Rep. 522, 86 N. W. 479; *Campbell v. Cotes* (Tex. Civ. App.), 51 S. W. 268; but there is no privity between a subtenant and the original landlord, and the latter cannot sue the former on covenants in the original lease, nor hold him liable for the rent therein reserved: See the note to *Washington Natural Gas Co. v. Johnson*, 10 Am. St. Rep. 564; *Williams v. Michigan Cent. R. R. Co.*, 133 Mich. 448, 103 Am. St. Rep. 458, 95 N. W. 708; *Coles v. Marquand*, 2 Hill, 447; *Harvey v. McGrew*, 44 Tex. 412; *Missouri etc. Ry. Co. v. Keahey* (Tex. Civ. App.), 83 S. W. 1102. But while a subtenant cannot be sued on the covenants of the original lease, he may be ousted if they are violated: *Geer v. Boston Little Circle Zinc Co.* (Mo. App.), 103 S. W. 151.

If a lease contains no covenants for renewal, the right of the lessor to the premises at the end of the term is not affected by the lessee underletting with covenants of renewal: *Goelet v. Roe*, 14 Misc. Rep. 28, 35 N. Y. Supp. 145.

b. *Right of First Lessee to Surrender Lease.*—Where a lessee surrenders to his landlord, having had authority to grant, and having granted, a sublease of the premises, this surrender cannot prejudice the rights of the subtenants, and does not affect them further than to make them the tenants of the original lessor: See the principal case; *Appleton v. Ames*, 150 Mass. 34, 22 N. E. 69, 5 L. R. A. 206; *Etem v. Luyster*, 60 N. Y. 252; *Ritzler v. Raether*, 10 Daly, 286; *Weiss v. Mendelson*, 24 Misc. Rep. 692, 53 N. Y. Supp. 803; *Oshinsky v. Greenberg*, 39 Misc. Rep. 342, 79 N. Y. Supp. 853; *Moskowitz v. Diringen*, 48 Misc. Rep. 543, 96 N. Y. Supp. 173; *Cuschner v. Westlake*, 43 Wash. 690, 86 Pac. 948. When the lessor accepts the surrender, he is affected with notice of the rights of the subtenant in possession to fixtures and improvements: *Morrison v. Sohn*, 90

Mo. App. 76. And where a tenant for a term certain has underlet a portion of the premises and surrendered his lease, the subtenant remaining in possession, his goods cannot be distrained for rent owing by a subsequent tenant to whom the landlord has leased the whole premises after the surrender: *Hessel v. Johnson*, 129 Pa. 173, 15 Am. St. Rep. 716, 18 Atl. 754, 5 L. R. A. 851.

c. **Notice to Subtenant of Terms of First Lease.**—A subtenant is chargeable with notice of the terms, covenants and conditions of the original lease and holds the premises subject thereto: *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241; *Blachford v. Frenzer*, 44 Neb. 829, 62 N. W. 1101; *Peer v. Wadsworth*, 67 N. J. Eq. 191, 58 Atl. 379; *Eten v. Luyster*, 60 N. Y. 252; *Appeal of Goddard*, 1 Walk. (Pa.) 97; *Missouri etc. Ry. Co. v. Keahey* (Tex. Civ. App.), 83 S. W. 1102. For instance, when a lease contains a covenant forbidding subletting and reserving the lessor's right to sell the premises, a sublessee is charged with notice of these conditions, and is therefore liable to have his term terminated by a sale of the property: *Shannon v. Grindstaff*, 11 Wash. 536, 40 Pac. 123. And if a tenant for a year, with the privilege of renewal if the lessor does not sell the premises, sublets beyond the end of the first year, such sublease is terminated by the lessor's sale of the premises: *Sutherland v. Goodnow*, 108 Ill. 528, 48 Am. Rep. 560. When subtenants know that their lessor is a tenant, they are charged with the terms of his lease giving the landlord a lien for rent on the crops, and the crops grown by them are subject thereto: *Foster v. Reid*, 78 Iowa, 205, 16 Am. St. Rep. 437, 42 N. W. 649. Furthermore, a subtenant takes the risk of the original lease being canceled, when, under its terms and the facts, the landlord has the right of cancellation as against his lessee: *Cuschner v. Westlake*, 43 Wash. 690, 86 Pac. 948. The subtenant's rights are measured by those of his immediate landlord, the original lessee, and the cancellation of the lease, by its own terms, as to one, cancels it as to both: *Bove v. Coppola*, 91 N. Y. Supp. 8; *Bruder v. Geisler*, 94 N. Y. Supp. 2, 47 Misc. Rep. 370.

d. **Remedies of First Lessor Against His Lessee.**—Leases which stipulate against subletting without the consent of the lessor usually provide that a violation of the stipulation shall give the lessor a right to enter and enforce a forfeiture: *Kew v. Trainor*, 150 Ill. 150, 37 N. E. 223. But if a lease merely stipulates against subletting, without providing any such penalty, then the stipulation is regarded merely as an agreement or covenant as distinguished from a condition, and therefore its breach leaves the landlord to an action for damages, or, if the circumstances warrant, to a suit to enjoin the breach or its continuance: *Knoepker v. Redel*, 116 Mo. App. 62, 92 S. W. 171. An injunction has, in several instances, been recognized as a proper remedy to prevent the breach of a covenant not to sublet: *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241; *Barrington Apartment*

Assn. v. Watson, 38 Hun, 545. If a tenant, in violation of his covenant not to sublet without the lessor's consent, nor to allow an occupancy for any purpose deemed extrahazardous, sublets for a carpenter-shop, which requires the lessor to pay extra insurance premium, the tenant is liable therefor: *Romaine v. Simpson*, 84 N. Y. Supp. 875.

JONES v. WOLFORT.

[80 Ark. 474, 97 S. W. 452.]

CHATTEL MORTGAGES not Satisfied by Substitution of Property.—If a contract for the sale of a mule provides that the vendee may return it and receive another in case it proves unsatisfactory, such return and substitution do not satisfy the note and mortgage executed by the vendee to the vendor for the purchase price at the time of the original sale. (p. 101.)

James A. Comer, for the appellant.

Bradshaw, Rhoton & Heim, for the appellee.

⁴⁷⁵ **BATTLE, J.** Wolfort sold to Thomas Jones and James Garrett a mule for one hundred and eighty-five dollars with the understanding and on condition that, if it did not suit or was not satisfactory, he would let them have another in lieu of it. They executed to him a promissory note for the purchase money, and a mortgage to secure the payment of the same. The mule did not prove satisfactory, and they returned it, and Wolfort let them have another in lieu of it, as he agreed to do, and the latter died from ill-treatment. Jones then brought suit in the Pulaski chancery court to require Wolfort to satisfy the note and mortgage; and Wolfort filed a cross-complaint, and asked that the mortgage be foreclosed. The court rendered a decree against Jones for so much of the note as remained unpaid, and for the foreclosure of the mortgage.

The return of the mule first sold did not satisfy the note or mortgage. One of the terms of the sale was that it might be returned and another substituted for it, which was done. The return did not satisfy the note or release the makers. That was ⁴⁷⁶ not the contract. The effect of it and the substitute was to leave the parties and note and mortgage in the same condition they would have been had the second mule

been sold, instead of the first, and had been the only mule sold.

On What Constitutes a Contract a Sale, see the note to Fleet v. Hertz, 94 Am. St. Rep. 209.

On Title and Rights of the Holder of a Chattel Mortgage after condition broken, see the note to St. Mary's Machine Co. v. National Supply Co., 96 Am. St. Rep. 682.

CITIZENS' BANK v. ARKANSAS COMPRESS AND WAREHOUSE COMPANY.

[80 Ark. 601, 97 S. W. 997.]

WAREHOUSEMEN—Delivery to Persons Holding Unindorsed Receipt.—A warehouseman is not protected in delivering property to the holder of unindorsed receipts which on their face show that he is not the owner. (p. 107.)

WAREHOUSEMEN—Mingling of Goods as Devesting Title.—If the holder of a bill of lading for particular bales of cotton delivers them to a compress company and takes its receipt for them, the fact that the compress company mingles the bales with others and thus makes their identification difficult does not divest the owner of title. (p. 109.)

WAREHOUSEMEN—Conflicting Claims to Goods.—Where a compress company accepts bills of lading from a bank for cotton and issues its receipts in place thereof, in a suit in equity by the bank and others against the compress company to adjust conflicting claims to the cotton, it is immaterial, as between the bank and the compress company, whether the bank owns the cotton or holds it as collateral security. (p. 111.)

WAREHOUSEMEN—Transfer of Goods—Assent of Holder of Receipt.—A statute forbidding a warehouseman from removing beyond his control goods for which he has given his receipts, without the written assent of the holder of the receipts, cannot be evaded by showing a custom to treat such receipts as made to bearer. (p. 112.)

INTEREST—Time from Which to Compute.—When it is agreed, in a controversy between a bank and others over the proceeds to certain property, that the property shall be sold and the proceeds deposited in the bank to wait the action of the court, interest on the sum deposited can be recovered only from the date of the judgment. (p. 114.)

Rose, Hemingway, Cantrell & Loughborough, for the appellant.

W. S. McCain and Ratcliffe & Fletcher, for the appellee.

⁶⁰¹ RIDDICK, J. The Arkansas Compress and Warehouse Company is a corporation, and during the years 1902

and 1903 was carrying on business in Little Rock, Arkansas. During the cotton season of 1902-03 the compress company handled a large amount of ⁶⁰²cotton for different parties. Of the cotton which passed through the compress company's hands during that season eight thousand bales were placed on the books as belonging to W. H. McMurray & Company, about the same number of bales were credited to Geo. M. Miller & Co., and the Alphin-Lake Cotton Company had in its name about seven thousand bales.

The Alphin-Lake Cotton Company and the other firms named above were cotton buyers, doing business at Little Rock. A large part of the cotton purchased by these parties was paid for by money obtained from the different banks in Little Rock. The business was usually transacted in the following way: When the cotton was purchased, the purchaser gave to the seller a draft on the bank, to which was attached the bill of lading given by the railway company over which the cotton was shipped to Little Rock. The bank paid the check, charged the money to the buyer, and held the bill of lading as security. When the cotton was received by the compress company, it entered the cotton on its books as the property of the buyer, issued receipts in his name, and, with the consent of the purchaser, took up the bill of lading held by the bank and delivered to the bank the compress receipts issued in the name of the purchaser, which the bank held as collateral security for its loan in lieu of the bill of lading surrendered to the compress company. These compress receipts had no written indorsement on them at the time they were delivered to the bank, and were all in the same form, with the exception of the marks or tag numbers. One of them was as follows:

"No. 1,214.

(1) Bale.

"ARKANSAS COMPRESS & WAREHOUSE COMPANY.

"Little Rock, Ark., Jan. 15, 1903.

"Received for compression for account of Alphin-Lake Cotton Company, one bale of cotton in apparent good order. No charge is made for storage on cotton covered by this receipt. Not responsible for loss by fire or other damage.

"Marks or tag number ———. No. Bales Cotton ———.

"Ozark B-L 198. H. T. ZIBA BENNETT.

"G. H. H., Secretary and Treasurer."

Before this action was commenced this receipt, which was held by the Bank of Little Rock, was indorsed on back as follows: ⁶⁰³ "Alphin-Lake Cotton Company, per G. P. P." The words "Ozark B-L 198" on the receipt mean that the cotton was shipped from Ozark, and that the number of the bill of lading was 198. If the cotton was bought in Little Rock, the purchaser would obtain the money from the bank to pay for cotton by depositing the receipt of the compress company. The compress company, whether the cotton was bought here or shipped in, would also weigh and sample the cotton, place on each bale a tag number of the party in whose favor the receipt was issued, and furnish a list of the cotton, showing the weight and tag number of each bale, accompanied by a sample of each bale, which would be delivered to the person in whose name the receipt was issued, and a record of it was kept in the office of the compress company. When anyone sold cotton that was in the compress, or shipped it out, he would simply deliver to the purchaser or railroad company receipts for so many bales, accompanied by what is known as a transfer sheet or turnout order, showing the tag numbers of the bales to be transferred or shipped out. This would enable the compress company to transfer the cotton on its books to the purchaser or ship out the cotton as the case might be.

At the end of the cotton season of 1902-03, the compress company had taken up, in exchange for cotton in the usual way, all the receipts which it had issued during the season, except receipts for one hundred and twenty-nine bales, which had been issued to Alphin-Lake Cotton Company, and which were held by the Citizens' Bank as security for a loan to that company. The compress company had no cotton on hand in the name of Alphin-Lake Cotton Company to meet these receipts, but did have on hand forty-six bales in the name of McMurray & Company, and eighty-two bales in the name of Miller & Company. McMurray & Company and Miller & Company had no compress receipts to present for the cotton, but did have the turnout orders or transfer sheets. The Citizens' Bank had receipts calling for this number of bales, but it had no turnout order or transfer sheet for the cotton. The compress company refused to deliver the cotton upon the transfer sheets or turnout orders held by McMurray & Company and Miller & Company, ⁶⁰⁴ unless they would at the same time tender receipts for that number of bales, and it refused to deliver the cotton

to the Citizens' Bank without a turnout order or transfer sheet describing the cotton. Thereupon McMurray & Company brought an action against the compress company to recover forty-six bales of cotton which were held by the compress company. Miller & Company brought an action in the chancery court against the compress company to compel it to account for eighty-two bales of cotton or proceeds therefor; while the Citizens' Bank brought an action against the compress company to recover the value of the one hundred and twenty-nine bales of cotton, for which it held the receipts of the compress company.

The compress company admitted that it had on hand one hundred and twenty-eight bales of cotton belonging to some of these parties which it was willing to turn over as the court might direct, and that it had lost one bale which it offered to pay for, but denied further liability. Two of the above actions were brought at law, but on motion the two cases at law were, without objection, transferred to the chancery court, and all three cases consolidated and heard together.

While the case was pending in the chancery court, the following order was entered: "By consent it is ordered that the cotton in controversy in this suit be sold for the benefit of whom it may concern, and that the proceeds be deposited with the Citizens' Bank, subject to the order of this court; and if the money, or any of it, be awarded to any one of the parties other than the Citizens' Bank, the party to whom it is awarded shall be credited by the bank as of the date the deposit is made."

The cotton was sold, and proceeds, \$6,292.11, deposited accordingly. The court found against the bank and in favor of the other parties, except that the court refused to charge the bank with interest. Judgment was rendered against the Citizens' Bank in favor of Miller & Company for \$4,178.50, and in favor of McMurray & Company for \$2,113.61. The bank appealed, and Miller & Company and McMurray & Company took a cross-appeal on refusal of court to charge the bank with the interest.

⁶⁰⁶ In this controversy three separate actions are involved. As these cases rest to a certain extent on the same facts, the parties consented that they should be consolidated and heard together by the chancery court. Without discussing the pro-

priety of this practice, we shall proceed to consider the questions raised by the appeal.

First, as to the action brought against the compress company by Miller & Company to recover eighty-two bales of cotton and the action of McMurray & Company to recover forty-six bales: The evidence shows that the identical cotton owned by these parties, and which had been deposited with the compress company by McMurray & Company, and receipts issued to them, was still held by the compress company at the time these suits were commenced. The books of the compress company show that ⁶⁰⁷ the one hundred and twenty-eight bales of cotton now held by the compress company belong to these plaintiffs; and while the receipts given to the plaintiffs were lost or stolen from them, it is admitted by the defendant that these receipts are now in its possession, having been surrendered to it by another party. But the compress company, for a defense against the claims of these parties to the cotton in its possession, alleges that it has already delivered to the party who surrendered to it the receipts issued for this cotton the number of bales called for by these receipts. It will be necessary to notice the circumstances under which this delivery was made.

The evidence shows that the Alphin-Lake Cotton Company had purchased and shipped to the compress company several thousand bales of cotton during the cotton season of 1902-03. All of this cotton was purchased with money obtained from different banks. The compress company issued receipts for this cotton in the name of the Alphin-Lake Cotton Company, but it delivered the receipts, not to Alphin-Lake Cotton Company, but to the banks in exchange for bills of lading held by the banks, and the banks then held the receipts of the compress company as collateral security for the money advanced to the Alphin-Lake Cotton Company. Lake was the general manager of this company, and conducted its business at Little Rock. When he desired to ship any cotton held by the compress company, he obtained from the bank receipts for the number of bales he desired to ship, and the compress company would then ship the cotton out on his "turnout" order upon his surrendering receipts for an equal number of bales, without regard to whether these receipts had been issued or assigned to him or not. For, prior to this litigation, the receipts which the compress company gave for cotton contained only

a meager description of the cotton, and cotton standing on the books of the warehouse to the credit of one person would be shipped out on the order of such person upon his surrendering receipts issued to him or to any other person for a like number of bales. In other words, the compress company, the banks and cotton dealers dealt with these compress receipts as if they called for no particular cotton, but only for a certain number of bales of cotton.

808 While business was being carried on in this way, Lake found or obtained in some surreptitious way compress receipts for one hundred and twenty-eight bales of cotton which had been issued by the compress company to McMurray & Company for cotton deposited by them, and of which they had afterward sold eighty-two bales to Miller & Company. At the time Lake came into possession of these McMurray receipts, he had at the compress warehouse a large number of bales of cotton which stood on the books of that company in his name, or in his firm's name. But the company knew that he had pledged the compress receipts issued to him for this cotton to the banks as security for loans, and they would not allow him to ship the cotton without the surrender of receipts covering the number of bales he desired to ship. Lake, then, in order to get possession of his cotton without paying his debt to the bank, presented these receipts of McMurray & Company which he had found. And, although the receipts had never been indorsed by McMurray & Company, and showed on their face that they did not belong to Lake, the compress company relying on his honesty, and supposing that he was the owner, took them up, and in exchange therefor turned over to Lake, not the cotton for which the receipts were given, but one hundred and twenty-eight bales which, though they stood on the books of the compress company as belonging to him or his firm, had, with knowledge of the compress company, been pledged to the bank by the deposit of the compress receipts issued therefor. Lake thus obtained one hundred and twenty-eight bales of cotton the compress receipts for which were held by the bank as security for its loan, and to which he had no right, and the compress company obtained from him compress receipts that he did not own and had no authority to surrender.

Although our statute makes such receipts "negotiable by written indorsement thereon and delivery in the same manner as bills of exchange and promissory notes" (Kirby's Digest,

sec. 529), it does not follow that all the consequences incident to the indorsement of bills and notes before maturity ensue or are intended to result from such negotiation. That question was ably discussed by the supreme court of the United States in *Shaw v. Railroad Co.*, and the rule stated that the finder of a bill of lading indorsed in blank could not by transfer divest the title of the owner: ⁶⁰⁰ *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. ed. 892. The same rule would apply to a lost warehouse receipt, for bills of lading and compress and other warehouse receipts stand in this respect on the same footing: *Hale v. Milwaukee Dock Co.*, 29 Wis. 482, 9 Am. Rep. 603. The compress receipt represents the property, and the transfer of the compress receipt by the owner transfers the title to the property. But a thief who finds a compress receipt can give no more title to a purchaser from him than he could to property which he had found or stolen: *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. ed. 892. If this is the law, even where the lost receipt had been indorsed in blank by the owner, as held by the supreme court of the United States in the case just cited, how clear it is that the finder of an unindorsed receipt, which on its face shows the name of the true owner, cannot by selling or surrendering such receipt transfer the title of the owner. In this case the compress receipts issued to *McMurray & Company* which were found by *Lake* had never been indorsed, and carried on their face notice to anyone dealing with them that they belonged, not to *Lake*, but to another. *Lake* not only had no title to them, but his finding and surrender of them to the compress company in no way affected the rights of the owners thereof or their title to the cotton which these receipts represented.

It is true, as remarked by the supreme court of the United States in *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. ed. 892, that the owner of a bill of lading or compress receipt may by his own carelessness put it in the power of a finder to occupy the position of an owner under circumstances that would estop such owner from setting up his rights against an innocent purchaser. In this case there is the suspicious circumstance that the manager of *McMurray & Company*, who was also a member of that firm, admitted that he had loaned or exchanged compress receipts with *Lake* on at least one occasion to enable *Lake* to ship out cotton which a compress company held. If

he had loaned these receipts to Lake by which Lake obtained from the defendant compress company the one hundred and twenty-eight bales of cotton in controversy here, his firm would clearly be estopped to claim title to such receipts or cotton as against the compress company. But he testified positively that the receipts he exchanged with Lake were those of another ⁶¹⁰ company, that he had never delivered or authorized Lake to take any receipts rendered by the defendant compress company, and if he had those receipts they were obtained without the consent of the plaintiffs in some way unknown to them. The chancellor found in favor of plaintiffs on that point, and we think the evidence supports the finding. That being so, there is nothing shown to estop the owners of these receipts from asserting their ownership to this cotton. It was their cotton for which they hold the receipts of the compress company, have neither sold it nor transferred the compress receipts therefor to others, and, so far as the law is concerned, their right to recover is clear. The chancellor, we think, correctly decided in their favor against the compress company.

Second, as to the action of the Citizens' Bank against the compress company to recover the value of the one hundred and twenty-nine bales of cotton for which it holds the receipts of the compress company: The evidence shows that the cotton for which these receipts were given is not now in the possession of the compress company. One bale of this cotton the compress company admits that it lost, and the other one hundred and twenty-eight bales that it ought to have to meet these receipts held by the bank, it, as before stated, delivered to Lake on receipts of McMurray & Company, which he had surreptitiously obtained. In other words, the compress company let Lake have one hundred and twenty-eight bales of cotton belonging to the bank which it held as collateral security for loans made to Lake upon his surrendering to the compress company receipts given to McMurray & Company. But, as we have seen, these receipts had never been transferred or indorsed by the owners, and showed on their face that they did not belong to Lake. The compress company simply took Lake's word for it that he was the owner of the receipts. The compress company thereupon surrendered to him cotton for which it had previously delivered its receipts to the bank, and to which it should have known that the bank had a claim.

Counsel for the compress company attempts to have it evade liability by contending that the receipts of the compress company held by the bank call for only a certain number of bales of cotton, and do not describe or identify any particular cotton, and that therefore the title to the cotton did not pass ⁶¹¹ to the holder of the receipts. But this cotton was purchased outside of the city and shipped to this market. It was paid for by drafts on the bank to which the bills of lading of the railway company describing the cotton were attached and held by the bank as security for the loan. This cotton was thus identified at the time of the purchase, and the title thereto vested in the bank by transferring to it the bills of lading issued by the railway company. Afterward, when the cotton arrived at the compress, the compress company took up the bills of lading and gave the bank in lieu thereof compress receipts stating the number of bales of cotton, but this exchange did not affect the title of the bank to the cotton. This was, then, not an attempted transfer to the bank of a certain number of bales out of a larger number, where title would not pass until a separation or selection was made. It was a transfer to the bank of a certain selected lot of cotton, which, while in the hands of the warehouseman, was afterward mingled with a larger number of bales so as to make identification more or less difficult. But this mingling did not divest the title of the bank, and it still owned a certain number of bales in the hands of the compress company.

But if we concede that no particular cotton was identified by these receipts, and that no title passed to the bank, the compress company would still be bound for the number of bales of cotton named in the receipts. The receipts would, in effect, be a contract on the part of the compress company that it would hold for and on demand deliver to the owner of the receipt or his assignee the number of bales of cotton named therein. This is not a suit between the bank and a creditor of Lake attaching the cotton, nor between the bank and the person to whom Lake sold the cotton after he withdrew it from the compress company. In such a suit the question as to whether the title of the cotton passed to the bank might be very material. But in this action between the bank and the compress company, it is not very material whether the title passed to the bank or not. If the title passed to the bank, the compress company has wrongfully disposed of one hundred

and twenty-nine bales of cotton belonging to the bank, and must account for it to the value thereof. If the title did not pass to the bank, still the bank ⁶¹² holds the contract of the compress company to the effect that it has received of the Alphin Lake Cotton Company one hundred and twenty-nine bales of cotton which it agrees to deliver to the bank on demand, and which contract it has failed to perform, and it must respond in damages for the value of the cotton, or at least to the extent of the bank's debt or interest in the cotton.

If this was an action at law for conversion, it might be material for the bank to show that it had title to the cotton; but, it being now an action in equity to settle the rights of these parties growing out of the transactions set up in the pleadings, the question whether title passed to the bank is not material to show liability of defendant. There is no denial that the cotton mentioned in the receipts was actually delivered to the compress company. The compress company had notice that the receipts which it issued therefor were held by the bank as collateral security for a loan to Lake. Under those circumstances, as between the bank which held the receipts and the compress company which issued them, we think that the compress company is liable to the bank for the number of bales of cotton called for by the receipt, whether the title to the cotton passed to the bank or not.

Again, the compress company undertakes to justify its conduct in turning over to Lake this cotton for which the bank held its receipts, on the surrender to him of receipts issued by the compress company to McMurray & Company which he had found, by saying that it was the custom to treat all these compress receipts as made to bearer. But the receipts were not issued to bearer. The receipts which the compress company accepted from Lake in exchange for this cotton were issued to McMurray & Company. On the surrender of receipts issued to McMurray & Company, which had never been indorsed by them, the compress company delivered to Lake cotton which he had pledged to the bank, which held the receipts of the compress company therefor. The compress company had notice that the receipts which it had issued to Lake for this cotton had been pledged to the bank, and yet, without consulting the bank, it turned over to him this cotton on his surrendering receipts of another party for other cotton, which receipts he had found. In acting in this way the compress

company ⁶¹³ acted in direct violation of our statute which forbids a warehouseman from removing or permitting to be shipped or removed beyond its control any goods, cotton, grain or other produce or commodity for which he has given his receipts without the written assent of the person holding the receipt: Kirby's Digest, sec. 527. The bank did not assent to this act of the compress company, and the compress company cannot set up a custom to protect it from the consequences of its act done in direct violation of the plain mandate of the statute: Dickinson v. Gay, 7 Allen (Mass.), 29, 83 Am. Dec. 656; Coxe v. Heisly, 19 Pa. 243; 29 Am. & Eng. Ency. of Law, 2d ed., 376-378.

But even if the statute could be abrogated in that way, the evidence does not show any custom that could protect the compress company under the facts of this case. The evidence may show that there was a custom for the compress company to deliver cotton to the party who had placed it in the company's warehouse upon surrender by him of receipts of the compress company for an equal number of bales, whether the receipts were originally issued to him or not, provided that he then owned them, and had a right to surrender them. But there is no proof of a custom that would justify a delivery of cotton which the owner had pledged to a bank with knowledge of the compress company upon the surrender by him of a lost or stolen receipt to which he had no right or title, without the consent of the bank. When cotton was delivered upon the surrender of receipts not issued to the party obtaining the cotton, it was done on the assumption that such party was the owner of the receipts, and had the right to surrender them. If the party obtaining the cotton delivered therefor compress receipts that were issued to and belonged to another, and which he had no authority to surrender, the compress company gained no rights thereby in the absence of fault of the legal owner of the receipt, and was in the same position as if it had delivered the cotton without requiring any receipt in exchange therefor. In fact, this custom that the compress company relies on seems to have been based on the theory that all men were honest. So long as no unscrupulous dealers appeared, so long as the compress company was certain that the parties to whom cotton ⁶¹⁴ was delivered were the owners of the receipts they surrendered, no great harm was felt; for, while that was so, the compress company always had on hand

the number of bales called for by its outstanding receipts, though it might not be the identical cotton for which the receipts were executed. But this loose method of doing business was calculated to attract the attention of dishonest commercial adventurers. That years passed before any harm was felt speaks well for the honesty of those dealing with cotton in this market. But the unscrupulous man arrived at last, and then a day dawned full of danger to these unsuspecting dealers. Taking advantage of this lax method of transacting business, a daring financial buccaneer simply walked off with one hundred and twenty-eight bales of cotton to which he was not entitled, and for which the bank that had loaned him money held the receipts of the compress company. It is a matter of current history that these were not his only victims. Other banks, compress companies and even railroads suffered from his assaults. The question here is whether this bank or the compress company, neither of which had been guilty of any intentional wrong, must sustain the loss in this case. The substance of the matter is that Lake bought one hundred and twenty-nine bales of cotton and shipped it to the compress company. He transferred the railroad bills of lading to the bank to obtain money to pay for the cotton. Afterward the compress company, or Lake with the knowledge of that company, procured the bills of lading from the bank by substituting therefor the compress receipts issued in his name for the cotton. Although there was no written indorsement of the receipts, the transfer was good in equity, and gave the bank an equitable title thereto. The debt of Lake to the bank has never been paid. It still holds the compress receipts. But the compress company, relying on Lake's word that he was the owner of other receipts belonging to McMur-ray & Company, turned him over in exchange therefor the cotton that in equity belonged to the bank. As the compress company had notice that these receipts were held by the bank, as it was not in any way misled by the bank and as the bank had never consented to this act of the compress company in delivering the cotton to Lake, we think that the compress company should account to the ⁶¹⁵ bank for the value of the cotton, or for such an amount as will cover the bank's debt. For, in delivering cotton to Lake for which the bank held its receipts without the consent of the bank, the compress company violated both its contract and the statute

of the state, and must bear the loss resulting from its own carelessness.

On the whole case, the judgment of the chancellor as to McMurray & Company and Miller & Company will be affirmed.

The judgment in favor of the compress company as to claim of Citizens' Bank will be reversed, and the cause remanded with an order that the cause be referred to a master or commissioner to hear evidence and determine the value of the one hundred and twenty-nine bales of cotton for which the bank holds compress receipts, and on the coming in of such report that the bank have judgment against the compress company for the value of the cotton.

By consent of parties the one hundred and twenty-eight bales of cotton in the hands of the compress company at the time these actions were commenced were sold, and the proceeds deposited in the bank to await the action of the chancery court. This cotton has been decided to be the property of McMurray & Company and Miller & Company, but under the terms of that agreement we do not think these parties can recover interest on the money except from the date of the judgment of the chancery court. Nor do we think that the bank which held the money should be allowed interest on the sums claimed by it except from the date of that judgment. After the judgment the bank had no right to retain the fund, and must pay interest, and is entitled to recover from the compress company interest on its debt from the same date.

Warehouse Receipts possess many of the qualities of negotiable instruments, and in some jurisdictions they seem to be made fully negotiable by statute: *Anderson v. Portland Flouring Mills*, 37 Or. 483, 82 Am. St. Rep. 771, and cases cited in the cross-reference note thereto.

It is the Duty of a Warehouseman not to deliver goods to any other person than the depositor, except on this order, or by his consent or authority: *Velsian v. Lewis*, 15 Or. 539, 3 Am. St. Rep. 184. A warehouseman delivering goods to one entitled thereto because he presents a duplicate bill of lading, not signed by either the consignee or consignor, is answerable to the owner for any resulting loss: *Cavallaro v. Texas etc. Ry. Co.*, 110 Cal. 348, 52 Am. St. Rep. 94.

CASES
IN THE
SUPREME COURT
OF

CALIFORNIA.

EX PARTE QUARG,

[149 Cal. 79, 84 Pac. 766.]

CONSTITUTIONAL LAW—Right to Resell.—The constitutional right of "acquiring, possessing and protecting property" includes the right to dispose of such property in such manner as the purchaser pleases, and at such prices as he can obtain at fair barter. (pp. 115, 116.)

CONSTITUTIONAL LAW.—A Statute Forbidding the Sale of Theater Tickets at a Price Higher than Paid for Them infringes a right of property guaranteed by the constitution, and is void. (pp. 116, 117.)

THE POLICE POWER Extends Only to Such Measures as are Reasonable in Their Application and Tend in Some Appreciable Degree to promote, protect or preserve the public health, morals or safety, or the general welfare. (p. 117.)

Leon Samuels, for the petitioner.

Lewis F. Byington, district attorney, Davis Freidenrich and Naphtaly, Freidenrich & Ackerman, for the respondent.

79 SHAW, J. The act of March 18, 1905, added a new section ⁸⁰ to the Penal Code, numbered 526, which reads as follows: "Every person who sells or offers for sale any ticket or tickets to any theater or other public place of amusement at a price in excess of that charged originally by the management of such theater or public place of amusement, is guilty of a misdemeanor": Stats. 1905, c. 140, p. 140. The petitioner is in custody upon conviction of a violation of this section, and seeks a discharge on the ground that the provisions of the section are unconstitutional, and consequently that the judgment of conviction is void.

The constitutional guaranty securing to every person the right of "acquiring, possessing, and protecting property," re-

fers to the right to acquire and possess the absolute and unqualified title to every species of property recognized by law, with all the rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases, and to sell it for such price as he can obtain in fair barter. Any statute which interferes with this right, except in cases where the public health, morals, or safety, or the general welfare authorizes such restriction as an exercise of the police power, is, to the extent of such interference, unconstitutional and void: 8 Cyc. 886. These rights are in fact inherent in every natural person, and do not depend on constitutional grant or guaranty. Under our form of government by constitution, the individual, in becoming a member of organized society, unless the constitution states otherwise, surrenders only so much of these personal rights as may be considered essential to the just and reasonable exercise of the police power in furtherance of the objects for which it exists: Cooley on Statutory Limitations, pp. 68, 244; 1 Barbour on Rights, pp. 122, 284.

It is, perhaps, not important in this case to consider and define the precise nature of a theater ticket. It may be either a mere license, revocable at the will of the proprietor of the theater, or it may be evidence of a contract whereby, for a valuable consideration, the purchaser has acquired the right to enter the theater and observe the performance, on condition that he behaves properly. These are matters which concern only the proprietor and the purchaser. No third person can ⁸¹ question the right of the purchaser. However, by the act of 1893 (Stats. 1893, c. 185, p. 220), a ticket of admission to a public place of amusement, when sold, is made at least an irrevocable license to the purchaser of the ticket to occupy a place therein during the performance: *Greenberg v. Western Turf Assn.*, 140 Cal. 357, 73 Pac. 1050. Such a ticket, therefore, represents a right, positive or conditional, as the case may be, according to the terms of the original contract of sale. This right is clearly a right of property. The ticket which represents that right is also necessarily a species of property. As such, the owner thereof, in the absence of any condition to the contrary in the contract by which he obtained it, has the clear right to dispose of it; to sell it to whom he pleases and at such price as he can obtain. The statute in question forbids any sale for a price higher than that at which

it was sold by the proprietor of the theater, and, to that extent, it infringes upon the right of property guaranteed by the constitution, and existing in the individual. It is therefore a void enactment, unless it can be upheld as an exercise of the police power.

The police power is broad in its scope, but it is subject to the just limitation that it extends only to such measures as are reasonable in their application and which tend in some appreciable degree to promote, protect, or preserve the public health, morals, or safety, or the general welfare. The prohibition of an act which the court can clearly see has no tendency to affect, injure, or endanger the public in any of these particulars, and which is entirely innocent in character, is an act beyond the pale of this limitation, and it is therefore not a legitimate exercise of police power. The sale of a theater ticket at an advance upon the original purchase price, or the business of reselling such tickets at a profit, is no more immoral, or injurious to public welfare or convenience, than is the sale of any ordinary article of merchandise at a profit. It does not injure the proprietor of the theater; he must necessarily have parted with the ticket at his own price and upon his own terms before such resale can be made. It does not injure the second buyer; he must have had the same opportunity as the first buyer to purchase a similar ticket, and no greater right thereto, and having neglected that ⁵² opportunity, or being unwilling to undergo the necessary inconvenience, and willing to pay a higher price rather than forego the privilege which the other by his greater diligence and effort has obtained, the transaction is just, so far as he is concerned. The fact that such tickets are obtained and resold at an advance does not compel the manager of the theater to put the tickets upon the same plane as ordinary articles of merchandise. He can make them nontransferable and place in the contract of sale any conditions necessary for the protection of himself or his patrons, and by printing such conditions on the tickets he can prevent their resale to innocent buyers. He can restrict or limit the number of tickets sold to one person, and, in general, manage his own business according to his own will, except that, by the act of 1893, he cannot refuse admission to a well-behaved and proper person, holding a ticket which he has sold without conditions affecting such holder. There is nothing in that act, nor in the decision

in *Greenberg v. Western Turf Assn.*, 140 Cal. 357, 73 Pac. 1050, which would operate to prevent the imposition of such conditions. The act of 1893 does not purport to regulate or control the original sales of tickets, nor to make them assignable at all events, contrary to the terms of such sale. Section 526 of the Penal Code, above quoted, does not purport to forbid the resale of tickets which by the original contract of sale have been made nontransferable, nor a resale for a price equal to or less than that of the original sale. It only forbids sales at an advanced price, and as to such sales, it forbids them all. It is plainly not enacted for the purpose of preventing such frauds as the sale of tickets to innocent purchasers, contrary to the conditions of the original sale forbidding a transfer. The act must be considered as intended to be operative without regard to the willingness or unwillingness of the manager to allow the transfer, to be directed to the transfer of tickets, assignable or nonassignable, and to have been intended to interfere with the purchaser who for any reason wishes to engage in the unhurtful transaction or business of reselling at a profit a property right which he has lawfully acquired. It is perhaps unnecessary to add that the right to attend a theater is not so sacred or important in character as to require or justify legislation⁸³ regulating the price of admission. Viewed in any aspect, we think the legislation in question is an unwarrantable interference with the inherent and constitutional rights of individuals, and for that reason is void.

Let the petitioner be discharged.

Beatty, C. J., Angellotti, J., Lorigan, J., and Henshaw, J., concurred.

McFarland, J., concurred in the judgment.

The Law of Theaters and like shows is the subject of a note to *Horney v. Nixon*, 110 Am. St. Rep. 525. The proprietor of a theater has a right to impose and enforce a regulation that if a ticket is sold on the sidewalk admission on it may be refused at the door: *Collister v. Hayman*, 183 N. Y. 250, 11 Am. St. Rep. 740. And a statute making it unlawful to refuse admission to a proper person holding a ticket to a place of public amusement is constitutional: *Greenberg v. Western Turf Assn.*, 148 Cal. 126, 113 Am. St. Rep. 216.

The Power of a State to Regulate the Sale of passenger tickets is discussed in the note to *Jannin v. State*, 96 Am. St. Rep. 828, and in the recent case of *Samuelson v. State*, 116 Tenn. 470, 115 Am. St. Rep. 805.

DUNGAN v. SUPERIOR COURT.

[149 Cal. 98, 84 Pac. 767.]

JURISDICTION of the Estates of Decedents.—There cannot be Two Valid Administrations of the same estate, at the same time, and in the same state. When any court acquires jurisdiction of an estate, such jurisdiction is exclusive. (p. 121.)

JURISDICTION of the Estates of Decedents—Concurrent, When Becomes Exclusive.—Though two or more courts may be equally entitled to exercise jurisdiction over the estate of a nonresident who has died without the state, the jurisdiction becomes exclusive in the courts of the county in which a petition for letters of administration is first filed. (p. 121.)

ESTATES OF DECEDENTS.—An Application for Letters of Administration is Deemed Made when a petition therefor is filed with the clerk of a superior court. (pp. 121, 122.)

JURISDICTION of Court, Power of the Legislature to Limit to One County.—Though the constitution purports to confer on the superior court jurisdiction in all matters of probate, the legislature may prescribe general rules determining which of the many superior courts shall exercise jurisdiction in any particular estate, and may, therefore, declare that jurisdiction of the estate of any nonresident dying beyond the state, shall be in any county in which he left property and in which application for letters shall first be made. (p. 122.)

JURISDICTION of Estates of Decedents, Collateral Attack Upon.—If a petition for letters of administration on the estate of a deceased nonresident alleges that she left estate in the county in which the petition was filed, the truth of such allegation must be determined by such court, and it cannot be ousted of jurisdiction by the subsequent filing of a similar petition in another county and proving under the latter petition that decedent did not leave any estate in the other county, as long as the petition therein remains undetermined. (p. 123.)

PROHIBITION—Estates of Decedents—Other Remedy, When Does not Debar.—If a court assumes to grant letters of administration on the estate of a decedent when another court has acquired exclusive jurisdiction to make such a grant, a writ of prohibition will issue to the court exercising jurisdiction without authority, though the applicant for such writ could maintain proceedings for the revocation of the order complained of, and appeal from any order refusing such revocation, if such appeal could not stay proceedings nor debar the person to whom letters of administration had been granted from exercising the powers of administrator. (p. 124.)

PROHIBITION, Who may Apply for.—An Heir and an Applicant for Letters of Administration on the Estate of a Decedent have a sufficient beneficial interest to entitle them to maintain an application to prohibit a court, having no authority so to do, from exercising jurisdiction of another application for letters of administration on the same estate. (p. 124.)

Carter P. Pomeroy, Hannah & Miller, H. T. Miller and Frank H. Short, for the petitioner.

Everts & Ewing and Truman & Oliver, for the respondent.

⁹⁹ ANGELLOTTI, J. This is an application for a writ of prohibition to restrain the superior court of Fresno county from taking any further proceedings in the matter of the settlement of the estate of Jane Davis, deceased. The petitioners are the public administrator of Tulare county and Mary G. Stone, the niece and next of kin of said deceased.

It is claimed that the superior court of Fresno county is without jurisdiction in the matter of said estate, notwithstanding ¹⁰⁰ which fact it is asserting jurisdiction, having entertained an application for letters of administration therein, made an order appointing R. D. Chittenden, public administrator of Fresno county, administrator of said estate, issued letters of administration to him, and refused to vacate said letters. There is no controversy as to the material facts. Jane Davis died in the state of New York on September 19, 1904, being at the time of her death a resident of said state of New York. She left estate in various counties of the state of California. On the same day, but after her death, petitioner Dungan, as public administrator of Tulare county, filed with the clerk of the superior court of Tulare county his written petition and application for letters of administration of said estate, in the form and manner prescribed by law, and said clerk, thereupon, on the same day, set such petition for hearing by the court and posted the required notices. The petition contained the allegations essential to the jurisdiction of said superior court, including allegations to the effect that the decedent died out of the state, not being a resident of the state, and that a portion of the estate left by her was situate in the county of Tulare. The hearing of said application was continued from time to time, until, on December 24, 1904, after a hearing, an order was made by said superior court, appointing Dungan administrator of said estate, and letters of administration were thereupon issued to him. An appeal has been taken from said order, which is still pending undetermined. The alleged jurisdiction of the Fresno county superior court is based upon proceedings initiated therein by R. D. Chittenden, public administrator, who did not file his petition for letters of adminis-

tration until September 22, 1904, His petition alleged that the deceased left estate in Fresno county, His application was heard by the court on October 3, 1904, and an order was thereupon made appointing him administrator, and letters of administration issued accordingly.

It is conceded that jurisdiction of proceedings for the settlement of the estate of a deceased person cannot coexist in two superior courts of the state at the same time. "There cannot be two valid administrations at the same time in this state": Estate of Griffith, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381. When any such court has acquired jurisdiction in such a matter, ¹⁰¹ that jurisdiction is exclusive: See Woerner on American Law of Administration, sec. 204. It is provided by our statute that where the decedent died out of the state, not being a resident of the state at the time of his death, such proceedings may be had "in the county in which any part of the estate may be": Code Civ. Proc., sec. 1294, subd. 3. Recognizing that such a decedent may leave estate in more than one county, the legislature further provided as follows, viz.: "When the estate of the decedent is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, . . . the superior court of that county in which application is first made for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate": Code Civ. Proc., sec. 1295. It thus appears that although, prior to the making of any application for letters, two or more courts may have concurrent jurisdiction to receive and entertain an application, the county of exclusive jurisdiction for the settlement of the estate is as definitely and precisely fixed by the legislature as it is in the case of a resident of this state, where the exclusive jurisdiction is declared to be the county of which the deceased was a resident at the time of his death: Code Civ. Proc., sec. 1294, subd. 1. Here it is in that county containing a portion of his estate "in which application is first made."

The only point made as to the construction of this plain and unambiguous statutory provision is as to the meaning of the words "in which application is first made." When is such an application "made" within the meaning of this provision? In view of our statutory provisions upon the subject

(Code Civ. Proc., secs. 1371-1379), we are satisfied that the filing of a proper petition with the clerk of a superior court constitutes the making of the application. An application must necessarily precede the hearing. The statute fully prescribes the manner and form for the making of such application. It cannot be oral, but "must be in writing, signed by the applicant or his counsel, and filed with the clerk of the court, stating the facts essential to give the court jurisdiction of the case": Sec. 1371. This plainly constituted the making of the application, in the opinion of the framers of the original code, in which both sections 1295 and 1371¹⁰² were contained in their present form, for the headnote to section 1371 was "Applications, How Made": See *Barnes v. Jones*, 51 Cal. 303; *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345. Thereupon the court to which the petition or application (which words are used synonymously in the statute) is presented must assume jurisdiction thereof, through its designated officer, the clerk of the court, by appointing a time "for the hearing of the application" which has been made, and giving the prescribed notice: Secs. 1372, 1373. At the time appointed for the "hearing of such application," or at any time to which such hearing is continued, the court must hear the allegations and proof: Secs. 1372, 1375. Obviously, in the light of these statutory provisions, what takes place at the hearing is not the making of an application, but is the hearing of the application that has, at a previous date, been made in the manner prescribed by statute.

The question is simply one of construction of a statute. It is true that the constitution confers jurisdiction in "all matters of probate" upon the superior court, but this does not mean that all superior courts in the state shall have concurrent jurisdiction in every particular probate matter. The legislature undoubtedly has the right to prescribe by general laws the rules which shall obtain, in determining which of the many superior courts shall exercise the constitutionally conferred jurisdiction in any particular estate. It follows from the above that Tulare county is the county in which application was first made for letters of administration, and that thereby, if any part of the estate of decedent was situate therein, the superior court of that county obtained exclusive jurisdiction of the settlement of said estate.

It is contended that as a matter of fact no part of the estate of decedent was situate in Tulare county. Such contention is not available to respondent here. The petition filed in that county alleged the existence of estate therein, and the question as to the truth of that allegation was one which the Tulare court had exclusive jurisdiction to determine, subject only to review on appeal. While the existence of estate in such county was essential to jurisdiction, it was one of those jurisdictional facts which the Tulare court had to determine from evidence produced before it, and its decision¹⁰³ upon that point would be entitled to the same presumption of verity as its decision upon any other point, and could not be collaterally attacked: *In re Eichhoff's Estate*, 101 Cal. 600, 36 Pac. 11. The case is analogous to those where residence of the deceased within the county is the essential to jurisdiction, and in such cases it is settled that where applications are made in different counties upon conflicting claims as to the fact of residence the superior court of the county in which a petition is first filed has exclusive jurisdiction to determine the question of residence, and that the courts of other counties must abide the determination of that court, which is reviewable only upon appeal: See *Estate of Latour*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441; *Estate of Damke*, 133 Cal. 430, 65 Pac. 889; *Estate of Griffith*, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381. In *Estate of Damke*, 133 Cal. 430, 65 Pac. 889, an order of the superior court of Sacramento county appointing an administrator, upon a petition filed two days after the filing of the petition in San Joaquin county, was reversed on the sole ground that the superior court of San Joaquin county had taken jurisdiction of the proceeding prior to the filing of the petition in Sacramento county. The effect of the decisions plainly is that jurisdiction in such matters attaches upon the filing of the first petition to the superior court in which the petition is filed, and continues during the pendency of the proceeding thus instituted, and that this jurisdiction is exclusive, precluding any other court from effectually acting in the matter; in other words, that during the pendency of such proceeding action by any other court is without and in excess of its power. In this connection, we cite the case of *Estate of Worthington*, 4 Ohio Dec. 381, where the principles applicable here are fully and learnedly dis-

cussed. It is therefore immaterial in this proceeding whether or not, as a matter of fact, there was property of the estate in Tulare county. It is enough that the proceeding instituted therein, upon a petition alleging the existence of such property therein, is still pending.

In the answer and oral argument it was contended that prohibition will not lie, for the reason that there is a plain, speedy, and adequate remedy by appeal. It appears that Dungan made an application for the revocation of the Fresno letters, and has in fact appealed from the order denying his ¹⁰⁴ application. Regardless of the question as to whether Dungan could maintain such proceedings for revocation (see *Estate of Griffith*, 84 Cal. 107, 23 Pac. 258, 24 Pac. 381), an appeal by him from an order refusing to vacate the letters issued by the superior court of Fresno county does not stay the proceedings in that court nor debar the person to whom letters were granted therein from exercising the powers and performing the duties of administrator. In view of the complications which will necessarily follow the attempted exercise of jurisdiction in this matter by two superior courts, we are of the opinion that it cannot be said that there is a plain, speedy and adequate remedy in the ordinary course of law. We have no doubt that petitioners have a sufficient beneficial interest to entitle them to maintain this proceeding (see *Estate of Damke*, 133 Cal. 430, 65 Pac. 888), and are of the opinion that the superior court of Fresno county should be restrained from proceeding in the matter of said estate.

Let a writ of prohibition issue directing the superior court of Fresno county to desist and refrain from further proceedings in the matter of the settlement of the estate of Jane Davis, deceased, pending the final determination of the proceeding in the matter of said estate instituted in the superior court of Tulare county on September 19, 1904.

Beatty, C. J., Lorigan, J., Henshaw, J., and McFarland, J., concurred.

The Appointment of an Administrator in one county while a prior appointment in another county is still in force and effect, is a nullity, for there cannot be two valid administrations of an estate at the same time: *Coltart v. Allen*, 40 Ala. 155, 88 Am. Dec. 757; *Estate of Griffith*, 84 Cal. 107, 23 Pac. 528, 24 Pac. 528; *Oh Clow v. Brockway*, 21 Or. 440, 28 Pac. 384.

DUFFY v. YORDI.

[149 Cal. 140, 84 Pac. 838.]

PARENT AND CHILD, Obligation of the Latter to Support the Former.—At the common law, a child is not under any legal obligation to support its parent. (p. 126.)

PARENT AND CHILD—Statutory Obligation and Remedies.—The obligation of a child to support its parent and the remedies for its enforcement are both statutory, and no proceeding for its enforcement can be maintained except under the circumstances and in the manner prescribed by statute. (p. 127.)

PARENT AND CHILD.—A parent supported by one child cannot maintain an action against another for support. (p. 127.)

Joseph O'Gara, for the appellant.

Joseph Rothschild, for the respondent.

¹⁴⁰ McFARLAND, J. The plaintiff, a widow, is the mother of the defendant, also a widow; and the purpose of this action is to obtain a judgment that defendant pay to plaintiff for her permanent support the amount of one hundred dollars per month, and also one hundred dollars to be paid forthwith for plaintiff's immediate use. It is averred in the complaint that plaintiff is seventy-seven years old, is without any means ¹⁴¹ of subsistence, and, by reason of her age and physical condition, is unable to maintain herself by work; that defendant has ability to support her; and that one hundred dollars a month is a reasonable sum to be allowed her for her maintenance. In the answer of the defendant the material averments of the complaint are denied, and it is averred that plaintiff has other children able to support her, and that, when defendant was about six years old, plaintiff abandoned her and gave her to her aunt, Bridget Duffy, and her husband, and agreed that her aunt should rear and support her, and that defendant's obligations as a child should be due to her said aunt; and that since then plaintiff would have nothing more to do with defendant, and that defendant was reared and supported by her aunt, and that defendant now supports her said aunt. The court found that plaintiff was destitute and unable to maintain herself by work; that defendant is able to support her; that plaintiff did not abandon defendant as alleged in the answer; that sixty dollars a month is a reasonable amount for plaintiff's maintenance, and that twenty dollars a month is a reasonable proportion

thereof to be paid plaintiff by defendant. Judgment was rendered in favor of plaintiff against defendant for one hundred and forty-three dollars and thirty cents for her support from the commencement of the action until the date of the judgment, and that thereafter defendant pay to plaintiff twenty dollars on the 15th of each month until further order of the court. From this judgment defendant appeals.

Appellant contends that the material findings of the court are not supported by the evidence, but, under our views of the case, this contention need not be discussed. While some writers speak of the "natural obligation" of a child to support a parent, it is clear that at common law there was no legal obligation on the part of the child to do so; that such obligation depends entirely upon statutory provisions; and that the procedure provided by statute for the enforcement of the obligation must be pursued. In Schouler on Domestic Relations (section 265) it is said that the following is a "well-settled rule at the common law: Namely, that there is no legal obligation resting upon a child to support a parent; that, while the parent is bound to supply necessities to an infant child, an adult child, in the absence of positive statute, or ¹⁴² a legal contract on his own part, is not bound to supply necessities to his aged parent." In *Edwards v. Davis*, 16 Johns. 281, it is said: "The duty of a child of sufficient ability to maintain its poor and indigent parents being an imperfect one, not enforced at common law, and the statute having prescribed the manner in which it is to be enforced and the extent of the penalty, the statute remedy is the only one to be resorted to." In England and in many of the American states there are statutes declaring this obligation, and providing how it shall be enforced—who may institute proceedings for that purpose, the court which shall have jurisdiction, etc. The main purpose of the statutes seems to be to protect the public from the burden of supporting poor people who have children able to support them. Our statutory provisions on the subject are very meager, and are all contained in section 206 of the Civil Code, which is as follows: "It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessities previously furnished to such parent is binding." Counsel

discusses somewhat elaborately the meaning and effect of this section—what right it gives, who may bring an action under it, what court has jurisdiction, whether there is not a fatal absence of any procedure, etc. The only case in point, under a statute similar to ours, that has been cited, is *McCook County v. Kammoss*, 7 S. Dak. 558, 58 Am. St. Rep. 854, 64 N. W. 1123, 31 L. R. A. 461. In that case the county, having supported an indigent father, brought suit against his children to recover for the amount which the county had already expended for such support, and also to recover for his future support; and the court held that the county could recover for the amount already expended, but that under the statute there was no procedure for enforcing future support. We have referred to these questions because they are interesting, and because they should be thoroughly considered in any future cases which may arise under said section 206. But it is not necessary to pass upon them definitely here, or to determine whether *McCook County v. Kammoss* was properly decided, because we think that the case at bar does not give the plaintiff a right to recover under any reasonable construction ¹⁴³ of the section, and that defendant's motion for a nonsuit should have been granted. The plaintiff has three children other than defendant—Mrs. Perkins, Mrs. Germaine, who lives in Seattle, and a son who has not been heard from in several years. Mrs. Perkins testified as follows: "My mother is living with me, and I am supporting my mother. I have supported my mother. This sister in Seattle sends five dollars or ten dollars or fifteen dollars, once a month for the last two years. Otherwise, my mother has been entirely supported and cared for and protected by me." It is apparent, therefore, that plaintiff, being supported by her other children, and there being no threat of a withdrawal of such support, is in no condition to demand support from defendant. She is demanding from defendant what she is already receiving from another. For instance, what is the judgment of one hundred and forty-three dollars and thirty cents for? Evidently not for her support, but for an amount of money independent of and in addition to the support which she had already received. It may be that her other children, having supported her, may maintain an action against defendant for her proportionate contributive share of such support; but that question is not here presented. A mother being sup-

ported by one child cannot maintain an action against another child for another support. For this reason the judgment in the case at bar cannot be sustained.

The judgment appealed from is reversed.

Henshaw, J., and Lorigan, J., concurred.

OBLIGATION OF CHILD TO SUPPORT PARENT.

I. Is Purely Statutory, 134.

II. Proceedings under Statutes, 135.

I. Is Purely Statutory.

The cases are agreed that at common law there is no legal or moral obligation on the part of a child to support a parent, which can be enforced by an action at law: *Town of Waterbury v. Hurlburt*, 1 Root, 60; *Gilbert v. Lynes*, 2 Root, 168; *Stone v. Stone*, 32 Conn. 142. A son of sufficient ability is under no legal obligation to pay for past expenditures made for the relief of an indigent parent: *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79.

As was well decided in the principal case, at common law there was no legal obligation on the part of a child to support his parent, and such obligation depends entirely upon statute: *Duffy v. Yordi*, 149 Cal. 140, ante, p. 125, 84 Pac. 838, 4 L. R. A., N. S., 1159. The obligation of a child to support his infirm, destitute or aged parent is established by and rests only in statutory provisions: *Dawson v. Dawson*, 12 Iowa, 512. There is no common-law obligation by which a child is liable to support an infirm and indigent parent, but the liability of the child is created solely by statute: *Edwards v. Davis*, 16 Johns. 281.

As there is no common-law obligation by which a child is liable to support an infirm and indigent parent, and such liability is created solely by statute, the law does not imply a promise from the child to pay for necessities furnished without his special request to an indigent parent: *Edwards v. Davis*, 16 Johns. 281; *Belknap v. Whitmire*, 43 Or. 75, 72 Pac. 589. But a child may be charged in any event for necessities furnished to his parent at his request, but such request must be proved, and cannot be inferred from the natural duty of relieving and supporting a needy parent: *Lebanon v. Griffin*, 45 N. H. 558; *Belknap v. Whitmire*, 43 Or. 75, 72 Pac. 589.

When there is no legal obligation either under the common law or the statutes of a state, imposed upon a son to support his parents, he cannot be charged for necessities furnished them, unless they are furnished at his special instance and request: *Becker v. Gibson*, 70 Ind. 239. If, however, one of several children furnishes support to a parent at the request of the others, they will become liable therefor: *Stone v. Stone*, 32 Conn. 142.

It has even been decided that the statutory liability is not a sufficient consideration in law to support a promise by the child to pay,

for past expenditures made by a third person for the support of the parent of such child: *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79; *Loomis v. Newhall*, 15 Pick. 159; *Belknap v. Whitmire*, 43 Or. 75, 72 Pac. 589. An express promise by a son to pay for past expenditures by a third person for the support of a parent is not binding as a moral obligation, and is not a sufficient consideration to sustain a promise when a good or valuable consideration has not once existed: *Dawson v. Dawson*, 12 Iowa, 512.

II. Proceedings Under Statutes.

In many of the American states there are statutes declaring an obligation on the part of the child to maintain his indigent parent to the extent of the child's ability, and providing how it shall be enforced, who may institute proceedings for that purpose, and the courts which have jurisdiction, together with other matters of procedure. The main purpose of such statutes seems to be to protect the public from the burden of supporting poor people who have children able to support them, and it is generally maintained that such obligation can only be enforced in the mode pointed out by the statute: *Duffy v. Yordi*, 149 Cal. 140, ante, p. 125, 84 Pac. 838, 4 L. R. A., N. S., 1159; *Lebanon v. Griffin*, 45 N. H. 558; *Gray v. Spaulding*, 58 N. E. 345; *Edwards v. Davis*, 16 Johns. 281.

The statutory procedure provided for enforcing the duty thus enjoined is exclusive, and the child cannot be held liable except in the manner provided, and it is generally held that the statutory liability is not a sufficient legal consideration to support a promise to pay for past expenditures made by a third person for such purpose: *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79; *Belknap v. Whitmire*, 43 Or. 75, 72 Pac. 589. But if a statute imposes a duty upon "the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability," a county which has, under the direction of the law, furnished necessities to an indigent and helpless father, may recover therefor in an action against the children whose duty it was to furnish them, and whose neglect or refusal so to do made it necessary for the county to furnish such necessities, but a court would have no authority to render a judgment requiring such children to undertake the future support of their father where the statute is silent as to the means of enforcing such duty as to future maintenance: *McCook Co. v. Kammos*, 7 S. Dak. 558, 58 Am. St. Rep. 854, 64 N. W. 1123, 31 L. R. A. 461.

Some of the statutes, however, providing a mode of compelling the children of a pauper to contribute to his support, relate solely to a provision for future and not to compensation for past support, and recovery can be had only in the manner pointed out by them: *Stone v. Stone*, 32 Conn. 143.

Without a special request to a third person, a son cannot be charged for the support of a parent standing in need of relief and necessities, except in compliance with the terms of the statute relative to the support of the poor, but the liability of the child for the support of his parent does not depend upon his residence nor on the settlement of the parent: *Lebanon v. Griffin*, 15 N. H. 558.

A statute empowering a town, that performs its duty of relieving a needy parent, to enforce a statutory liability of his or her children does not authorize a volunteer to enforce it: *Gray v. Spaulding*, 58 N. H. 345. These statutes do not authorize a volunteer who has furnished relief to an indigent parent to maintain an action therefor against his child as upon an implied contract arising merely from the moral duty which the child owes to support his parent: *Belknap v. Whitmore*, 43 Or. 75, 72 Pac. 589.

Under the Iowa statute the son of a poor person is liable for his support to the county or to any citizen who humanely takes care of him, and the county may pursue its remedy against such son, and waive its remedy against the poor father's wife, who is occupying a homestead, provided that because of the cruelty and violence of such son his father is unable to live on the homestead or assert his claim to the property: *County of Jasper v. Osborn*, 59 Iowa, 208, 13 N. W. 104.

Statutes of the nature under consideration in this note do not convert the moral obligation to support indigent parents into an absolute legal duty on the part of the child until the court has found the necessity for aid, and the ability to aid, and has prescribed to what extent the aid shall be furnished, but the mere imposition of such statutory duty does not give the person bound the right to determine the place where the support shall be furnished: *Condon v. Pomroy-Grace*, 73 Conn. 607, 48 Atl. 756, 53 L. R. A. 696.

FITTS v. SOUTHERN PACIFIC COMPANY.

[149 Cal. 310, 86 Pac. 710.]

JURY TRIAL, Challenge for Bias.—If a person under examination respecting his qualification as a juror in a case declares that he has long entertained a prejudice against cases of that class, which, if accepted as a juror, it would take strong and positive evidence to remove, he is not fair and impartial, and a challenge for actual bias should be sustained, especially if he states that he would not be willing, if he were the plaintiff, to have his cause tried by a juror in the same frame of mind as himself. (p. 135.)

William J. Herrin, for the appellant.

P. F. Dunne, for the respondent.

310 LORIGAN, J. Plaintiff was injured in a collision with one of the trains of defendant while driving across the railroad tracks on Treat avenue, in the city of San Francisco, and brought this action to recover damages. The verdict was for defendant, and from an order denying his motion for a new trial plaintiff appeals.

Several grounds are urged for a reversal, only one of which is of sufficient importance to merit particular consideration. It is insisted that the court erred in disallowing the challenge of plaintiff to a juror—C. G. Young—interposed on the ground (Code Civ. Proc., sec. 602, subd. 7) that his examination disclosed the existence of a state of mind evidencing bias against the plaintiff. The testimony of the juror given **311** upon his voir dire showed that while then employed as a hardware manufacturing agent, he had in former years been a purchasing agent for a railroad company in Arizona—the Arizona and South West Railroad Company—and as such had then some dealings with defendant; that he had probably read of the facts of the case in the papers, but had no present recollection of them; that he was acquainted with some of the officials of the defendant corporation—just a casual acquaintance. His examination from this point then proceeded:

“Q. Would your acquaintance have any influence with you as a juror in this case? A. I think not, if the proof was strong enough.

“Q. When you say, ‘If the proof was strong enough,’ what do you mean by that? A. I mean that there are a good many of these accidents probably caused by the negligence of the parties injured.

“Q. Would you go into the jury-box with a bias in favor of the defendant in a case of this kind? A. Without any testimony, yes, sir.

“Q. And it would take testimony to remove that feeling? A. I would not render a verdict without strong and positive testimony.

“Q. Would you not go into the jury-box here with that feeling in favor of the defendant? A. Without proof, yes, sir.

“Q. And you have that feeling now? A. I have had it for many years.”

Here counsel for the plaintiff interposed his challenge. On examination by the attorney for the defendant the juror continued:

"Q. If there was no evidence introduced in this case at all, you would give a verdict for defendant? A. Yes, sir.

"Q. The plaintiff has to prove his case? A. Yes, sir.

"Q. You say you have some views upon the question of damage suits? You think that in a good many cases the damage is due to the negligence of the party himself? A. I have no doubt of it.

"Q. That is a general impression or deduction which you have from your experience? A. Yes, sir."

The attorney for the plaintiff here renewed his challenge on account of a feeling of bias and prejudice on the part of the juror, whereupon the court inquired: "Does he say he has a bias?

"Attorney for Plaintiff.—A bias in favor of defendant.

"The Juror.—No, sir. I believe a great many cases of that kind are through the negligence of the parties injured.

"Q. Are you in that frame of mind that you would be ³¹² willing to change places here with the plaintiff and be willing to accept him upon a jury in a case in which you yourself were the plaintiff, provided he was in the same frame of mind as yourself? A. I don't know whether I want to answer that question or not.

"Q. That is what I want to know. We are entitled to have a fair and impartial jury, and if you should in any way feel that you could not sit upon this case impartially, we want to know it. You are in that frame of mind that the plaintiff would have to make out an exceedingly strong case? A. Yes, sir, the proof would have to be ample.

"Q. Would you be willing, if he was in the same frame of mind you are, to have him try your case? A. Possibly not.

"Q. Why not? A. From my remarks you can judge, probably.

"Q. Have you ever expressed yourself as prejudiced against this class of cases? A. Yes, sir, I think I have. As I remarked to you before, that is all the prejudice I have. Railroad accidents—I believe, a great many of them are through their own carelessness.

"Q. You say you cannot answer that question as to whether you would be willing to change places with the plaintiff and have him try a case of yours, provided he was in the same frame of mind that you are? A. In answer to that I

will say that I would be perfectly honest in the case; and if the proof was ample, he would get my vote for a verdict. But I should require good proof.

"Q. What do you mean by good proof? A. Proof that satisfied me that he ought to have a verdict.

"Q. You say that you have expressed a bias or prejudice against this class of cases? A. I have spoken about them a great many times.

"Q. And you entertain that opinion still? A. I do."

We have produced the entire examination of the juror, because it is not very lengthy, and upon a fair consideration of it we are of the opinion that the challenge interposed should have been allowed. While the law does not guarantee to a litigant on the trial of the cause any particular kind of juror, it does guarantee to him a jury composed of persons who are wholly impartial as far as the particular merits of the suit they are required to try is concerned, and the juror Young was clearly not of the class so guaranteed. It is true that a general abstract bias which a juror may entertain to a class of litigation will not of itself disqualify him from trying ~~his~~ a cause, when it appears that, notwithstanding he entertains that feeling, he can set it aside, and can and will fairly and impartially decide the particular case solely upon the evidence and the instructions of the court: *Baker v. Borello*, 136 Cal. 166, 68 Pac. 591; *Graybill v. De Young*, 146 Cal. 421, 80 Pac. 618. This, however, is not the situation disclosed here. The prejudice the juror held against the class of actions in which that of the defendant fell was a fixed and abiding one; he entertained it as the result of personal observation and experience; had so entertained it for years, frequently expressed it, and still adhered to it. While the juror did not in express terms declare that, by reason of his general feeling of prejudice, his judgment in the particular case would be colored, still we think it is apparent from the consideration of his entire examination, that in weighing the evidence adduced on behalf of the plaintiff, his judgment would be prejudicially affected against him by reason of his bias against the class of actions to which his belonged. In effect this is what his testimony shows would be his mental attitude toward plaintiff's cause. He declared that he would go into the jury-box with a feeling of prejudice in favor of the defendant; that in the case at bar that prejudice would operate in favor

of defendant, and it would take strong and positive testimony to remove it.

In the face of these declarations, it would seem to be idle to claim that the juror was a fair and impartial one. No juror can be said to be so who enters upon the trial of a cause prejudiced against a class of actions to the extent that a litigant is required in a particular case falling within the class to overcome his prejudice by strong and positive evidence or any other kind of evidence.

The constitutional right to the trial of a case before an unbiased and unprejudiced jury is not afforded a party, when, over his protest, a juror is retained whose prejudice requires such litigant to support his cause, not simply by a preponderance of evidence, but by evidence which must preponderate to an extent so as to overcome the antecedent prejudice with which the juror enters upon the trial of the cause.

Aside from this, when asked if he would be willing to have a case in which he was plaintiff tried by a juror in the same frame of mind as himself, he was uncertain as to whether ³¹⁴ he wanted to answer the question or not, that "possibly not," and when asked why, told counsel for plaintiff that he could probably judge from his remarks why not. Of course, the only judgment which could be satisfactorily arrived at from his remarks was that he would not want his case tried by a juror entertaining the same prejudice with which he previously declared he would go into the jury-box to try the cause of plaintiff.

As we have said, it has been held that a juror is not disqualified by reason of general bias entertained against a class of actions, when it appears from his testimony that he can lay aside that prejudice, and, uninfluenced by it, try the cause at issue solely upon the evidence and the instructions of the court as to the law. In the case at bar, Mr. Young stated on his examination that he would be perfectly honest in the case, and if the proof were ample would vote for a verdict, and it is insisted this was the equivalent of stating that he would try the cause fairly upon the evidence and under the law as declared by the court.

Whether this was the meaning he intended to convey is simply matter of conjecture. He nowhere definitely declared any such intention. That the juror was honest and candid in all his answers is beyond question, and that he honestly

entertained a prejudice to the extent, and in the manner, that he declared it would influence him in considering the case of plaintiff, is also beyond the question. No doubt such a juror would, to the best of his ability, try the cause upon the evidence and instructions of the court—in fact, there would be nothing else upon which he could try it—but he would still try it under the influence of the prejudice he honestly entertained, and which he nowhere announced either his ability or intention to divest himself of. It is to be observed, too, that in stating that he would be perfectly honest in the case, he at the same time declared that he meant thereby that if the proof was ample he would vote for a verdict. Several times during his examination he referred to the degree of proof which he would require before he would return a verdict for plaintiff. He would require “strong and positive testimony,” “ample proof,” “good proof.” These answers as to the amount of proof he would require, considered in connection with the questions to which they were ³¹⁵ responsive, and in view of the prejudice he entertained, clearly showed that he would require in the class of actions to which plaintiff’s belonged stronger proof than he would consider necessary were the action of another character. While generally no exception could be taken to the answer of the juror that he would require ample proof, yet what this particular juror meant by ample proof is apparent from his answer to the interrogatory: “You are in that frame of mind that the plaintiff would have to make an exceedingly strong case? A. Yes, sir, the proof would have to be ample.” While his answer to this particular question of itself clearly indicated what the juror considered would be the ample proof under which he would return a verdict—that it would have to be proof making out an exceedingly strong case—it is, as we say, quite apparent from all the rest of his examination on this subject—that he would, on account of his prejudice, require stronger proof in the case he was about to try than if it were an action of another kind. This requirement on his part of stronger proof was, of course, perfectly consonant with his declared prejudice against such actions, but the law recognizes no such requirement, and a juror who demands it cannot be classed as a fair and impartial juror. Aside from the fact that a plaintiff may recover upon a *prima facie* case made, yet taking for the purpose of illustration the ordi-

nary action for damages where the evidence is conflicting, it goes without saying that if jurors could be deemed fair and impartial who entertain the prejudice and thereby require the degree of proof that the juror Young required, verdicts for plaintiff would be extremely rare.

The mental attitude of this juror, we think, was so apparently affected by bias against actions brought to recover from railroad companies for personal injuries as to influence his judgment prejudicially in the consideration of the cause of plaintiff, and for that reason the challenge to him should have been allowed, and it was error not to have granted it.

The other grounds urged for reversal, consisting of alleged erroneous rulings of the court as to the admissibility of evidence, are without force.

Complaint is made as to two of the instructions given. They announce correct principles of law, but in view of a new trial we are inclined to think that the use of the ³¹⁸ expression "In a case like this," found in one of them, is open to the criticism that the jury might imply from its use that reference was being made to the case at bar, rather than to the class of damage cases to which that of plaintiff belongs, as that term was doubtless intended to be used. This objection can, however, readily be obviated should the same instruction be again asked.

For the reasons indicated relative to the error of the court in disallowing the challenge to the juror Young, the order denying the motion of plaintiff for a new trial is reversed, and the cause remanded that a new trial may be had.

Henshaw, J., and Beatty, C. J., concurred.

Hearing in bank denied.

A Juror is not Disqualified from trying a person accused of a particular crime, according to *Higgins v. Minaghan*, 78 Wis. 602, 23 Am. St. Rep. 423, by the fact that he has a prejudice against such crime. See, further, *State v. Van Wye*, 136 Mo. 227, 58 Am. St. Rep. 627; note to *Commonwealth v. Brown*, 9 Am. St. Rep. 747.

IN RE SPENCER.

[149 Cal. 396, 86 Pac. 696.]

CONSTITUTIONAL LAW—Presumption of Constitutionality, and of Facts Required to Support a Statute.—The presumption is that an act of the legislature is constitutional, and when this depends upon the existence or nonexistence of some fact, or state of facts, the determination thereof is primarily for the legislature, and the courts will acquiesce in its decision, unless error clearly appears. (p. 139.)

CONSTITUTIONAL LAW—Class Legislation, When Proper.—Minors are peculiarly entitled to legislative protection, and form a class to which legislation may be exclusively directed without falling under the constitutional prohibition of special legislation and unfair discrimination. (p. 140.)

CONSTITUTIONAL LAW—Child Labor, Prohibition of in Certain Occupations Only.—A statute prohibiting the employment and laboring of children under fourteen years of age in certain designated occupations will not be held to be unlawful class legislation on the ground that there are other employments not falling within the prohibited classes, which are equally hurtful to children. The decision of the legislature that the specified occupations are more injurious to children than other occupations not mentioned, and that they constitute practically all the injurious occupations in which children are employed at all is not so manifestly incorrect as to justify the court in declaring it unfounded and the law consequently invalid. (p. 141.)

CONSTITUTIONAL LAW—Child Labor Statute.—The fact that a statute prohibiting the employment of children under fourteen years of age contains a proviso permitting such employment, if either of its parents makes a sworn statement to the judge of the juvenile court that the child is more than twelve years of age, and that its parent or parents are unable, from sickness, to labor, such judge may, in his discretion, issue a permit allowing the child to work for a time specified therein, does not render the statute unconstitutional. It does not create a discrimination against orphan and abandoned children. (p. 142.)

CONSTITUTIONAL LAW—Child Labor Statute—Exception During Vacation in Schools.—A statute forbidding the employment and working of children in designated occupations may contain a provision permitting such employment, as to children more than twelve years of age, during the time of regular vacations, upon a permit from the principal of the school attended by the child during the term next preceding such vacation. This does not give the principals of public schools the exclusive right to issue permits. (p. 143.)

CONSTITUTIONAL LAW—Separating the Invalid from the Valid Parts of a Statute.—Those portions of the statute relating to the employment of children declaring that no child under sixteen years of age shall work at any gainful occupation during the hours the public schools are in session, unless such child can read English at sight and write simple English sentences, or is attending night school, and that no minor under sixteen shall work in any mercantile institution, office, laundry, manufacturing establishment or workshop, between 10 o'clock in the evening and 6 o'clock in the morning, are

separable and independent provisions, and might be unconstitutional without rendering the whole statute invalid. (p. 143.)

CONSTITUTIONAL LAW—Child Labor Statutes—Special Provision Concerning Illiterate Children.—A statute regulating and forbidding the employment of children may contain special provisions relating to those who are unable to read and write English, and forbidding their employment when under sixteen years of age, unless they attend night school. (p. 143.)

CONSTITUTIONAL LAW—Child Labor Statutes—Exception in Favor of Agricultural, Viticultural, Horticultural or Domestic Labor.—A statute regulating and forbidding the employment and laboring of children under designated ages may exempt agricultural, viticultural, horticultural or domestic labor, because it is generally carried on at home and under the care and supervision of parents or those occupying the place of parents. (p. 144.)

W. F. Williamson, for the petitioner.

W. H. Langdon, district attorney, R. W. Harrison, assistant district attorney, and John M. Ehleman, for the respondent.

³⁹⁹ SHAW, J. The petitioner was arrested and confined upon a charge of violating sections 2 and 4 of the act of February 20, 1905, regulating the employment and hours of labor of children, and prohibiting the employment of illiterate minors and of minors under certain ages: Stats. 1905, pp. 11, 14. The return to the preliminary writ shows that the petitioner was arrested and taken into custody upon four several complaints, relating to four different children, each complaint charging him with employing a child under fourteen years of age in the workshop and boiler-room of a steamer, the child not then having a permit to work from the judge of the juvenile court of the county, and the time of such employment not being the time of the vacation of the public schools.

The second clause of section 2 of the act provides that no child under fourteen years of age shall be employed in any mercantile institution, office, laundry, manufactory, workshop, restaurant, hotel, or apartment house, or in the distribution or transmission of merchandise or messages; provided, that upon the sworn statement of the parent that the child is over twelve years of age and that the parent or parents are unable, from sickness, to labor, the judge of the juvenile court, in his discretion, may issue a permit allowing such child to work for a specified time; and provided further, that during the time of the regular vacation of the public schools of the city or county, any child over twelve years of age may work

at any of the prohibited occupations, upon a permit from the principal of the school attended by the child during the immediately preceding term. Section 4 of the act declares that a violation of any of the provisions of the act shall be a misdemeanor. The complaints charge violations of these provisions.

Several objections on constitutional grounds are made to the validity of the act. It is claimed that it is a special law for the punishment of crime, where a general law could be made applicable, and therefore contrary to subdivisions 2 and 33 of section 25 of article 4 of the constitution of California; that ⁴⁰⁰ it is not of uniform operation, but is discriminatory, and hence in conflict with sections 11 and 21 of article 1; and that it would deprive persons of the right to acquire and possess property, thus violating section 1 of article 1 of the state constitution and the fourteenth amendment to the constitution of the United States.

The presumption always is that an act of the legislature is constitutional, and when this depends on the existence or non-existence of some fact, or state of facts, the determination thereof is primarily for the legislature, and the courts will acquiesce in its decision, unless the error clearly appears: *Bourland v. Hildreth*, 26 Cal. 161; *University v. Bernard*, 57 Cal. 612; *In re Madera Irr. Dist.*, 92 Cal. 296, 2 Am. St. Rep. 106, 28 Pac. 272, 675, 14 L. R. A. 755; *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496; 1 *Tiedeman on Police Power*, p. 10, note; *Cooley on Constitutional Limitations*, 7th ed., 228. "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule": *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496. "The delicate act of declaring an act of the legislature unconstitutional and void should never be exercised unless there is a clear repugnancy between the statute and the organic law. . . . In a doubtful case the benefit of the doubt is to be given to the legislature; but it is to be remembered that the doubt to which this rule of construction refers is a reasonable doubt as distinguished from vague conjecture or misgiving": *Bourland v. Hildreth*, 26 Cal. 161.

From their tender years, immature growth, and lack of experience and knowledge, minors are more subject to injury from excessive exertion, and less capable of self-protection, than adults. They are therefore peculiarly entitled to legislative protection, and form a class to which legislation may be exclusively directed without falling under the constitutional prohibition of special legislation and unfair discrimination.

The first objection to the validity of the part of the section above stated is that it is discriminatory and special because it does not prohibit such employment of minors in all occupations, but only in those specifically mentioned; that work at ⁴⁰¹ other places, of which saloons, barber-shops, railroads, ferries, and warehouses are specified by counsel as instances, would be equally injurious, and that in order to be general and uniform they should be included in the prohibition. The objection is twofold: 1. That the legislation constitutes an unfair discrimination against the particular trades mentioned; and 2. That it unduly and without reasonable cause restricts the right of minors to work at any and every occupation in which they may wish to engage. There is nothing in the act to indicate a purpose on the part of the legislature to make use of the laudable object of protecting children as a mere pretense under which to impose burdens upon some occupations or trades and favor others. It appears to have been framed in good faith and for the purpose of promoting the general welfare by protecting minors from injury by overwork and by facilitating their attendance at schools. The legislature may undoubtedly forbid the employment of children under the age of fourteen years at any regular occupation, if the interests of the children and the general welfare of society will be thereby secured and promoted. The power to forbid their employment in certain occupations and not in all depends on the questions, whether or not any appreciable number of children are employed in the callings not forbidden, and whether or not those callings are injurious to them, or less injurious than those forbidden. If certain occupations are especially harmful to young children, and others are not so, there can be no serious doubt that it is within the power of the legislature to forbid their employment in one class and permit it in the other. The difference in the results would justify the classification with a view to the difference in the legislation. Also, if children are employed in certain occupations to their injury, and are not

employed at all in others, or so infrequently that the number is inappreciable and insignificant, the occupations regularly employing them have no ground to complain of discrimination. They compose the entire class to which the legislation is directed, the class which causes the injury which is to be prevented. And upon the facts assumed, neither the children nor the persons engaged in the occupations in which they are not employed would be affected by the prohibition as to other occupations. The preliminary questions, as to the effect of the specified occupations on the children, and as to the number of ⁴⁰² children engaged therein, are questions of fact for the legislature to ascertain and determine. It has determined that the facts exist to authorize the particular legislation. If any rational doubt exists as to the soundness of the legislative judgment upon the existence of the facts, that doubt must be resolved in favor of the legislative action, and the law must accordingly be held to be valid in these respects. The specifications of forbidden callings are broad and comprehensive. Even of those which, as counsel assert, are omitted from the classification, we cannot say that a saloon is not a "mercantile institution," it being a place where merchandise is sold; nor that a barber-shop is not a "workshop," it being a place where a handicraft is carried on; nor that ferries and railroads are not engaged in the "distribution or transmission of merchandise or messages." At all events, in view of the rule that a statute must be liberally construed, to the end that it may be declared constitutional rather than unconstitutional (*People v. Hayne*, 83 Cal. 117, 17 Am. St. Rep. 211, 23 Pac. 1, 7 L. R. A. 348; 26 Am. & Eng. Ency. of Law, 640), we would not give the description of forbidden occupations this narrow construction in order to make the law invalid. The decision of the legislature that the specified occupations are more injurious to children than other occupations not mentioned, and hence the subject of special legislation, and that they constitute practically all the injurious occupations in which children are employed at all, and therefore the only cases in which regulation is needed, is not so manifestly incorrect, not so beclouded with doubt concerning its accuracy, as to justify the court in declaring it unfounded and the law consequently invalid.

There is a proviso to this clause of the section, to the effect that if either parent of such child makes a sworn statement to the judge of the juvenile court of the county that the child

is over twelve years of age, and that the parent or parents are unable, from sickness, to labor, such judge, in his discretion, may issue a permit allowing such child to work for a time to be specified therein. There is no force to the objection that this discriminates against orphans and abandoned children. The exception allowed by the proviso is not made for the direct benefit of the child, but for the sick parent. It is a burden put upon the child because of the special necessity of his case which justifies the different provision respecting him. ⁴⁰³ The legislature deems the necessity of allowing the child to work to aid in the support of the sick parent sufficient to outweigh the benefits which would otherwise accrue from the education and protection of the child during such inability. If there are no parents whose necessities the child's labor could alleviate, the reason for this exception is wanting. The provision seems a reasonable one in view of the conditions upon which alone it can apply.

There is a further proviso or exception, to the effect that any child over twelve years old may work at the prohibited occupations during the time of the regular vacations of the public schools of the city or county, upon a permit from the principal of the school attended by the child during the term next preceding such vacation. This does not, as counsel contends, give the principals of the public schools the exclusive power to issue the contemplated permits. Its true meaning is that the permit is to be given by the principal of the school which the child has attended, whether the school is public or private, but that it can extend only to the time of the public school vacation. This act was approved February 20, 1905. Its provisions relating to attendance upon schools, and those of section 1 of the act of March 24, 1903 (Stats. 1903, p. 388), with the amendment of March 20, 1905 (Stats. 1905, p. 388), to said section 1, must be considered together. The act of 1903, in effect, requires all children to attend, either the public schools or a private school, during at least five months of the time of the sessions of the public schools. The amendment of March 20, 1905, extends the time of such compulsory attendance so as to embrace the whole period of the public school session. Therefore, if the parents, guardians, or custodians of a child choose to send it to a private school, it must attend thereon at least during the time the public schools are in session. A permit may then be obtained for it to work during

the vacation of the public schools, if its interests or necessities so require, without subjecting it to conditions substantially different from those affecting the children attending the public schools. There is no discrimination. The legislature has the power to make such reasonable regulations as these with respect to the time of the vacations of schools, whether public or private, in the interest of the public welfare and the welfare of the children.

404 The last clause of section 2 declares that no child under sixteen years of age shall work at any gainful occupation during the hours that the public schools are in session, unless such child can read English at sight and write simple English sentences, or is attending night school. The first clause of section 2 provides that no minor under sixteen shall work in any mercantile institution, office, laundry, manufacturing establishment, or workshop, between 10 o'clock in the evening and 6 o'clock in the morning. Section 5 of the act further provides that nothing in the act is to be construed to prevent the employment of minors at agricultural, viticultural, horticultural, or domestic labor, during the time the public schools are not in session, or during other than school hours. The petitioner's contention with respect to the first and last clauses of section 2 is that they constitute such important parts of the statute that it cannot be presumed that the legislature would have adopted the other parts thereof if it had been aware of the invalidity of these particular provisions, and hence the whole act must fall. We cannot accede to this proposition. They are separable and independent provisions and are not so important to the entire scheme as to justify us in concluding that the legislature would have refused to adopt the other parts without these, and thereby to declare the entire statute invalid.

Nor can it be conceded that these provisions are invalid. The principles already discussed apply with equal force to the first clause of the section. The proviso concerning illiterate children is a reasonable regulation to prevent those having control of such children from working them to such an extent as to hinder them from acquiring, or endeavoring to acquire, at least the beginning of an education before arriving at the age of sixteen years. The exemption of domestic labor and the several kinds of farming from the operation of the act is not an unreasonable discrimination. Such work is generally car-

ried on at home and as a part of that general home industry which should not be too much discouraged, and it is usually under the immediate care and supervision of the parents or those occupying the place of parents, and hence is not liable to cause so much injury. These circumstances distinguish them from the prohibited industries and is a sufficient reason for the exemption.

⁴⁰⁵ We find no reasonable ground for declaring the law invalid.

The petition is denied and the petitioner remanded to the custody of the officer.

Sloss, J., Angellotti, J., Lorigan, J., and Beatty, C. J., concurred.

McFARLAND, J., Concurring. I concur in the judgment, and in what is said by Mr. Justice Shaw in his opinion; but I do not concur in some of the quotations which he makes from other cases, and particularly in that quotation in which it is stated that the presumption in favor of the validity of a statute "continues until the contrary is shown beyond a rational doubt." This is, in my opinion, too strong a statement of the rule.

The Constitutionality of Statutes which, with the avowed purpose of protecting the health and promoting the welfare of certain classes of employes, place limitations upon the right of employers and employes freely to contract with each other, is discussed in the recent cases of *Starne v. People*, 222 Ill. 189, 113 Am. St. Rep. 389; *Ex parte Kair*, 28 Nev. 127, 113 Am. St. Rep. 817; *People v. Marcus*, 185 N. Y. 257, 113 Am. St. Rep. 902; *People v. Lochner*, 177 N. Y. 773, 101 Am. St. Rep. 773.

GOLDBERG, BOWEN & CO. v. STABLEMEN'S UNION,
LOCAL No. 8760.

[149 Cal. 429, 86 Pac. 806.]

BOYCOTTING, Injunction Against.—An injunction will issue against members of a local union of stablemen to prevent their continuing a boycott carried on by them by means of pickets or representatives in front of complainant's place of business, carrying placards, for the purpose and having the effect of intimidating employes and patrons of complainant from entering his place of business. (p. 147.)

CONSTITUTIONAL LAW—Statutes Undertaking to Forbid an Injunction Against Boycotting.—If a statute may be construed as prohibiting the courts from enjoining acts in the nature of boycotting, and which are done for the purpose and have the effect of intimidating complainant's patrons and employes from entering his place of business, such statute must be pronounced void as violative of his right to acquire, possess, enjoy and protect property. (p. 150.)

INJUNCTION Against Boycotting, When too Comprehensive.—An injunction against members of a stablemen's union engaged in an unlawful boycott must not assume to restrain them from mere expressions of opinion as to complainant and his business, which, at most, consist of slander which could not be reached in the suit in equity, nor from doing other acts not connected with or incidental to the main acts and therefore acts properly enjoined, and the judgment will be modified on appeal by striking out the matters properly enjoined. (pp. 150, 151.)

Henry B. Lister, for the appellants.

Bush Finnell, for the respondent.

⁴²⁹ **McFARLAND, J.** This is an action for injunction to restrain the defendants, who are members of the Stablemen's Union, Local No. 8760, from doing certain alleged damaging acts to plaintiff, which acts are mostly connected with what is called a "boycott" of plaintiff's business by the defendants. A demurrer on the general ground that the complaint does not state facts sufficient to constitute a cause of action, and also on some special grounds, was interposed by defendants. The demurrer was overruled; and defendants declining to ⁴³⁰ answer, judgment was rendered for plaintiff. From this judgment defendants appeal.

We see no merits in the special grounds of demurrer, and do not deem it necessary to specially notice them. The main question is whether the complaint states facts sufficient to constitute a cause of action.

The plaintiff was a corporation, and at the time mentioned in the complaint was engaged, in its places of business, "in selling groceries and general household goods to various patrons and customers with whom it had established business relations, and with the public in general, upon whose patronage and trade plaintiff depended for its existence." Its places of business were No. 432 Pine street, and No. 232 Sutter street, in the city and county of San Francisco. It also had a place at No. 965 Sutter street which was used as a stable, in which the horses and vehicles used in carrying on its business were kept and cared for. It is averred that in September, 1904, defendants notified plaintiff at its place of business, No. 432 Pine street, that plaintiff must continue to pay certain wages to its employes at said stable, or defendants would order a strike and cause all of the union stablemen employed by plaintiff, of whom there were many, to quit plaintiff's employment. On or about October 3, 1904, plaintiff notified defendants that it would not comply with said demand, but would exercise the right to pay its said employes what employes in the same kind of work were receiving from their employers. It is further averred that thereupon, and on or about said October 3, 1904, "the said defendants entered into a combination, confederation and conspiracy, for the purpose of coercing plaintiff to subject the control of its business to the said Stablemen's Union, Local No. 8760, and the members thereof, by inaugurating and declaring a boycott on the said business of said plaintiff, and thereupon and on the third day of October, 1904, in pursuance of said unlawful combination, confederation and conspiracy, placed and continue to place, representatives or pickets in front of the places of business of plaintiff, carrying placards or transparencies which are false in fact, bearing the words and figures as follows, to wit: 'Unfair firm; reduced wages of employes 50c per day. Please don't patronize.' "

It is further averred "that subsequent to the third day of ⁴³¹ October, 1904, and since the said boycott so ordered as aforesaid by said Stablemen's Union, Local No. 8760, the said Stablemen's Union and the members thereof have conspired, confederated and combined among themselves and with other parties to the plaintiff unknown, and will continue to conspire, confederate and combine among themselves and with other parties to the plaintiff unknown, to provide means and

methods for impeding the plaintiff in the conduct and transaction of its aforesaid business, to interfere with employes, not members of said union, employed by said plaintiff, who are engaged in a line of work other than that of stablemen, and to greatly impede and obstruct the plaintiff in carrying on its aforesaid business, and by threats and intimidations by reason of maintaining pickets or representatives in front of the said places of business of plaintiff, compel and force said employes engaged in other lines of work than that of stablemen to quit the services of plaintiff."

It is further averred "that the defendants in furtherance of their said combination, confederation and conspiracy, have placed and continue to place in front of the aforesaid places of business of plaintiff said representatives or pickets, and that said representatives or pickets are for the purpose of not only inducing but intimidating the nonunion employes of plaintiff to quit its service, and are for the purpose of intimidating patrons and customers of plaintiff who may desire or attempt to do business with the said plaintiff." It is further averred that by means of said representatives and pickets placed in front of plaintiff's said places of business bearing the placards and transparencies above described, "many patrons and customers of said plaintiff have been and now are frightened and intimidated from entering the places of business of plaintiff." It is further averred "that the said pickets or representatives are still engaged in the acts herein complained of, and threaten to continue the commission of the acts, and each of the said acts, to the irreparable damage and injury of this plaintiff, and that by reason of and by consequence of the acts herein set forth, plaintiff has already been damaged in the sum of five hundred dollars, and if the said acts still continue, and the said defendants threaten to continue, the said acts as hereinbefore alleged, plaintiff will be irreparably damaged, and his business will be greatly injured, if not destroyed." ⁴³² It is further averred that defendants and each of them are financially irresponsible and unable to respond in damages to any judgment against them on account of the commission of the acts alleged to have been committed and threatened to be committed by them.

We think that the complaint clearly states facts sufficient to constitute the cause of action alleged. It is not necessary here to undertake to define the limits within which a number

of persons conspiring for the purpose of injuring the business of another may legally do acts tending to accomplish that result. It is averred in the complaint that in the case at bar, and for the purpose above stated, and with intent to threaten and intimidate employes and patrons and customers of plaintiff, the said defendants do keep immediately in front of plaintiff's place of business, and threaten to so keep there, representatives and pickets bearing the placards and transparencies above set forth, and that by said means they have intimidated patrons and customers of plaintiff from entering said place of business, and will, if not restrained, continue to so intimidate the said patrons. It cannot be successfully contended that the said acts of defendants committed immediately in front of plaintiff's place of business as aforesaid, could not, in the nature of things, have had the effect of intimidating plaintiff's patrons, and as it is averred that they did have that effect, the fact of such intimidation must, for the purposes of this case, be considered as established. And such acts, having such effect, undoubtedly interfered with and violated plaintiff's constitutional right to acquire, possess, defend and enjoy property. In many cases cited in respondent's brief a "boycott" was enjoined without reference to the means used to carry it into effect; as, for instance, in *Oxley Stave Co. v. Coopers' etc. Union*, 72 Fed. 695, it was held that "A boycott by members of trades unions as assemblies (which term in law implies a combination to inaugurate and maintain a general proscription of articles manufactured by the party against whom it is directed) is unlawful and may be enjoined by a court of equity." But there is no necessity to go that far in the case at bar; here the alleged acts tended directly to intimidate customers, and did intimidate them. That in such a case the threatened acts will be enjoined has been frequently held. In *Allis Chalmers Co. v. Reliable* 433 *Lodge*, 111 Fed. 264, the court said: "That a conspiracy existed among a number of these officers and members to stop and thereby injure the business of complainant by intimidation and violence is evident. . . . These being the facts in the case, the law is clear and emphatic. The jurisdiction being established, is there any doubt as to whether the court should, in this case, grant the temporary injunction prayed for? I am clear there is not. As now presented, the court must grant the writ, in broad and unmistakable terms, com-

mensurate with the exigencies of the situation, as shown by the facts and evidence upon this proceeding. To do so will work no hardship, nor will it even hamper the actions of any law-abiding person. Indeed, no one without purpose to commit an unlawful act could be affected thereby." In *United States v. Haggerty*, 116 Fed. 510, the court said: "This court, however, has heretofore, upon repeated occasions, recognized the power of the court to issue injunctions in cases where there is a combination and conspiracy upon the part of any class of people to prevent them from interfering with the business of others." In *Frank v. Herrold*, 63 N. J. Eq. 443, 52 Atl. 152, the court said: "Now, then, I think it is quite clear from what I have said that these defendants had no right to use the means which are forbidden by the restraining order now brought in question to prevent these operatives from continuing to work for the complainants, and that in doing so they are inflicting an injury upon the complainants, in respect to their private rights, precisely the same as they would if they broke, interfered with or clogged the engine that drove their machinery, and that for such injury the complainants are entitled to a legal remedy by action. Now, this being so, the next question is, What right have the complainants here in this court asking for the restraining power of the court? Why, the answer to this is twofold: First, it is quite clear that the relief in damages to be recovered in an action at law is entirely inadequate. It is quite absurd to say that they can sue each of these persons, and recover damages against them in separate suits, for every little act which in the aggregate tends to result in an injury. And, in the second place, the injury is continuing and irreparable, and not capable of admeasurement according to legal principles. So that at law the remedy is entirely inadequate. It ⁴³⁴ is, therefore, a clear case for the interposition of a court of equity to exercise its preventive remedy, and that is the particular sphere at this day of a court of equity, as contradistinguished from a court of law." There are many other cases to the same effect decided in England, and in many of the American states. Appellants cite *Davitt v. American Bakers' Union*, 124 Cal. 99, 56 Pac. 775; but in that case it was merely held that the complaint was defective because it dealt wholly in "generalities, presumptions and conclusions," and stated no "specific overt acts" done for the purpose of

carrying out the alleged conspiracy. That case, therefore, does not apply to the case at bar, for here the specific acts are alleged.

Appellants make the bare statement, without argument, that "an injunction in this case is also specifically forbidden by Penal Code, page 581." The section of an act of the legislature there referred to is somewhat difficult of construction; but, in the first place, it cannot, in our opinion, be construed as undertaking to prohibit a court from enjoining the main wrongful acts charged in the complaint in this action; and, in the second place, if it could be so construed, it would to that extent be void because violative of plaintiff's constitutional right to acquire, possess, enjoy and protect property.

It is contended by appellants that the judgment rendered in this case is too comprehensive, and enjoins them from doing some acts which are not within the averments of the complaint, or within the principle, even if conceded to be correct, upon which the court below based its conclusion. We think that this contention must be sustained, to the extent at least as is hereinafter stated. Some parts of the judgment seem to enjoin appellants from the mere expression of an opinion at any time or place as to plaintiff and its business, which would, at the worst, consist only of slander, which could not be reached in this form of action, and seem to restrain them from doing other things which do not appear to be connected with or incidental to the main acts and threatened acts done at and in front of plaintiff's said places of business as above stated. The judgment must, therefore, be modified so as to eliminate those objectionable parts.

The judgment, after the first paragraph thereof, is amended ⁴³⁵ and modified so as to read as follows: "Now, therefore, it is ordered, adjudged and decreed that the Stablemen's Union, Local No. 8760 of San Francisco, T. F. Finn, T. J. White, and all and each of the defendants herein, and each of their officers, members, agents, clerks, attorneys, and servants be, and they are hereby enjoined and restrained from interfering with, or harassing or obstructing plaintiff in the conduct of its business at any of its said places of business No. 432 Pine street, No. 232 Sutter street, and No. 965 Sutter street in the city and county of San Francisco, state of California, by causing any agent or agents, representative or repre-

sentatives, or any picket or pickets, or any person or persons, to be stationed in front of or in the immediate vicinity of said places of business, with a placard or transparency having on it the words and figures as alleged in the complaint herein, or any placard or transparency (having words or figures) of similar import, and from, at said places of business, or in front thereof, or in the immediate vicinity thereof, by means of pickets or transparencies, or otherwise, threatening or intimidating any person or persons transacting or desiring to transact business with said plaintiff, or being employed at said place or places by the plaintiff." And as thus amended and modified the judgment will stand affirmed.

Shaw, J., Lorigan, J., Sloss, J., Angellotti, J., Henshaw, J., and Beatty, C. J., concurred.

Boycotting is the subject of a note to Gray v. Building Trades Council, 103 Am. St. Rep. 488. The subject is further considered, with special reference to conspiracies, in the recent cases of Franklin Union v. People, 220 Ill. 355, 110 Am. St. Rep. 248; Purrington v. Hinchliff, 219 Ill. 159, 109 Am. St. Rep. 203, and cases cited in the cross-reference note thereto. If a labor union attempts to injure a person in his business in order to coerce him into submission to the demands of such union, requiring him to furnish the capital and his business to be controlled in its essential features by such union, which is in no way responsible for the capital invested or the losses entailed, such attempt is a conspiracy, and equity will restrain such interference by injunction: Purvis v. United Brotherhood, 214 Pa. 348, 112 Am. St. Rep. 757. Strikes and strikers are discussed in the note to O'Neill v. Behanna, 61 Am. St. Rep. 706.

LEWIS v. OGRAM.

[149 Cal. 505, 87 Pac. 60.]

BOUNDARY, Agreement Undertaking to Establish What the Parties Know not to be Correct.—An agreement between coterminous owners, though in writing, undertaking to establish as a boundary between their lands a line which they know not to be the true boundary will not be enforced. If its object is to pass the title to land, it cannot be conceded that effect unless it contains apt words of conveyance. (p. 154.)

AGREEMENT to Establish Boundary, When Without Consideration.—An agreement purporting to establish the boundary between the lands of coterminous proprietors at a line where both know such boundary is not, and the result of which, if it is given effect, must be to transfer to the one lands which both know do not belong to him, is without consideration and inoperative. (pp. 155, 156.)

ESTOPPEL, When not Created by an Agreement Purporting to Establish a Boundary Line.—If two persons having the right to acquire title to adjoining tracts of public land, the boundary between which, as both know, has already been flagged by a government surveyor, but not finally located, enter into an agreement in writing purporting to establish such boundary at a line ten chains distant from the line so flagged, and to stipulate that one of them will not include in his filing any lands north of such line, nor the other in his filing any land south thereof, and each thereafter files upon and acquires title to the land he was entitled to acquire from the government, neither is estopped by such agreement from claiming all the land included in his patent. (p. 156.)

William G. Griffith, for the appellant.

B. F. Thomas, for the respondent.

506 SHAW, J. Lewis sued Ogram to recover damages for trespass on land alleged to be in his possession, described as the north half of the northwest quarter of the northwest quarter of section 23, township 5, range 28. Ogram filed a cross-complaint in the usual form to quiet his alleged title against the claims of plaintiff. Issue was joined upon the averments of the complaint and cross-complaint, respectively, and after a trial the court gave judgment for the defendant. Plaintiff appeals.

The southwest quarter of section 14 lies north of and adjoins the northwest quarter of section 23. The official United States survey of the boundary line between the sections was not completed until February, 1900. In April, 1897, Lewis was residing upon the southwest quarter of section 14, and Ogram was residing upon the northwest quarter of section 23, each claiming the right, under the United States land laws, to file a homestead claim upon his particular tract when open for entry. The location of the division line between the two tracts was at that time uncertain, but both parties supposed it to be about ten chains south of the true line as afterward surveyed and established. Lewis was occupying all that part of the actual northwest quarter of section 23, lying between this supposed line and the true line, embracing substantially the north half of said forty-acre tract, claiming and believing, until **507** August, 1898, that it was a part of the southwest quarter of section 14, and that it was covered by his entry. In August, 1898, the government surveyor, at Ogram's request and with the knowledge of Lewis, "flagged" a line through between the two sections, on or near the true line, and set a post at the common section corner thus located at the west end line. The court

finds that Lewis thereafter, until this action was begun, continued in peaceful and exclusive possession of the twenty acres of section 23 in controversy, "but with full knowledge that the said portion of section 23 was not covered by his filing." The finding also states that the "exact location of the dividing line between said homestead of the plaintiff and the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 23" was not known by either Lewis or Ogram until the official survey in February, 1900. In January, 1899, Lewis and Ogram orally agreed to establish a division line between their respective claims, and for that purpose measured ten chains south from the aforesaid line "flagged" by the surveyor, and, at that distance therefrom, built a fence at joint expense, as and for a division fence between their claims. On November 16, 1899, they executed the following agreement:

"Whereas there is a controversy between said parties hereto as to the boundary lines of their respective government claims including in part the northwest quarter of the northwest quarter of section 23 township 5 north range 28 west S. B. M. and whereas they are desirous of settling said controversy. Now therefore said parties do mutually agree as follows, viz.: That the said Ogram will not include in his filing any part of the north half of said parcel of land, and Lewis hereby agrees that he will not include any part of the south half of said parcel of land: The said parties further agree that the fence now subsisting and dividing their respective claims of said parcel of land shall be and remain the division line of their said claims irrespective as to what may be the true line that would divide said parcel of land in two equal parts lying north and south of such true division line. In witness whereof we have hereunto set our hands this 6th day of November, 1899."

In February, 1900, the official survey was completed, showing that the twenty acres in dispute constituted the north half of the northwest quarter of the northwest quarter of section 23, that it was not included in the homestead claim of Lewis, ~~was~~ and that the line "flagged" through in August, 1898, was substantially correct. On April 5, 1900, Ogram filed his claim for a homestead upon the northwest quarter of section 23, including this twenty acres. In July, 1902, Lewis instituted in the United States land office a contest of the said entry of Ogram with respect to the twenty acres, setting forth as his

ground of contest the same facts relied on by him in this action. A hearing of the contest was refused by the register and receiver, no appeal was taken from the ruling, and on September 22, 1902, a patent was duly issued by the United States granting the land to the defendant Ogram.

The rule upon which Lewis, the plaintiff, relies is thus stated in the decisions of this court: "Where coterminous proprietors of land in good faith agree upon, fix and establish a boundary line between their respective tracts of land, in which they acquiesce, and under which they occupy, for a period equal to that fixed by the statute of limitations, the line as thus established is binding upon them": *Cooper v. Vierra*, 59 Cal. 282; *White v. Spreckels*, 75 Cal. 616, 17 Pac. 715; *Helm v. Wilson*, 76 Cal. 485, 18 Pac. 604; *Dierssen v. Nelson*, 138 Cal. 398, 71 Pac. 456. In other cases it is said that the occupancy in pursuance of the agreement need not continue for the period of the statute of limitations. This is obviously so where other conditions creating an estoppel exist: *Cavanaugh v. Jackson*, 91 Cal. 583, 27 Pac. 931; *Helm v. Wilson*, 76 Cal. 485, 18 Pac. 604. This qualification, however, is not important in this case. Such an agreement, necessarily, is not valid for any other purpose than that of settling an uncertainty in regard to the common boundary. If adjoining owners agree on a division line, knowing that it is not the true line, and with the purpose of thereby transferring from one of them to the other a body of land which they know his true line does not embrace, the agreement will not be enforced. Such a transaction would not constitute an adjustment of uncertainties or doubts as to the line, but would be an attempt to convey or release land from one to the other. Land cannot be conveyed by the device of moving fences or changing the marks or monuments which define its limits. If an agreement having for its real object the transfer of the land, but relating by its terms solely to the boundary line and made with knowledge that the true line is elsewhere than at the place fixed, is ⁵⁰⁹ oral, it would be void, being an attempt to transfer land without writing. If it is in writing it would be ineffectual to pass title, for it would lack the apt words of conveyance that are necessary to accomplish a transfer of real property. The authorities are to the effect that these agreements, when deemed valid, are of such a nature that they do not operate upon the title at all. It is said that "one party does not pur-

port or attempt to sell or convey to the other any land" (Sneed v. Osborn, 25 Cal. 619); that such agreement is "not a contract for the sale or conveyance of lands, and has no ingredients of such a contract" (Boyd v. Graves, 4 Wheat. 513, 4 L. ed. 628); that "adjoining owners who adjust their partition line by parol do not create or convey any estate whatever between themselves; no such thought or intention influences their conduct; after their boundary line is fixed by consent they hold up to it by virtue of their title deeds and not by virtue of a parol transfer" (Hagey v. Detwiler, 35 Pa. 409); and that "agreements of this character . . . are not considered as extending the title. They do not operate as a conveyance so as to pass the title from one to the other, but proceed upon the theory that the true line of separation is in dispute, and to some extent unknown, and in such cases the agreement serves to fix the line to which the title extends": White v. Spreckels, 75 Cal. 616, 17 Pac. 715.

The facts found clearly show that the agreement in question, although in terms purporting only to fix the division line, could have had no other object or purpose than to operate upon the title or right of possession of the parties to the land which they knew was not within the limits of Lewis' claim. There was, it is true, some uncertainty as to the "exact location" of the section line at the time the agreement was made, but it arose solely from the fact that the flagged line, although made by the government surveyor, had not then become official or final and was still subject to correction and change. The findings, properly construed, are not in conflict on this subject, as claimed by the appellant. There was no doubt or uncertainty over the fact that the so-called division line agreed upon was not the true line, nor anywhere within ten chains of the true line, nor over the fact that the true line did not include in Lewis' claim any part of the twenty acres lying between the agreed line and the flagged line, the same twenty acres ⁵¹⁰ which Lewis now seeks to have transferred to him by virtue of the agreement. The agreement itself indicates this, for it does not recite that there was any uncertainty about the location of the line, but merely that there was a "controversy" about it, which, of course, may have arisen from some other cause. The findings place the absence of such doubt beyond question. Lewis knew that his claim extended only to the south line of section 14, and that it

did not cover any of the twenty acres in question, which the agreed line would give him. He therefore must have known that the true line was not ten chains south of the flagged line, but was either coincident with the flagged line or somewhere to the north of it. The object and purpose of the agreement, therefore, could not have been to resolve or settle any existing doubts as to the exact location of the section line. This explains the finding that no consideration passed. If the agreement was made to settle a doubt about the division line, and in good faith to substitute an arbitrary line as the boundary, no other consideration than the mutual concessions of the parties would be necessary. The court below must, therefore, have believed that there was no such purpose and no such concession, and that, for the real object it was intended to accomplish, no consideration was given or received. The line agreed on, in view of the known facts, had no relation to the true line, and could not have been intended to represent the true line. There must have been some ulterior object. It may have been made for the purpose of allowing Lewis an opportunity to change his possession and, when the land was open for entry, file his claim to include this twenty acres, as he would have had the right to do. But he did not see fit to do this, and when the time within which he could have done so expired, Ogram, or any other qualified person, was at liberty to enter it.

Whatever the real purpose may have been, the agreement can have no present effect on the title. It does not by its terms purport to convey or transfer any land, or operate upon the title in any manner, and, consequently, does not effect an estoppel by covenant or agreement. And being without consideration, it could not, in any event, operate to create such an estoppel. It had no relation whatever to the true line, nor to any doubt concerning the location of the boundary, and hence it does not come within the rule which makes an agreed ⁵¹¹ line binding between the parties, not as a contract to convey, but as an attempt in good faith to make certain that which before was in doubt. We are therefore of the opinion that the court below was correct in its decision.

The judgment is affirmed.

Angellotti, J., and Sloss, J., concurred.

Hearing in bank denied.

The Practical Location of a Boundary by agreement or otherwise is discussed in the note to *Washington Rock Co. v. Young*, 110 Am. St. Rep. 682. By agreement, land owners may establish a final and decisive boundary between their lands, without regard to the line of the government survey: *Cox v. Daugherty*, 75 Ark. 395, 112 Am. St. Rep. 75.

When the Boundary Line between coterminous proprietors is in dispute, and they agree upon the true division line and take possession accordingly, the agreement binds them although not in writing, for its effect is not to pass title. But if the true boundary is known, and the parties attempt to transfer land from one to the other by changing the location of the boundary, the statute of frauds applies: See the note to *McCoy v. McCoy*, 102 Am. St. Rep. 246.

BURNS v. HIATT.

[149 Cal. 617, 87 Pac. 196.]

MORTGAGE, FORECLOSURE—Effect of Omitting a Grantee. The foreclosure of a mortgage to which the grantee of the mortgagor is not a party is ineffective, and a sale thereunder does not transfer title to the mortgaged premises. (p. 159.)

MORTGAGE.—An Ineffectual Attempt to Foreclose a Mortgage does not extinguish the lien, but leaves the parties as they were before. (p. 159.)

MORTGAGE, Assignment of by an Ineffectual Foreclosure.—One who purchases at a foreclosure sale void because the grantee of the mortgagor was not made a party becomes the assignee of the mortgage. (p. 160.)

A MORTGAGOR or His Successor in Interest cannot Quiet His Title Against the Mortgagee without paying, or offering to pay, the mortgage debt, though it is barred by the statute of limitations. (p. 160.)

MORTGAGEE'S RIGHT of Possession Where He Enters Under a Void Foreclosure.—If a foreclosure and sale thereunder are void because the grantee of the mortgagor was not a party thereto, but the purchaser enters into possession peaceably, though without the consent of the mortgagor, and claiming title under the sale, such purchaser has such right to retain possession that he cannot be disturbed therein at the suit of the mortgagor or of his successor in title, without first paying, or offering to pay, the mortgage debt, though it is barred by the statute of limitations. (p. 163.)

MORTGAGEE in Possession, Who is and Rights of.—Where for any reason foreclosure proceedings are void, the mortgage continues alive for the benefit of the mortgagee, or the purchaser at the foreclosure sale as his assignee, who, if he peaceably and in good faith, under color of the foreclosure proceedings, though without the consent of the mortgagor, enters into possession of the mortgaged premises, obtains possession thereof in a lawful manner and becomes a mortgagee in possession with all the rights incident thereto, and cannot be dispossessed without payment of the debt. (pp. 163, 164.)

E. B. Mering, G. V. Martin and W. A. Anderson, for G. W. Hiatt, appellant and respondent.

Arthur C. Huston, for D. M. Burns, respondent and appellant.

⁶¹⁸ ANGELLOTTI, J. This action was brought by plaintiff to obtain a decree quieting his title to the west twenty-two feet of lot 2 in block 4 in the city of Woodland, he alleging in his complaint that he was the owner and entitled to the possession of said property. The complaint was in the usual form of complaints in actions to quiet title. Judgment was given—1. That plaintiff was the owner in fee simple and entitled to the possession of said property; 2. That he owns the same “subject to the rights of the defendant, Hiatt, under ⁶¹⁹ a certain indenture of mortgage made, executed and delivered on the eighteenth day of August, 1892, by George H. Jackson to the said G. W. Hiatt”; 3. That said Hiatt has no right, title, or interest in said premises, “except such right, title or interest as may be derived by the said Hiatt, under the said mortgage”; and 4. That a certain foreclosure proceeding instituted by said Hiatt on said mortgage, and the decree, judgment and all proceedings therein are null and void so far as plaintiff is concerned, and in no way bind him. These are appeals from said judgment—one by the defendant from the judgment in favor of plaintiff, and the other by plaintiff from that portion of the judgment decreeing that his ownership of the property is subject to the rights of defendant under said mortgage. Both appeals are on the judgment-roll.

According to the findings of the trial court, based upon appropriate allegations in that behalf contained in defendant's answer, the material facts are as follows: On August 18, 1892, one Jackson was the owner and in possession of the property in controversy and other property, and on that day he borrowed one thousand dollars from defendant, giving him his note therefor, payable one day after date, with interest at the rate of nine per cent per annum, and also, as security for the payment thereof, a mortgage on said premises, which mortgage was duly recorded on August 22, 1892. On November 29, 1893, said Jackson executed and delivered to plaintiff a grant, bargain and sale deed of the property in controversy, which deed was duly recorded on the same day. On August

15, 1896, said note and mortgage being wholly unpaid, defendant commenced an action against Jackson for the foreclosure of said mortgage. Plaintiff was never made a party to this action. Proceedings were had in such action, resulting, on December 1, 1898, in a judgment for the sale of the mortgaged premises and the application of the proceeds to the payment of the amount found due—viz., \$1,344.89. At the sale so ordered defendant became the purchaser for the sum of twelve hundred dollars. He subsequently, on August 30, 1899, received from the commissioner appointed to make the sale a deed for the premises, and immediately entered into the possession of all of the mortgaged premises, and has ever since been and now is in the actual and peaceable possession of the same, claiming to own the whole thereof.

620 The court further found that the possession of said premises taken by defendant after the delivery of the commissioner's deed was without the consent of the plaintiff, and also that the note and mortgage are barred by the provisions of section 337 of the Code of Civil Procedure.

This action to quiet title was commenced on July 22, 1904, almost five years after defendant's possession commenced.

Plaintiff not having been made a party to the foreclosure proceedings, his title to the mortgaged premises was, of course, in no way affected thereby. It is the universally accepted rule wherever a mortgage is only a lien, not only before but after default in its conditions on the part of the mortgagor, that the title of the grantee of the mortgaged premises is not affected by a foreclosure of the mortgage in an action commenced after the conveyance to him, unless he is made a party to the action. As to him, under such circumstances there is no foreclosure. This is not disputed by defendant.

It does not, however, follow from this that he is entitled to a decree quieting his title against the mortgagee. He took the property under his deed from the mortgagor, subject to the lien of the mortgage, and as to such lien, he thenceforth stood in the place of the mortgagor. The proceeding to enforce such lien, although ineffectual against plaintiff by reason of the fact that he was not made a party, did not operate to divest the lien. His rights were in no way affected by the proceeding and he acquired no additional right thereby. He simply continued to be the owner of the property, subject to the lien which had not been enforced, his situation in this

regard being precisely the same as it would have been had no attempt to foreclose been made. The mortgage was not extinguished by the ineffectual attempt to enforce it. It is clear that where, for any reason, foreclosure proceedings are void, the legal title continues subject to the lien of the unpaid mortgage, and it appears to be well settled that a purchaser of the property at a foreclosure sale in such void proceedings thereby becomes an assignee of such mortgage, and the debt thereby secured, of which the mortgage was an incident, with all the rights of the original mortgagee: See *Miner v. Beekman*, 50 N. Y. 337; *Townshend v. Thompson*, 139 N. Y. 152, 34 N. E. 891; *Turman v. Bell*, 54 Ark. 273, 26 Am. St. Rep. 35, 15 S. W. 886; *Cooke v. Cooper*, 18 Or. 142, 17 Am. ⁶²¹ St. Rep. 709, 22 Pac. 945, 7 L. R. A. 273; *Bryan v. Kales*, 162 U. S. 411, 16 Sup. Ct. Rep. 802, 40 L. ed. 1020; *Bryan v. Brasius*, 162 U. S. 415, 16 Sup. Ct. Rep. 803, 40 L. ed. 1022; *Investment Sec. Co. v. Adams*, 37 Wash. 211, 79 Pac. 625; *Frische v. Kramer's Lessee*, 16 Ohio, 125, 47 Am. Dec. 368; 2 *Jones on Mortgages*, sec. 1395.

So, far, therefore, as the claims of plaintiff that his title should be quieted against the mortgagee is concerned, we have the case presented in *Brandt v. Thompson*, 91 Cal. 458, 27 Pac. 763, viz., that of a party standing in the position of a mortgagor seeking to quiet his title against the mortgagee, without paying or offering to pay the debt for which the mortgage was created. It is the settled rule in this state that this cannot be done, even though the mortgage debt be barred by the statute of limitations. In *Brandt v. Thompson*, 91 Cal. 458, 27 Pac. 763, which was an action by a mortgagor in possession to quiet his title against the mortgagee under such circumstances, it was said: "But such a result cannot be achieved. It would be against general equitable principles and adjudicated cases: Citing cases. The only way for a party in respondent's position to quiet a mortgage is to pay it. . . . Respondent can have no reply in the premises without paying or tendering the amount due appellant on his mortgages." The same rule was previously applied in *Booth v. Hoskins*, 75 Cal. 276, 17 Pac. 225, which was also an action to quiet title by a mortgagor in possession, and in which the mortgage debt was barred by the statute of limitations. In *Spect v. Spect*, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203, 13 L. R. A. 137, which was an action in ejectment by the successor of the mort-

gagor against a mortgagee in possession, it was pointed out that the rights which grow out of the relations existing between mortgagor and mortgagee, as well as the remedies for the enforcement and protection of those rights, are of equitable origin and are to be determined by the principles of equity, whether the right be asserted or the remedy sought in an action at law or in equity. It was there said: "Whenever a mortgagor seeks a remedy against his mortgagee which appears to the court to be inequitable, whether it be to cancel the mortgage as a cloud upon his title, or to enjoin a sale under the power given by him in the security, or to recover from the mortgagee the possession of the mortgaged premises, the court will deny him the relief he seeks, except upon the conditions ⁶²² that he shall do that which is consonant with equity." It was further declared in that case that the fact that the debt is barred by the statute of limitations is immaterial in such a case, the statute barring the remedy only, and not extinguishing, or even impairing, the obligation of the debtor. As long as the obligation to pay the debt exists it is not equitable that the mortgagor should have relief against the mortgage given to secure the same, and such relief can be given only on condition that he discharges the obligation.

From what has been said, it is clear that plaintiff cannot complain of the judgment. He was not entitled to a judgment decreeing him to be the owner of the property free and clear of the alleged mortgage. It is suggested by him that the defendant in his answer does not set up any equity. He does fully set up the facts already stated, which show such equity, and we know of no reason why this is not sufficient.

Another question is presented by defendant's appeal from the judgment. Is he thereby given everything to which he is entitled upon the facts already stated? While the judgment declares that plaintiff's ownership is subject to the rights of defendant under the mortgage, and probably saves to defendant the right to take such affirmative proceedings as the law allows for the collection of the debt, a somewhat valueless privilege if the statute of limitations has run against his debt, as the court finds, it also undoubtedly entitles plaintiff to take and retain possession of the property. He is expressly adjudged as against the defendant to be "the owner in fee simple and entitled to the possession" of the property, and this

adjudication as to his right to possession is not at all qualified by any other portion of the judgment. The defendant, standing in the position of a mortgagee, is in possession of the mortgaged premises, this possession having been taken without the consent of plaintiff, standing in the position of the mortgagor, but having been taken and peaceably retained by him under a claim made in good faith that he owns the same by virtue of the attempted but ineffectual sale made in the foreclosure proceedings. By the judgment, the person standing in the position of a mortgagor is given possession of the mortgaged premises, without being compelled to pay the mortgage debt. The question is thus presented as to whether a mortgagee who has entered into and holds possession of the mortgaged premises, ⁶²³ under such circumstances, can be thus disturbed in his possession, at the suit of a mortgagor having the legal title who does not pay or offer to pay the mortgage debt.

In *Spect v. Spect*, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203, 13 L. R. A. 137, it was declared that, in consonance with the equitable principles applicable in the determination of the relative rights of the mortgagor and mortgagee, "it is a settled rule that a mortgagor cannot maintain ejectment against his mortgagee until the debt is paid." This was said with reference to a mortgagee who had been placed in possession by the mortgagor, and as to such a case it is not seriously disputed by plaintiff that the rule is as stated in that case. It is universally declared by the decisions that ejectment will not lie on behalf of the mortgagor against a mortgagee who may properly be called a "mortgagee in possession." The contention of plaintiff is that no one can be included in that term unless he has entered into possession by reason of the agreement or assent of the mortgagor or his assigns that he have such possession under the mortgage and because of it—that the mortgage being a mere lien not entitling the mortgagee to possession, some assent on the part of the mortgagor thereto is absolutely essential to a right to possession in the mortgagee. If we disregard all equitable considerations, this position of plaintiff is apparently impregnable. But the rule is based solely upon equitable considerations (see *Spect v. Spect*, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203, 13 L. R. A. 137). and, we think, means more than plaintiff's contention would make it mean.

Mr. Pomeroy, in his *Equity Jurisprudence*, declares the doctrine established by the courts in this matter to be that, while the mortgagee is declared to have no legal estate and is unable to recover possession against an unwilling mortgagor or owner of the fee subject to the mortgage, yet if the mortgagee, while the mortgage is still subsisting, does "in any lawful manner" obtain the possession, his interest under the mortgage enables him to retain such possession, and to defend it against the mortgagor, or those succeeding to his title. He further says: "If, through his (the mortgagor's) express consent, or through any other lawful means, the mortgagee has been permitted to obtain possession of the land, the mortgagor's only remedy is the equitable suit for a redemption."

⁶²⁴ While admitting that it is difficult to reconcile this doctrine, on principle, with the theory that the mortgage is purely a lien, he declares that the doctrine is retained by the courts as settled: 3 *Pomeroy's Equity Jurisprudence*, secs. 1189, 1190. Thus stated, in a manner which seems to us to be fully warranted by the authorities, the true rule would appear to be that where the mortgagee has, under color of the mortgage or legal proceedings based thereon, acquired possession without resort to force, fraud, or any other unlawful or wrongful means upon which he would be estopped to found a right, and under such circumstances as not to make it inequitable that he should retain such possession as security, he will be regarded as a mortgagee in possession, and his possession will not be disturbed at the suit of the mortgagor, unless the mortgagor first pay the mortgage debt. So stated, the rule is in consonance with the equitable maxim that he who seeks equity must do equity, and with the well-recognized rule applicable in determining the relative rights of mortgagor and mortgagee, that, whatever the mere form of the action as shown by the complaint, the courts will not aid the mortgagor in obtaining a remedy that is inequitable, and will not grant him the relief sought to which he may be entitled under strict legal rules only upon the condition that he shall do that which is equitable.

A long list of authorities holds that, where for any reason foreclosure proceedings are void, not only does the mortgage continue alive for the benefit of the mortgagee, or the purchaser at the foreclosure sale, as his assignee, but also, if the person entitled to the benefit of the mortgage peaceably and

in good faith, under color of such foreclosure proceedings, enter into possession of the mortgaged premises, he does obtain possession in a lawful manner and is a mortgagee in possession, with all the rights incident thereto, and cannot be dispossessed by the grantor without payment of the debt: See *Townshend v. Thompson*, 139 N. Y. 152, 34 N. E. 891; *Croner v. Cowdrey*, 139 N. Y. 471, 36 Am. St. Rep. 716, 34 N. E. 1061; *Shriver v. Shriver*, 86 N. Y. 575; *Cooke v. Cooper*, 18 Or. 142, 17 Am. St. Rep. 709, 22 Pac. 945, 7 L. R. A. 273; *Bryan v. Kales*, 162 U. S. 411, 16 Sup. Ct. Rep. 802, 40 L. ed. 1020; *Romig v. Gillett*, 187 U. S. 111, 23 Sup. Ct. Rep. 40; *Investment Sec. Co. v. Adams*, 37 Wash. 311, 79 Pac. 625; *Stouffer v. Harlan*, ⁶²⁵ 68 Kan. 135, 104 Am. St. Rep. 396, 74 Pac. 610, 64 L. R. A. 320; *Backus v. Burke*, 63 Minn. 272, 65 N. W. 459.

Under the rule as declared in these cases, it is immaterial whether possession is taken with or without the consent, express or implied, of the mortgagor. In *Backus v. Burke*, 63 Minn. 272, 65 N. W. 495, the supreme court of Minnesota repudiated the doctrine enunciated in the earlier case of *Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765, relied on by plaintiff, to the effect that consent of the mortgagor, express or implied, is essential. In *Bryan v. Kales*, 162 U. S. 411, 16 Sup. Ct. Rep. 802, 42 L. ed. 1020, the supreme court of the United States declares the rule enunciated above to be the rule prevailing generally in the United States. In *Stouffer v. Harlan*, 68 Kan. 135, 104 Am. St. Rep. 396, 74 Pac. 610, is to be found an extended discussion of the question and the decisions thereon. It is there declared that the requirement of the rule that the mortgagee's possession must be obtained by lawful means does not mean that it must be obtained under a formal right capable of enforcement by legal process, but simply that it must not be obtained through any unlawful or wrongful act, upon which the mortgagee would be estopped to found a right. While decisions may be found upholding a contrary doctrine, we are of the opinion that the rule enunciated by the authorities cited is in full accord with equitable principles, and the necessary result of the views of this court as expressed in *Brandt v. Thompson*, 91 Cal. 458, 27 Pac. 763, *Booth v. Hoskins*, 75 Cal. 276, 17 Pac. 225, and *Spect v. Spect*, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203, 13 L. R. A. 137.

The justice of such a rule is shown by the facts of this case, where the possession peaceably and in good faith acquired under color of foreclosure proceedings has been peaceably and in good faith maintained thereunder for nearly five years, and, the debt being barred, now constitutes the only real security for the debt for which the mortgage was given. The mortgagee ought not to be deprived of the security thus obtained and held without payment of the amount thereby secured, and equitable principles prevent the accomplishment of such a result at the suit of the mortgagor or his successor.

Plaintiff claims that his contention that plaintiff may recover possession without paying the mortgage debt is fully supported by the decision of this court in *Davenport v. Turpin*, 626 43 Cal. 597, and this may be admitted. But we are satisfied that, in so far as that case supports such a contention, it is so opposed to the principles enunciated in the later California cases already cited that it cannot now be accepted as authority. The other California cases cited upon the question as to what constitutes a mortgagee in possession we do not consider in point here.

As we understand the record, the land of plaintiff constituted only a portion of the mortgaged premises, and defendant purchased at the foreclosure sale and entered into possession of all the mortgaged premises. Under these circumstances, the land of plaintiff is justly liable for only a portion of the original debt. The amount of the debt, and the proportion for which plaintiff's land is justly liable are questions that could have been determined in an action brought by plaintiff against defendant to have these matters determined, and possession awarded him upon paying the amount adjudged. Whether this can now be done in this action, we do not decide.

The judgment is reversed and the cause remanded for such proceedings as are not inconsistent with the views herein expressed. Plaintiff shall not recover his costs of appeal. Defendant shall recover his costs of appeal.

Shaw, J., and Sloss, J., concurred.

A hearing in bank was denied September 29, 1906, upon which Beatty, C. J., delivered the following dissenting opinion:

BEATTY, C. J. I dissent from the order denying a rehearing. By the present decision the case of *Davenport v. Turpin*, 45 Cal. 597, is overruled, upon the assumption that it has been heretofore overruled, or set aside, by the decisions in *Brandt v. Thompson*, 91 Cal. 458, 27 Pac. 763, *Spect v. Spect*, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 213, and other cases. It cannot be contended that *Davenport v. Turpin* has ever been expressly overruled or drawn in question, and it has not been set aside by implication from the other decisions cited from our own reports for the reason that all those cases are clearly distinguishable on the facts. In those ⁶²⁷ cases the mortgagees went into possession lawfully under the mortgagor while he was entitled to transfer the possession. In this case the defendant took possession of plaintiff's lot unlawfully after his mortgagor had transferred his right of possession to the plaintiff. He was not in any just sense a mortgagee in possession. Of the decisions cited from other jurisdictions it may be said that with the single exception of *Townshend v. Thompson*, 139 N. Y. 152, 34 N. E. 891, they may all be distinguished by the fact that the mortgagee was rightfully in possession by consent of the mortgagor while he retained the title, or where the mortgagee had gone into possession under defective foreclosure proceedings, and where the controversy was wholly between mortgagor and mortgagee. Of course, in such cases the equity of the mortgagee against his mortgagor is more substantial than it is against a grantee of the mortgagor, whose right of possession by virtue of his grant has been violated by the unlawful entry of the mortgagee.

The decision in the New York case does support the present decision, but it cannot be held to justify a reversal of one of our own decisions which has stood so long as a rule of property.

Ejectment Against a Mortgagee in possession cannot be maintained while the mortgage debt remains unpaid, whether or not the right of foreclosure is barred by the statute of limitations. And a mortgagee who enters into possession under a void foreclosure, the mortgagor acquiescing therein, is a mortgagee in possession: *Kelso v. Norton*, 65 Kan. 778, 93 Am. St. Rep. 308, and see the cases cited in the cross-reference note thereto. It has also been decided that when a mortgagee has taken possession by the consent of the mortgagor after a breach of the condition of the mortgage, he cannot maintain an action to recover possession until the debt is paid: *Hooper v. Young*, 140 Cal. 274, 98 Am. St. Rep. 56.

CRISMAN v. LANTERMAN.

[149 Cal. 647, 87 Pac. 89.]

MORTGAGE.—A mortgagor has the right to insist that the mortgagee shall not, by releasing the land which should pay the debt, throw upon him a personal liability therefor. (p. 171.)

MORTGAGE—Release of by Subsequent Trust Deed.—Whether a trust deed to secure the same indebtedness already secured by a mortgage accomplishes a merger of the mortgage, or, as it may be termed, a novation of securities, is a question of the intention of the parties, to be derived from their acts. (p. 172.)

MORTGAGE, When not Released by a Subsequent Trust Deed. If a trust deed given to secure indebtedness already secured by a mortgage provides that in case of a sale under the deed which does not realize enough to pay all the indebtedness, the parties shall have the same remedies to enforce the indebtedness as if the deed of trust had not been executed, the mortgage is not released, nor does it merge in the trust deed. (p. 173.)

APPEAL AND ERROR—Effect of Findings Where There is an Agreed Statement of Facts.—Where there are findings and also an agreed statement of facts, the former controls, if such statement details probative facts from which an inference either way may be drawn, and the ultimate fact as stated in the finding is not absolutely inconsistent with the agreed statement. (p. 176.)

ESTOPPEL BY SILENCE does not Exist Unless the party against whom the estoppel is invoked has stood by and seen the other party committing an act infringing on his rights, and his failure to speak has induced the person committing the act to believe that he assents to its being committed. (p. 175.)

ESTOPPEL—When does not Arise from Consenting to a Sale of Property Free from Encumbrances.—If a decedent was liable on indebtedness secured by a mortgage and also by a trust deed, consent by the executor to a sale of the property under the trust deed free from encumbrances, and to the subsequent release of the mortgage as to the property sold, does not estop him from insisting that, because of such release, the decedent's estate was relieved from liability for the mortgage debt. (p. 175.)

ESTATE OF DECEDENT, When not Bound by Act of Executor.—If the executor of an estate is also a comaker with the decedent on promissory notes secured by a mortgage and also by a trust deed, attends the trustee's sale and demands that the proceeds thereof be applied first to his own debt, and last to that which, for the benefit of the estate, should have been paid first, he may well be deemed to be acting in his individual, rather than in his representative, capacity. (p. 176.)

MORTGAGE, Release of, Purporting to Reserve Right to Pursue the Mortgagor.—Where a paper declares that, without in any manner waiving the right to assert against the estate of a deceased mortgagor the unpaid balance of the principal and interest on a certain promissory note, the undersigned does remise, release, relinquish and discharge from said mortgage and from the lien thereof the mortgaged lands, the persons executing such paper are estopped from denying that it releases the mortgage against a person who had purchased such lands at a sale by the terms of which the purchase price was to be paid only upon a certificate of an abstract company that they were

free from encumbrances, and it was paid after receiving such certificate and applied to the satisfaction of indebtedness and for the benefit of the persons executing such release. (p. 177.)

SALE, Application of Proceeds of—Power of Executors.—If a sale is made under a trust deed, and by the terms of the sale the property sold is to be free from encumbrances and the same property is also subject to a pre-existing mortgage to secure the same debts, and the proceeds of the sale are sufficient to pay the mortgage debts, a release of the mortgage executed by the executors of the mortgagee is binding, although by an agreement not assented to by the purchaser, an application of such proceeds has been so made as to leave part of the mortgage debt unpaid. (pp. 177, 178.)

Frank G. Finlayson, for the appellants.

M. W. Conkling and Charles T. Howland, for the respondents.

⁶⁴⁸ SLOSS, J. On June 18, 1895, Ammoretta J. Lanterman made her promissory note for five thousand dollars, payable to Frederick S. Crisman or order, on or before ten years after date. With the note, and as security for it, she delivered to Crisman a mortgage of the south eighty acres of lot 9 of the Rancho la Cañada, in Los Angeles county, and certain shares of stock in a water company. The property mortgaged stood of record in the name of Ammoretta J. Lanterman, but in fact it belonged to Roy S. Lanterman, her son, and the note and mortgage were given in consideration of a loan of five thousand dollars by Frederick S. Crisman to Roy S. Lanterman. These facts were known to the lender. In 1900 Ammoretta J. conveyed to Roy S. Lanterman the mortgaged property. In the meanwhile three other notes had been made by members of the Lanterman family to Crisman—to wit, a note for one thousand dollars, dated January 6, 1896, payable on or before eight years after date; a note for five hundred dollars, dated March 20, 1896, payable on or before eight years after date; and a note for two thousand eight hundred dollars, dated July 1, 1896, payable on or before six years after date. All of these ⁶⁴⁹ three notes were signed by Ammoretta J. and Roy S. Lanterman, and the last, the one for two thousand eight hundred dollars, bore in addition the signature of J. L. Lanterman, the husband of Ammoretta.

In October, 1900, Frederick S. Crisman died, leaving a will by which Albert J. Crisman and Dwight N. Lowell were named executors. The will was duly proved and letters testamentary issued.

On August 1, 1902, all of the principal of said four notes and some of the interest being unpaid, Roy S. Lanterman made a deed of trust to Albert J. Crisman, as trustee, whereby, as security for these notes, he conveyed to said Crisman lot 9 of the Rancho la Cañada, with the shares of water stock above mentioned. The property described included that which was covered by the mortgage given in 1895. The deed of trust, in which the grantor and his wife were described as parties of the first part, Albert J. Crisman as party of the second part, and the executors of Frederick S. Crisman's will as parties of the third part, provided for the sale of the property by the second party in the event that any of the notes remained unpaid on the first day of May, 1903. In addition to the ordinary provisions of deeds of trust to secure indebtedness, the instrument contained certain recitals and provisions which will be referred to hereafter. The deed of trust was accompanied by a written consent to its execution signed by Ammoretta J. Lanterman and her husband. In May, 1903, no payments having been made on account of either principal or interest since the making of the deed of trust, the trustee gave the required notice of sale to be had on June 2, 1903. Prior to this time, Ammoretta J. Lanterman had died testate, and her husband had been appointed executor of her will. At the time and place fixed, the trustee offered the property for sale. J. L. Lanterman was present, as was Frank D. Lanterman, one of his sons, together with M. W. Conkling, who was the attorney for the executor of Ammoretta's will and also for Frank D. Before calling for bids, the trustee read the published notice of sale, and a "statement of conditions of sale." The notice made no reference to any mortgage or other encumbrance, but the statement of conditions declared, among other things, that a deposit must be made by the successful bidder, and that the balance of the ⁶⁵⁰ purchase price would be payable "as soon as the Title Insurance and Trust Company can certify that the title is in the successful purchaser, free and clear of all encumbrances." These papers having been read in the hearing of J. L. Lanterman and M. W. Conkling, neither of whom made any objection or said anything regarding the conditions of sale, J. L. Lanterman, by Mr. Conkling, stated that he would require the proceeds of the sale to be applied, first, upon the two thousand eight hundred dollar note; second, upon the five hundred dollar note; third, upon the one

thousand dollar note; and lastly, upon the five thousand dollar note of June 18, 1895, executed by Ammoretta J. Lanterman alone. Thereupon the property was offered and struck off to Frank D. Lanterman for ten thousand dollars, that being the highest bid. The required deposit was made, and some two weeks later, Albert J. Crisman, as executor, acting under an order of court, executed a release of the mortgage of June 18, 1895. The deed was delivered to the purchaser, and the balance of the purchase money paid to the trustee, who applied it to the payment of the four notes in the order in which the application had been demanded. Thereby the three smaller notes were paid, and there remained a sum for application upon the principal and interest of the five thousand dollar note sufficient to reduce the unpaid part of such note to two thousand two hundred and seventy-four dollars and forty-one cents. For this amount the executors of Frederick S. Crisman's will presented a claim (as upon a note secured by mortgage) to Ammoretta J. Lanterman's executor. The claim having been rejected, this action, in form one to foreclose a mortgage, was commenced. Separate answers were filed, the defendants relying, in substance, upon the release of the mortgage as a defense. The case was presented to the superior court upon an agreed statement of facts, and judgment went for the defendants. The plaintiffs appeal.

While the complaint is in the familiar form used in actions for the foreclosure of mortgages, the plaintiff's theory really is that there is no mortgage to foreclose, and that they are entitled to a money judgment against Ammoretta's estate, payable in due course of administration. They concede, in effect, that if, at the time of the trustee's sale, the five thousand dollar note was secured by a subsisting mortgage on property which had been conveyed by the mortgagor, and if the ⁶⁵¹ mortgagee, without the consent of such mortgagor (or her executor), gave to the owner of the land a valid release of the mortgage, they, as payees of the note, could not hold the mortgagor (or her estate) to a personal liability thereon. And this conclusion is, of course, inevitable under our statutory system of enforcing the payment of obligations secured by mortgage, as construed by this court. While a mortgage creates merely a lien as security for the debt, the code provides that there can be but one action for the recovery of a debt so secured: Code Civ. Proc., sec. 726. By the judg-

ment in such action, the land is subjected to a sale for the purpose of satisfying the plaintiff's demand, and, if the proceeds be insufficient, a judgment for the balance is then docketed against the defendants personally liable for the debt. Until there shall be a deficiency on such sale, there can be no personal judgment against the mortgagor, who is entitled to have his debt paid out of the land so far as the proceeds realized on foreclosure sale may render payment possible. The land is thus made primarily liable for the payment of the obligation, and the mortgagor can be called on to pay only where the proceeds of a sale of the land are insufficient. He is therefore entitled to insist that the mortgagee shall not, by releasing the land, which should be made to pay the debt, throw upon him a personal liability therefor: *Bartlett v. Cottle*, 63 Cal. 366; *Biddel v. Brizzolara*, 64 Cal. 354, 30 Pac. 609; *Bull v. Coe*, 77 Cal. 54, 11 Am. St. Rep. 235, 18 Pac. 808; *Porter v. Muller*, 65 Cal. 512, 4 Pac. 531; *Barbieri v. Ramelli*, 84 Cal. 154, 23 Pac. 1086; *McKean v. German-American Sav. Bank*, 118 Cal. 334, 50 Pac. 656; *Woodward v. Brown*, 119 Cal. 383, 63 Am. St. Rep. 108, 51 Pac. 2, 542. Recognizing these well-settled rules, the appellants deny their applicability here by contending, first, that by the execution of the trust deed the mortgage became merged in the new security with the consent of the mortgagor, so that the debt thereafter was not one secured by mortgage; second, that even if the mortgage survived the making of the trust deed, the estate of Ammoretta J. Lanterman consented at the trustee's sale to the release of the mortgage given, or (which would amount to the same thing) such estate is by the conduct of the executor at the time of the sale estopped to deny that it consented to the release; and finally, if the court should be against the appellants on ⁶⁵² both these points, they urge, third, that the purported release of mortgage was (for reasons which will appear hereafter) void and of no effect, and therefore cannot destroy their right to a judgment, which, under this view, should be one foreclosing the mortgage. If any one of these propositions be sound, it destroys the effect of the contention that Ammoretta, as a mortgagor, is relieved by the release of the land from the lien of the mortgage. And it may be remarked incidentally that any of these positions, if it be well taken, is equally fatal to the respondents' contention (which appears to have been adopted by the learned judge of the trial court) that,

under all the circumstances, Roy became in equity the principal on the mortgage debt sued on, and Ammoretta a surety, and that the estate of the latter was exonerated by the release of the mortgage without Roy's consent, and the consequent release of Roy, the principal debtor. For, if there was no mortgage after the deed of trust was given, Roy could not, nor could his surety, be affected by a paper purporting to release it; if the release was with the consent of the surety, it would not relieve such surety from liability; and lastly, if there was no valid release, neither principal nor surety has ground for complaint. It is unnecessary, therefore, to decide the question, which is fully argued in the briefs, as to whether Ammoretta was, as to the Crisman estate, a principal debtor or a surety. Whether she was the one or the other, her estate is liable unless there was a subsisting mortgage which was released as to the owner of the land without her consent or that of her executor.

1. Did the execution of the deed of trust with the consent of Ammoretta supersede the mortgage? The appellants' contention is that the trust deed, being given to secure (with other notes) the same obligation secured by the mortgage, and furnishing, as security, the same property described in the mortgage, in favor of the same obligees, it must be assumed that the intention of the parties (including Ammoretta, who consented to the trust deed) was to substitute a new security—to wit, that of the deed of trust—for the existing security of the mortgage. If that be so, the mortgage was in effect then released by mutual consent, and the subsequent formal release, following the trustee's sale, was a vain and idle act, not affecting the substantial rights of any of the ⁶⁵³ parties. Whether the execution of the deed of trust accomplished such a merger of the mortgage, or, as it may be termed, a novation of securities, is a question of the intention of the parties, to be derived from their acts. It is not in a legal sense impossible for a mortgage to continue to exist, where there has been given to the mortgagee a further security on the same land for the same debt. It is argued that such situation may produce anomalous results—as, for example, if, by a sale under the junior security, the title to the land should become vested in the holder of the prior mortgage. But this might happen in any case where a deed of trust is given on land subject to an existing mortgage, and, even where the legal title becomes vested in the mortgagee,

equity will sometimes, to avoid injustice, treat the mortgage as alive in determining the rights of the parties. The language of the deed of trust here in question would seem to indicate an intention that the mortgage should continue to exist. The instrument first recites that Roy S. Lanterman had borrowed from Frederick Crisman the sums represented by the four promissory notes above mentioned (including the five thousand dollar note signed by Ammoretta), that the parties have agreed that all the notes shall be deemed to have matured on May 1, 1903, and that Roy agrees to pay all of the notes, whether executed by him or not, and then grants the lot 9 of the Rancho la Cañada, in consideration of the indebtedness, "and for the purpose of further securing any of said promissory notes which may now be secured by any mortgage," etc. The instrument contains, in addition, the provisions relative to reconveyance or sale which are customary in deeds of this character, and provides that in case of a sale which shall not realize sufficient to pay the entire indebtedness, "the said parties of the third part shall retain, have and possess the same remedies to enforce the payment of said promissory notes, or any of them, which they would have or possess if this deed of trust had not been executed." The clauses quoted certainly indicate that it was not the intention of the parties to have the new security supplant the old. It is described as "further security," which, in the ordinary acceptation of the term, means additional, not substituted, or superior, security, and besides, the executors retain all the remedies they had before, one of which was to foreclose the mortgage on the five thousand dollar note. The ⁶⁵⁴ argument that the parties would not be likely to intend to contract for two forced sales of the same property to satisfy (in part) the same debt does not seem to us a sufficient ground for disregarding any of the express provisions of their agreement. We think that even if the deed of trust had been made by Ammoretta, the mortgagor herself, it should not be construed as accomplishing a merger of the mortgage. And, when we consider the terms of her consent to the deed, the conclusion that there was no substitution is strengthened. She signed a writing, which provided that "said trust deed shall not be deemed to in any manner whatsoever affect or waive any rights which the . . . estate of F. S. Crisman, deceased, may now or hereafter have against the undersigned," upon or by reason of the said promissory notes or

any of them. This consent was intended to waive any defense which might be claimed to have accrued to Ammoretta on any of her notes by reason of the execution of the deed. But it was not intended to give new and greater rights against her. If the mortgage should be regarded as merged, her liability on her five thousand dollar note, which originally was merely "contingent on the fact that a sale of the mortgaged premises shall satisfy the debt and costs" (*Biddel v. Brizzolara*, 64 Cal. 354, 30 Pac. 609), would be converted into a liability, which might be enforced (as it is sought to be enforced here) after the security had been applied to other debts, or, perhaps, without any recourse to the security at all: See *Herbert Kraft Co. v. Bryan*, 140 Cal. 73, 73 Pac. 745.

2. Did the estate of Ammoretta J. Lanterman consent to the release of the mortgage? The answer to this question depends largely upon the effect that is to be given to the findings of fact made by the trial court. Among them is a finding that the plaintiffs released the mortgage "without the consent of . . . the estate of Ammoretta J. Lanterman." As has been stated, the cause was tried upon an agreed statement of facts, and it is claimed by the appellants that where the facts are agreed, no findings are necessary, and that, if findings are made, they are entitled to no weight. There have been several rulings by this court to the effect that the want of findings affords no ground for reversing a judgment where the facts have been agreed upon: *Gregory v. Gregory*, 102 Cal. 50, 36 Pac. 364; *Muller v. Rowell*, 110 Cal. 318, 42 Pac. 804. But here the facts embraced in the stipulation were not the ultimate facts put in issue by the pleadings, but were (as to the question of consent) a recital of the circumstances surrounding the sale, from which the ultimate fact of consent is, as is claimed, inferable. If those circumstances would support an inference either way, it was not only proper but necessary that the trial court should make a finding of the ultimate fact. Such finding when made is entitled to the same weight as any other finding on conflicting evidence, and will not be overthrown unless the facts stipulated cannot by any reasonable inference support the conclusion reached by the trial court. The cases relied on by appellants as establishing the rule that no presumptions will be indulged in favor of the findings where all the evidence before the trial court was written (*Wilson v. Cross*, 33 Cal. 60; *Lander v.*

Beers, 48 Cal. 546) are not in harmony with later decisions: *Reay v. Butler*, 95 Cal. 206, 30 Pac. 208; *Priest v. Brown*, 100 Cal. 626, 35 Pac. 323; *Sheehan v. Osborn*, 138 Cal. 512, 71 Pac. 622. In the case at bar, the appellants rely upon the conduct of J. L. Lanterman at the trustee's sale as constituting consent by the estate of Ammoretta, or an estoppel to deny consent. One element of such conduct consisted of his failure to object when the trustee read the conditions, showing that the title would be certified to the purchaser free and clear of encumbrances. So far as this silence is concerned, we do not see that it conclusively established an estoppel. No doubt there are cases in which mere silence may work an estoppel. But to effect this it is essential, first, that the party against whom the estoppel is invoked has stood by and seen the other party committing an act infringing upon his rights, and, second, that his failure to speak has induced the person committing the act to believe that he assents to its being committed: *De Bussche v. Alt*, L. R. 8 Ch. D. 286; *Carpy v. Dowdell*, 115 Cal. 677, 47 Pac. 695. Here the proposed sale, free of encumbrance, in no way infringed upon the rights of the estate represented by J. L. Lanterman (even if we assume that he attended the sale in his representative capacity). The release of the mortgage by the voluntary act of the mortgagee would not injure the estate, but would benefit it by relieving it of personal liability for the debt. Nor did his nonaction in any way mislead the plaintiffs or ~~use~~ induce them to believe that the estate of Ammoretta consented to be held liable on the five thousand dollar note without foreclosure of the mortgage. The facts were as well known to plaintiffs as to Lanterman. He had no reason to suppose that they, represented at the sale, as they were, by counsel, were ignorant of the legal effect of their proposed conduct, and was under no duty to warn them that a release of a mortgage without the consent of the mortgagor relieved such mortgagor from personal liability.

And the request or demand for the application of the proceeds does not raise a necessary inference that J. L. Lanterman, as executor, consented to the release of the mortgage, or that his testatrix's estate was estopped to deny consent. The demand was that the proceeds be applied to the payments of the smaller notes before the payment of the five thousand dollar mortgage note. The interests of the estate, as mortgagor, required either that the mortgage, which made the

estate's liability contingent on a foreclosure sale, should remain, or that, if the mortgage was to be released, the proceeds of the sale should be applied first to the satisfaction of the mortgage debt. Considered by itself, then, the demand that the five thousand dollar note be paid last would imply, not a consent by Ammoretta's estate that the land be sold free from the mortgage, but rather a requirement that the mortgage lien remain for the protection of the estate. Furthermore, J. L. Lanterman did not state that he was acting as executor in attending the sale. As comaker of one of the notes secured by the mortgage, he had an individual interest in the proceeding. And, in demanding that the proceeds of the sale be applied first to the satisfaction of his own debt, and last to that of the debt which, for the benefit of the estate, should have been paid first, it may well be said that he was acting in his individual, not in his representative, capacity. The trial court, by its finding as to consent, took this view, which finds additional support from the fact, stipulated in the record, that J. L. Lanterman would, if present, testify that he was acting for himself, and not for the estate. The fact that his demand included the application of the proceeds of the sale of two notes in which he was not individually interested, is entitled to some weight, but is not sufficient, in itself, to overthrow the finding that the estate did not consent to the release of the mortgage.

657 3. Was there a valid release of the mortgage? The instrument executed by the plaintiffs, so far as is material to the present inquiry, reads as follows: "Without in any manner waiving the right of the said executors of the estate of Frederick S. Crisman, deceased, to recover from the said estate of Ammoretta J. Lanterman, deceased, the balance of the principal and interest unpaid upon the said promissory note for five thousand dollars; but expressly reserving unto said estate of Frederick S. Crisman . . . all the rights now possessed by said estate . . . to recover and receive from the estate of said Ammoretta J. Lanterman, deceased . . . the unpaid balance of the principal and interest of said promissory note for five thousand dollars, the undersigned . . . does hereby remise, release, relinquish and discharge from the said mortgage and from the lien thereof all the lands in said deed of trust described," etc.

The contention of plaintiffs is that, if the mortgage lien still existed, it could not be released without releasing Am-

moretta's estate, and that, therefore, a reservation of rights against said estate prevented the release from operating at all. We agree that there could not be a release of the lien of the mortgage and a retention of the right to sue the mortgagor (unless she consented), but the conclusion that the release fails does not follow.

Whatever might be the proper construction of the instrument, considered by itself, the circumstances under which it was given estop the plaintiffs, as against the defendant Frank D. Lanterman, to deny that the mortgage was released. The property was sold to him free of encumbrances, and he bid ten thousand dollars upon the understanding that the balance of the purchase price beyond the deposit paid at the sale was to be paid upon a certificate being made by the abstract company that there was no encumbrance. The executors obtained an order of court authorizing them to release this mortgage, and delivered the document in question to the abstract company for the purpose of completing the sale. The abstract company gave the purchaser the certificate agreed upon, and paid the purchase price, previously deposited with it by him, to the trustee, who applied it on the indebtedness secured by the deed of trust. Such application paid in part the five thousand dollar note now sued on, and the plaintiffs ~~ess~~ recognize such payment in their complaint. They cannot be permitted to retain the purchaser's money, and still claim, as against him, that the mortgage, the release of which was a part of the consideration, still subsists as a lien upon his land. And if the mortgage cannot be enforced as against the owner of the land, it cannot, for the reasons hereinbefore stated, be the foundation of an action against the original mortgagor. The plaintiffs contend that, as executors, they had no power to release the mortgage except upon full satisfaction of the debt. But a sum was realized sufficient to satisfy the mortgage, and if a full satisfaction was necessary to authorize the release which had been agreed upon, the purchase price should, so far as affects the purchaser's rights, be deemed to have been so applied. The fact that J. L. Lanterman and the trustee agreed upon a different application cannot bind Frank. This not being a voluntary payment, neither the debtor nor the creditor had any right to direct the application of the proceeds. The application is to be made by the court according to the equities of the case: *Orleans Co. Nat. Bank v. Moore*, 112 N. Y. 543, 8 Am. St. Am. St. Rep., Vol. 117—12

Rep. 775, 20 N. E. 357, 3 L. R. A. 302; *Blackstone Bank v. Hill*, 10 Pick. (Mass.) 129; *Murdock v. Clarke*, 88 Cal. 384, 26 Pac. 601. Without undertaking to review the many decisions, not all in harmony, upon the proper application of funds derived from forced sales, we think it sufficient to say, that under the peculiar circumstances of this case, the equities, as between the estate of F. S. Crisman and Frank D. Lanterman, required the amount paid by the latter to be applied to the satisfaction of the mortgage debt, if such satisfaction was essential to a valid release of the mortgage.

From these views it follows that judgment was properly entered in favor of defendants.

The judgment is affirmed.

Shaw, J., and Angellotti, J., concurred.

The Liability of a Mortgagor under the laws of California is such that he cannot be compelled to pay any part of the mortgage debt until a decree has been entered for the sale of the premises, and the liability which even then exists against him is only to pay any deficiency which shall arise after a foreclosure sale. The mortgaged premises must be regarded as the principal debtor and the mortgagor as the surety, and his rights as surety should be preserved. Therefore the mortgagee cannot arbitrarily release portions of the premises for less than their actual value without the consent of the mortgagor; if he does so, he must, on foreclosure, credit the mortgagor with the value of the premises released: *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108. See, too, *Meigs v. Tunnicliffe*, 214 Pa. 495, 112 Am. St. Rep. 769.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

BELL v. GONZALES.

[35 Colo. 138, 83 Pac. 639.]

TRESPASS—Fence Law—Herding Sheep on Uninclosed Land.

Although the statute provides that no person shall be allowed to recover damages for any injury to crops or grass or other vegetable products unless the same at the time of the trespass are inclosed by a legal and sufficient fence, yet one who willfully drives and herds his sheep upon the uninclosed lands of another without his consent and against his protest, is liable in damages therefor. (p. 180.)

T. Smith and W. B. Morgan, for the appellant.

130 CAMPBELL, J. Action for damages for wanton trespass by defendant upon uninclosed lands of plaintiff. Defendant's demurrer to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, was sustained, and the plaintiff electing to stand by his complaint, the court dismissed the action. From this judgment of dismissal the plaintiff appeals.

There is no appearance in this court by the appellee; hence it is only by inference and from statements made by appellant in his brief that we are advised of the nature of defendant's contention below. Apparently defendant's position, in which the trial court coincided, was that the case came within our statute relating to the inclosure of lands by a lawful fence; hence no liability was incurred because plaintiff's lands were open. That such was his contention is obvious, because if this statute does not change the ordinary law of trespass the complaint undoubtedly contains

all averments necessary to the creation of a legal liability on the part of the defendant. It alleges the possession and right of possession in the plaintiff of certain lands, and that while they were in his possession the defendant, being the owner of a large herd of sheep, against plaintiff's consent, and notwithstanding he expressly warned defendant not to pasture his herd thereon, at the same time pointing out its location, during a ¹⁴⁰ stated period willfully and unlawfully drove and herded these sheep on these lands, to the plaintiff's damage in a certain sum.

The statute which is supposed to be controlling was passed by the fifth General Assembly, and is found at page 220 of the Session Laws of 1885. The first section describes what shall be a lawful fence in this state, and the third provides that whoever makes and maintains such a lawful fence around his inclosure may recover in a suit for trespass from the owner of any animals which break therethrough for whatever damages are thereby sustained, and further provides that no person shall be allowed to recover damages for any injury to crops or grass or other vegetable products unless the same at the time of the trespass are inclosed by a legal and sufficient fence.

The statute has no bearing whatever upon the case made by the complaint. In *Morris v. Fraker*, 5 Colo. 425, this court established the rule in this jurisdiction that owners of crops can recover for damages done thereto by the trespasses of cattle only when the same are, at the time of trespass, inclosed by a good and sufficient fence. In *Willard v. Mathesus*, 7 Colo. 76, 1 Pac. 690, the doctrine of *Morris v. Fraker*, 5 Colo. 425, was held inapplicable where the damage was done to crops growing upon uninclosed lands by a flock of sheep while they were in charge of a herder. In such a case it was held to be the duty of the herder in charge to use ordinary care to prevent their trespassing, and for his negligence in this respect the owner must respond for resulting damages. If liability attaches for mere negligence, a fortiori would it for an affirmative, willful trespass.

In *Nuckolls v. Gaut*, 12 Colo. 361, 21 Pac. 41, it was intimated, though not expressly decided, that where one willfully and deliberately drives his cattle upon the ¹⁴¹ premises of another for the purpose of pasturing on crops growing thereon, damages may be awarded.

In *Norton v. Young*, 6 Colo. App. 187, 40 Pac. 156, the court said that it was impossible to concede that the existence of a lawful fence is necessary to protect one's property against a willful trespasser who breaks into an inclosure and destroys property, citing to the proposition, *Fugate v. Smith*, 4 Colo. App. 201, 35 Pac. 283.

Other western states have enacted similar fence laws, and in construing them it is universally held, so far as our investigation has extended, that they do not "authorize cattle owners deliberately to take possession of such lands and depasture their cattle upon them [uninclosed lands of another] without making compensation, particularly if this were done against the will of the owner, or under such circumstances as to show a deliberate intent to obtain the benefit of another's pasturage": *Lazarus v. Phelps*, 152 U. S. 81, 14 Sup. Ct. Rep. 477, 38 L. ed. 363.

A case quite in point is *Monroe v. Cannon*, 24 Mont. 316, 81 Am. St. Rep. 439, 61 Pac. 863. In our judgment the law as contained in the foregoing excerpt applies to the case in hand. Without burdening the opinion with the citation of authorities, we refer to their collation in 12 American and English Encyclopedia of Law, second edition, 1045.

The judgment being in conflict with the law as herein declared must be reversed and the cause remanded. We observe, however, that it may be that the value of the grass destroyed and water polluted for which damages are claimed is not sufficiently pleaded, or it may be the allegation concerning the same is wholly inadequate as a basis for the recovery of substantial damages. But as no objection on the ground of uncertainty was raised, and as the acts charged against defendant in the complaint entitle plaintiff at least to nominal damages, that pleading ¹⁴² in the particular noted is good as against the only ground of demurrer interposed.

Reversed.

Chief Justice Gabbert and Mr. Justice Steele concur.

Although the Owner of Livestock is ordinarily not liable where they trespass upon uninclosed land, it is otherwise where he intentionally and persistently drives them upon such premises against the will of the owner thereof: *Cosgriff v. Miller*, 10 Wyo. 190, 98 Am. St. Rep. 977; *Healy v. Smith*, 14 Wyo. 263, 116 Am. St. Rep. 263; *Monroe v. Cannon*, 81 Am. St. Rep. 449.

VAN BUSKIRK v. STATE BANK OF ROCKY FORD.

[35 Colo. 142, 83 S. W. 778.]

BANKS AND BANKING—Checks—Acceptance.—A right of action does not exist in favor of the holder of a check against the drawee bank when there has been by the latter no acceptance or promise to pay in writing, especially when the statute has expressly so provided. (p. 184.)

BANKS AND BANKING—Checks—Liability of Drawee.—If a check drawn on one bank is presented to another for payment and the latter telephones the drawee bank and is informed by it that the check is good and thereupon pays it, but before presentation to the drawee the drawer notifies it not to pay, an action will not lie against the drawee bank by the bank paying the check, in the absence of fraud or false representation by the drawee bank. (p. 185.)

O. G. Hess, for the appellee.

F. A. Sabin, R. S. Bealle and C. E. Reed, for the appellant.

¹⁴² **CAMPBELL, J.** The parties are each doing a separate banking business in the same town. A check drawn on the appellant by one of its depositors was by the payee ¹⁴³ presented for payment to the appellee. Appellee telephoned to appellant asking if the check was good, and was informed that it was "good," or "all right." This was the extent of the information given, and there was no promise by appellant that it would accept or pay the check unless the information given is, in law, that promise. Appellee then paid the check upon the strength of the foregoing reply to its question, but otherwise would not have cashed it. A few minutes thereafter the drawer appeared before the drawee (appellant) and stopped payment, of which appellant immediately advised the appellee. Afterward, and on the same day, when appellee presented the check, duly indorsed, to appellant, for payment, the latter refused to pay it because it had been directed by its depositor not to do so, although at the time the drawer had, and still has, with appellant sufficient funds for such payment.

Thereupon this action was brought by appellee against appellant to recover the amount of the check, upon the ground that appellant had promised to pay it. The trial court submitted the case to the jury upon the theory that the cause of action stated in the complaint, setting up the foregoing

facts, was based upon an implied parol promise to pay. The verdict and judgment were for the plaintiff, and the defendant appeals.

The two chief points relied upon by defendants below (appellant here) are: 1. That under our negotiable instrument law passed in 1897 (Sess. Laws 1897, p. 210), an action will not lie in favor of the holder of a check against the drawee unless and until the same is accepted or certified by the drawee, which acceptance or certification must be in writing; and 2. That if a parol acceptance or promise to pay is binding, no such promise was established by the evidence.

¹⁴⁴ 1. The courts of England and America have often held that, at the common law, though many of the rules and principles applicable to bills of exchange apply to bank checks, the two kinds of instruments are not identical. Regardless of the common-law rights of the parties under the facts of this case, we think there can be no doubt as to the correctness of appellant's leading contention that, under our negotiable instrument law, the drawee of a check is not liable to the holder unless and until he accepts or promises to pay the same, and such assent to his liability must be in writing. Section 126 of our act defines a bill of exchange as "an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer." Section 185 reads: "A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check."

At the common law a bill of exchange payable on demand need not be presented for acceptance. Indeed, strictly speaking, there is no such thing as acceptance of a check in the ordinary sense of the term; yet by consent of the holder the drawee bank may enter into an engagement quite similar to that of acceptance by certifying the check to be good, instead of paying it: 2 Daniel on Negotiable Instruments, 4th ed., sec. 1601; sec. 143 of our act. A check is a species of bill of exchange, viz., that particular kind of a bill which is drawn on a bank and payable on demand. Under our act it need not be presented for acceptance unless it contains an express stipulation to that effect: Sec. 143.

¹⁴⁵ Before the passage of our negotiable instrument law, this court had ruled, in accordance with the weight of authority, that a right of action does not exist in favor of the holder of a check against the drawee bank where there has been by the latter no acceptance or promise to pay: *Colorado Nat. Bank v. Boettcher*, 5 Colo. 185, 40 Am. Rep. 142, reaffirmed in *Boettcher v. Colorado Nat. Bank*, 15 Colo. 16, 24 Pac. 582. Our statute has expressly so enacted: Sec. 189. The same cases at least tacitly recognized the doctrine that such acceptance or implied promise might, in the absence of a statute to the contrary, be proved by parol testimony, but this doctrine is abrogated by our statute, as we proceed to show. According to this statute, though all bills of exchange are not checks, yet as a check is therein expressly said to be a bill of exchange drawn on a bank and payable on demand, every check is a bill—that is, it is a species of a bill. So that, though a check need not be presented for acceptance in order to render the parties thereto liable, still as the check itself does not operate as an assignment of any part of the fund to the credit of the drawer with the bank, and the drawee bank is not liable to the holder, unless and until it accepts or certifies the check (section 189), and as (section 185), except as in the act otherwise provided, all of its provisions applicable to a bill of exchange payable on demand apply to a check, and as no contrary provision for the acceptance of or promise to pay a check has been made, the provision applicable to a bill of exchange that acceptance or certification when made must be in writing applies also to a check. There being no pretense in this case that the promise to pay or certification or acceptance of the check sued upon was in writing, the holder was not entitled to sue the bank upon it.

¹⁴⁶ There are distinctions between an action on a bill or check as an accepted bill and one founded on a breach of promise to accept: *Boyce v. Edwards*, 4 Pet. 111, 7 L. ed. 799; *Henrietta Nat. Bank v. State Nat. Bank*, 80 Tex. 648, 26 Am. St. Rep. 773, 16 S. W. 321. But we do not consider that such distinctions are important here. This action was based upon a parol promise to pay the check. Acceptance of a bill at common law and under our statute is merely the signification by the drawee of his assent to the order of the drawer. The legal meaning of an acceptance is that the acceptor engages to pay the instrument according to the tenor of his

acceptance. In other words, it is a promise to pay: *Sess. Laws 1897*, secs. 62, 132; 1 *Daniel on Negotiable Instruments*, 4th ed., sec. 475. This action is one by a holder of a check against the drawee based upon a parol promise of the latter to pay, and it cannot be maintained.

2. It is well to observe that this is not an action to recover money lost by the fraud or wrongdoing of another, and if such were the cause of action pleaded, the evidence would not support it. The only claim made by plaintiff is that the information which the appellant gave in response to an inquiry was, in legal effect, a promise to pay the check when the same was presented for that purpose. There is no pretense that the information given was false; it is conceded that the answer to plaintiff's inquiry on which the promise rests was true; hence there is present here no element of an action *ex delicto*.

In thus disposing of the case upon the ground that a promise such as is here relied upon must be in writing, we are relieved of the necessity of considering whether the mere oral statement by the drawee bank that a check drawn upon it is "good" or "all right" gives rise to an action in favor of one who parts with money upon the faith of it.

¹⁴⁷ The judgment should be reversed and the cause remanded, with instructions to the trial court to dismiss the action.

Chief Justice Gabbert and Mr. Justice Steele concur.

There is no Such Thing as "Acceptance" of Checks, in the ordinary sense of the term: *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634, 31 Am. St. Rep. 403. The parol acceptance of bills is considered in the note to *Walker v. Lide*, 44 Am. Dec. 252; and the defenses available to an acceptor of negotiable paper are considered in the note to *Credit Co. v. Machine Co.*, 1 Am. St. Rep. 135.

An Unaccepted Check or Draft in the usual form does not, according to many authorities, amount to an assignment of any part of the drawer's deposit, and therefore the refusal of the drawee bank to pay the paper does not give the holder a cause of action against it. Other authorities, however, take a different view: *Clark v. Toronto Bank*, 72 Kan. 1, 115 Am. St. Rep. 173; *Loan and Sav. Bank v. Farmers' etc. Bank*, 74 S. C. 210, 114 Am. St. Rep. 991; *Turner v. Hot Springs Nat. Bank*, 18 S. Dak. 498, 112 Am. St. Rep. 804; *Pullen v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep. 19, and cases cited in the cross-reference note thereto; note to *J. M. James Co. v. Bank*, 80 Am. St. Rep. 870-875.

NATIONAL BANK OF COMMERCE v. APPEL CLOTHING COMPANY.

[35 Colo. 149, 83 Pac. 965.]

CREDITORS' BILLS—Life Insurance—Pleading.—In a proceeding by creditor's bill to subject a policy of life insurance payable to a beneficiary on the death of the insured, but in which he has a surrender value to the payment of such creditor's claim, he must, to maintain his bill, make a case, both by his pleadings and proof, that would entitle him to subject property of his debtor not reachable, on execution, to the payment of his debt. (p. 187.)

CREDITORS' BILLS—Life Insurance—Pleading.—In a proceeding by creditor's bill to subject a policy of life insurance, payable to a beneficiary on the death of the insured, but in which he has a surrender value, to the payment of his debt, a complaint not alleging that the insured was insolvent at the time the policy issued or was assigned to the beneficiary, nor that the indebtedness sought to be enforced existed at the time the policy issued, nor that the policy was taken out or assigned with a view to the creation of future obligations, nor that there was any fraud either on the part of the insured or the beneficiary, is insufficient to entitle the plaintiff to equitable relief. (p. 187.)

CREDITORS' BILLS—Life Insurance.—A proceeding by creditor's bill to subject a life insurance policy in which a beneficiary has an interest and the insured a surrender value to the payment of his debts must be governed by the same rules that prevail in creditor's suits against other kinds of property, and before a court of equity is authorized to compel the surrender of such policy and the application of the proceeds to the payment of such debts, it must be alleged and proved that debts existed at the time of the issuing or the assignment of the policy to the beneficiary, or that it was issued or assigned with a view of contracting future indebtedness. (p. 187.)

H. S. Silverstein and T. J. O'Donnell, for the appellant.

D. V. Burns, M. B. Carpenter, Talbot, Denison & Wadley and Muller & Summerfield, for the appellees.

151 GABBERT, C. J. Counsel for plaintiff say that this action is in the nature of a creditor's bill. Their theory upon which they claim this action can be maintained is that where a debtor takes out a policy of life insurance upon his own life by the terms of which, should he survive a certain definite period, the company undertakes to pay him a certain sum of money, with the contingency that upon the death of the insured during this period the company will in that event pay certain sums of money to a beneficiary named in the policy or by assignment, and where such policy by its terms has a

value which the insured can obtain by surrender of the policy without the consent of the beneficiary, that such a policy is an asset of the insured which can be reached by his creditors. In other words, they claim that what he, himself, may do under such a policy a court of equity will compel him to do for the benefit of his creditors. This suit being in the nature of a 'creditor's bill, the elements necessary to maintain it must be present. Conceding, ¹⁵³ but not deciding, that the contention of counsel for plaintiff is correct in the abstract, a case must be made both in the complaint and by proof which would entitle a creditor to subject the property of his debtor not reachable on execution to the payment of his debts. There is no averment in the complaint to the effect that when these policies were issued or the assignments thereof made to the beneficiaries that the insured, who are now the judgment debtors, were insolvent, or that the indebtedness which forms the basis of the judgment existed at either of these times or that the insured were indebted to other parties or that the policies were taken out or assigned to the beneficiaries with a view to the creation of future obligations. In short, there is no averment of fraud whatever on the part either of the insured or the beneficiaries. The fact that the property sought to be subjected to the payment of the debts of the insured is represented by life insurance policies in which beneficiaries have an interest does not change the rules with respect to creditors' suits. They must necessarily be the same, without regard to the character of the property of the debtor which it is sought to reach. Before a court of equity is authorized to cancel a voluntary conveyance or transfer of property on the ground of fraud upon creditors it must be alleged and proved that debts existed at the time the conveyance or transfer was made, or that the conveyance or transfer was made with a view to the contracting of future obligations: *Emery v. Yount*, 7 Colo. 107, 1 Pac. 686; *Sexton v. Wheaton*, 8 Wheat. 229, 5 L. ed. 603; *Arnett v. Coffey*, 1 Colo. App. 34, 27 Pac. 614.

The beneficiaries obtained their respective interests before the judgment in favor of plaintiff was rendered. Whether these interests be subject to revocation by the insured is immaterial. The beneficiaries cannot be divested of their interests except ¹⁵³ by the acts of the insured. As the policies now stand, the money which the beneficiaries would receive in

the event of the death of the insured would not belong to their respective estates, but to the beneficiaries: Hendrie etc. *Mfg. Co. v. Platt*, 13 Colo. App. 15, 56 Pac. 209. This assignment was made for their benefit when, so far as the bill and proofs disclose, the insured had the right to do so. It does not appear that the plaintiff was in any manner prejudiced thereby, or that any property of the insured was applied in order to effect this arrangement, which in equity plaintiff would be entitled to have applied to the payment of its indebtedness, or that any conditions exist which would authorize a court of equity, at the instance of a creditor, to annul a voluntary arrangement on the part of the insured for the benefit of those for whom, by the laws of Nature as well as man, it was their duty to make provision. If the latter should be compelled to surrender these policies to the companies issuing them and accept the value thereof, the rights of the beneficiaries would be destroyed. The insured may have interests in these policies which a court of equity, if their rights only were involved, might have the power to compel them to apply to the payment of their indebtedness; but however this may be, a court of equity would not be authorized to exercise this power when thereby the vested rights of third persons would be destroyed, unless it should appear that the conditions existed under which a court of equity, at the instance of a creditor, may annul voluntarily arrangements entered into between his debtors and third persons.

The judgment of the district court is affirmed.

Mr. Justice Gunther and Mr. Justice Maxwell concur.

When an Insolvent Debtor Takes Out and Pays the Premium on an endowment insurance policy on his life in favor of his wife, and she receives the endowment from the insurer during the lifetime of the insured, she takes it, or the property in which it is invested in her name, subject to the claims of her husband's creditors: Talcott v. Field, 34 Neb. 611, 33 Am. St. Rep. 662. See, also, Tompkins v. Levy, 87 Ala. 263, 13 Am. St. Rep. 31. But a policy of life insurance on which the premium is payable quarterly until twenty years' premiums have been paid, and which is subject to forfeiture if any of the premiums are not paid when due, but which gives the policyholder the right to surrender the policy after three full annual payments have been made and to receive a policy for paid-up insurance, is not subject to execution, nor to the lien of that writ, during the lifetime of the assured, though three years' premiums have been paid: Boisseau v. Bass, 100 Va. 207, 93 Am. St. Rep. 956.

As to the Demands Which will Support a Creditor's Bill, see the note to Ladd v. Judson, 66 Am. St. Rep. 271.

IN RE MOYER.

[35 Colo. 159, 85 Pac. 190.]

HABEAS CORPUS—Pleading.—A return to a writ of habeas corpus is a response to the writ itself and not an answer to the petition therefor, and the respondent should in his return simply seek to relieve himself from the imputation of having imprisoned the petitioner without lawful authority by statements in the return from which the legality of the imprisonment may be determined without regard to the statements of the petition for the writ. He is not required to make any issue on the petition for the writ, but simply to answer the writ. (p. 192.)

INSURRECTION—Power to Call Out Militia.—It is the duty of the governor to determine as a fact when a state of insurrection exists in any given locality, such as to demand that in the discharge of his duties as chief executive of the state he shall employ the state militia to suppress, and his determination of such fact cannot be controverted. (p. 192.)

INSURRECTION—Power of Militia to Arrest.—If the governor has called out the militia of the state to suppress an insurrection, such militia has authority to arrest and imprison any person taking part in it or aiding and abetting the insurrection, and to detain him in custody until it is suppressed. (pp. 193, 194.)

INSURRECTION—Military Arrest—Habeas Corpus.—If, while the military authorities are engaged in suppressing an insurrection, they arrest and imprison a person for aiding and abetting it, his arrest is legal and his detention in the custody of such authorities until the insurrection is suppressed is also legal, and he is not entitled to his release on habeas corpus. (p. 196.)

Richardson & Hawkins, for the petitioner.

N. C. Miller, attorney general, H. J. Hersey, I. B. Melville, assistants attorney general, and J. M. Waldron, for the respondents.

¹⁶⁰ GABBERT, C. J. On behalf of Charles H. Moyer, a petition was presented representing that he was illegally restrained of his liberty in the county of San Miguel ¹⁶¹ by Sherman Bell and Bulkeley Wells. A writ of habeas corpus was issued, directed to these parties who, on the day it was returnable, produced the petitioner in court, and at the same time made a return to the writ whereby the jurisdiction of this court to further proceed in the matter was challenged. The averments upon which the claim of want of jurisdiction is based are to the effect that prior to the detention of petitioner His Excellency Governor Peabody, by proclamation, had determined and declared the county of San Miguel to be in a state of insurrection, and that, by reason of lawless-

ness, disturbances and threatened acts of violence, the civil authorities of the county were unable to cope with the situation. In pursuance of this proclamation the governor directed the respondent, Sherman M. Bell, adjutant general of the state of Colorado, to forthwith order out such troops as in his judgment might be necessary, and report to the sheriff of San Miguel county, and that he use such means as, in his judgment, might be right and proper to restore peace and good order in the county and enforce obedience to the constitution and laws of the state. In pursuance of this order General Bell proceeded to the county of San Miguel in charge and command of members of the Colorado national guard, and ever since has been, and now is, actively engaged in quelling the disturbances which called forth the proclamation and the executive order above referred to; that in the discharge of these duties he became convinced that petitioner had been and, if discharged from arrest, would continue to be, an active participant in fomenting and keeping alive the condition of insurrection existing in the county; that he was and is a prominent leader of those engaged in the acts of insurrection and crime, to suppress which the national guard was called into requisition; that for these reasons he caused the arrest, apprehension ¹⁶² and detention of the petitioner in the county of San Miguel, and does now restrain, detain and imprison him for the reasons and upon the grounds above set forth; that it is his purpose and intention to release and discharge petitioner from military arrest as soon as the same can be safely done with reference to the suppression of the existing state of insurrection in the county, and then surrender him to the civil authorities to be dealt with in the ordinary course of justice after such insurrection is suppressed. It is further stated that the governor has issued orders and instructions to General Bell not to surrender or release the military custody of petitioner during the existence and continuing condition of affairs in the county of San Miguel, as mentioned and set forth in the proclamation and executive order of his excellency. It is also stated that the respondent, Bulkeley Wells, is a subordinate military officer under the direct command of General Bell, and that his acts in the premises with reference to the arrest and detention of petitioner have been by virtue of express commands in that behalf issued to him by his superior officer.

To this return is appended the certificate of Governor Peabody, to the effect that the matters and things set forth in the return are true, and that the arrest and present detention of petitioner were had and done in pursuance of the authority conferred upon him by the constitution of the state; that the acts of General Bell in arresting and detaining petitioner were done by his express sanction as governor of the state and commander-in-chief of its military forces, and that the insurrection recited in his proclamation has not as yet been fully suppressed. To this return a reply was filed by petitioner in the nature of a general demurrer to the effect that it is wholly insufficient in law to constitute any justification whatsoever, either for the arrest, imprisonment or further ¹⁶³ detention of petitioner. The reply also alleges that neither on the date of the proclamation and order of the governor nor at any other time has there been a state of insurrection in the county of San Miguel.

Counsel for petitioner contend that on the facts above stated he is entitled to his discharge because the governor has no power to suspend the privilege of the writ of habeas corpus or declare martial law; or that, if he has such power, he has not assumed to exercise it. Special counsel representing the respondents controverts these propositions, and further contends that this court is without jurisdiction to proceed further than to deny the relief demanded, or remand the petitioner to their custody. The attorney general claims that the governor, independent of the questions of his power to declare martial law, suspend the privilege of the writ of habeas corpus, or the question of the jurisdiction of this court, is fully authorized under the constitution and laws of the state to suppress insurrection and lawless conditions through the power of the military under his command, and that his subordinate officers actively engaged in suppressing such insurrection by seizing and holding those engaged in acts of violence or in advising and aiding such acts to suppress which the military was called out, cannot be interfered with so long as conditions exist which require the action and the presence of the military to correct. Counsel amici curiae, in their views on these several questions, are divided.

The purpose of proceedings in habeas corpus is to determine whether or not the person instituting them is illegally restrained of his liberty, and we shall proceed to determine

whether or not, under ¹⁶⁴ the facts stated and the laws of this state, the petitioner is entitled to his discharge, without attempting to pass specifically upon the questions raised by his counsel. Before proceeding, however, to a discussion and determination of this question, two propositions are presented which should be disposed of. It is urged by counsel for petitioner that certain averments in the petition for the writ are not controverted by the return. The latter is not treated as an answer to the application, but, rather, as a response to the writ itself. The averments of the petition are made for the purpose of obtaining the writ, and the respondent, in his answer thereto, simply seeks to relieve himself from the imputation of having imprisoned petitioner without lawful authority, and this he does, or, rather, is required to do, under the law, by statements in the return from which the legality of the imprisonment is to be determined, without regard to the statements of the petition for the writ. In short, he is not required to make any issue on the petition for the writ, but to answer the writ: *In re Chipchase*, 56 Kan. 357, 43 Pac. 264; *Ex parte Durbin*, 102 Mo. 100, 14 S. W. 821; *Simmons v. Georgia Iron etc. Co.*, 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739.

By the reply it is alleged that, notwithstanding the proclamation and determination of the governor that a state of insurrection existed in the county of San Miguel, that, as a matter of fact, these conditions did not exist at the time of such proclamation or the arrest of the petitioner, or at any other time. By section 5, article 4 of our constitution, the governor is the commander-in-chief of the military forces of the state, except when they are called into actual service of the United States, and he is thereby empowered to call out the militia to suppress insurrection. It must, therefore, become his duty to determine as a fact when conditions exist in a given ¹⁶⁵ locality which demand that in the discharge of his duties as chief executive of the state he shall employ the militia to suppress. This being true, the recitals in the proclamation to the effect that a state of insurrection existed in the county of San Miguel cannot be controverted. Otherwise the legality of the orders of the executive would not depend upon his judgment, but the judgment of another co-ordinate branch of the state government: *In re Boyle*, 6 Idaho, 609, 96 Am. St. Rep. 286, 57 Pac.

706, 45 L. R. A. 832; *Luther v. Borden*, 7 How. 1, 12 L. ed. 581; *Ex parte Moore*, 64 N. C. 802; *Martin v. Mott*, 12 Wheat. 19, 6 L. ed. 537.

By the constitution the supreme executive power of the state is vested in the governor, and he is required to take care that the laws be faithfully executed: Const., art. 4, sec. 2. To this end he is made commander-in-chief of the military forces of the state, and vested with authority to call out the militia to execute the laws and suppress insurrection: Const., sec. 5. This authority is supplemented by the laws of 1897 (page 204, section 2), whereby it is provided that when an insurrection in the state exists or is threatened, the governor shall order out the national guard to suppress it. These are wise provisions, for the people, in their sovereign capacity, in framing the constitution, as well as the General Assembly, recognized that an insurrection might be of such proportions that the usual civil authorities of a county and the judicial department would be unable to cope with it. Through the latter, parties engaged in such insurrection might be punished, but its prompt suppression could only be secured through the intervention of the militia. Being vested with authority to employ the militia for a specific purpose, and it appearing from the return to the writ that the governor has called it into requisition for that purpose, his action through his subordinates cannot be interfered with so long as he ¹⁶⁶ does not exceed the power which, under the fundamental law of the state and the acts of the legislature in conformity therewith, he is authorized to exercise: *People v. District Court*, 29 Colo. 182, 68 Pac. 242.

The crucial question, then, is simply this: Are the arrest and detention of petitioner under the facts narrated illegal? When an express power is conferred, all necessary means may be employed to exercise it which are not expressly or impliedly prohibited: 1 Story on the Constitution, sec. 434.

Laws must be given a reasonable construction which, so far as possible, will enable the end thereby sought to be attained. So with the constitution. It must be given that construction of which it is susceptible which will tend to maintain and preserve the government of which it is the foundation, and protect the citizens of the state in the enjoyment of their inalienable rights. In suppressing an insurrection it has been many times determined that the mili-

tary may resort to extreme force as against armed and riotous resistance, even to the extent of taking the life of the rioters. Without such authority the presence of the military in a district under the control of the insurrectionists would be a mere idle parade, unable to accomplish anything in the way of restoring order or suppressing riotous conduct. If, then, the military may resort to the extreme of taking human life in order to suppress insurrection, it is impossible to imagine upon what hypothesis it can be successfully claimed that the milder means of seizing the persons of those participating in the insurrection or aiding and abetting it may not be resorted to. This is but a lawful means to the end to be accomplished. The power and authority of the militia in such circumstances are not unlike that of the police of a city or the sheriff of a county, aided by his deputies or posse comitatus in suppressing ¹⁶⁷ a riot. Certainly such officials would be justified in arresting the rioters and placing them in jail without warrant, and detaining them there until the riot was suppressed: Hallett, J., In re Application of Sherman Parker. If, as contended by counsel for petitioner, the military, as soon as a rioter or insurrectionist is arrested, must turn him over to the civil authorities of the county, the arrest might, and in many instances would, amount to a mere farce. He could be released on bail and left free to again join the rioters or engage in aiding and abetting their action, and if again arrested the same process would have to be repeated, and thus the action of the military would be rendered a nullity. Again, if it be conceded that on the arrest of a rioter by the military he must at once be turned over to the custody of the civil officers of the county, then the military, in seizing armed insurrectionists and depriving them of their arms, would be required to forthwith return them to the hands of those who were employing them in acts of violence, or be subject to an action of replevin for their recovery, whereby immediate possession of such arms would be obtained by the rioters, who would thus again be equipped to continue their lawless conduct. To deny the right of the militia to detain those whom they arrest while engaged in suppressing acts of violence and until order is restored, would lead to the most absurd results. The arrest and detention of an insurrectionist, either actually engaged in acts of violence or in aiding and abetting others to commit such acts,

violates none of his constitutional rights. He is not tried by any military court or denied the right of trial by jury; neither is he punished for violation of the law nor held without due process of law. His arrest and detention in such circumstances are merely to prevent him from taking part or aiding in a continuation of the conditions ¹⁶⁸ which the governor, in the discharge of his official duties and in the exercise of the authority conferred by law, is endeavoring to suppress. When this end is reached he could no longer be restrained of his liberty by the military, but must be, just as respondents have indicated in their return to the writ, turned over to the usual civil authorities of the county to be dealt with in the ordinary course of justice, and tried for such offense against the law as he may have committed. It is true that petitioner is not held by virtue of any warrant, but if his arrest and detention are authorized by law he cannot complain because those steps have not been taken which are ordinarily required before a citizen can be arrested and detained.

Nor do these views conflict with section 22 of the Bill of Rights, which provides that the military shall always be in strict subordination to the civil power. The governor, in employing the militia to suppress an insurrection, is merely acting in his capacity as the chief civil magistrate of the state, and, although exercising his authority conferred by the law through the aid of the military under his command, he is but acting in a civil capacity. In other words, he is but exercising the civil power vested in him by law through a particular means which the state has provided for the protection of its citizens. No case has been cited where the precise question under consideration was directly involved and determined, but in cases where the courts have had occasion to speak of the authority of the military to suppress insurrection and the means which may be employed to that end, it has been stated that parties engaged in riotous conduct render themselves liable to arrest by those engaged in quelling it: *In re Kemp*, 16 Wis. 359; *Luther v. Borden*, 7 How. 1, 12 L. ed. 581; *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 159.

¹⁶⁹ The same rule necessarily applies to those found in the zone of the disaffected district who are aiding and abetting the insurrectionists; for such conduct, unless repressed,

would result in the continuation of the insurrection, or, at least, render it more difficult to suppress. We therefore reach the conclusion that, independent of the questions of the authority of the governor to declare martial law or suspend the privilege of the writ of habeas corpus, that the petitioner, on the showing made by the return, is not illegally restrained of his liberty. In reaching this conclusion we are not unmindful of the argument that a great power is recognized as being lodged with the chief executive, which might be unlawfully exercised. That such power may be abused is no good reason why it should be denied. The question simply is, Does it exist? If so, then the governor cannot be deprived of its exercise. The prime idea of government is that power must be lodged somewhere for the protection of the commonwealth. For this purpose laws are enacted and the authority to execute them must exist, for they are of no effect unless they are enforced. Neither is power of any avail unless it is exercised. Appeals of a possible abuse of power are often made in public debate. They are addressed to popular fears and prejudices, and often given weight in the public mind to which they are not entitled. Every government necessarily includes a grant of power lodged somewhere. It would be imbecile without it: 1 Story on the Constitution, sec. 425; 1 Bailey on Jurisdiction, sec. 296, p. 300.

Many authorities have been cited by counsel for petitioner which it is not necessary to attempt to review. They are not in conflict with the conclusions reached in this case. They treat of the power of the president to declare martial law; to suspend the privilege of the writ of habeas corpus; of the authority of ¹⁷⁰ the military to arrest, try and punish persons not actually in the military service; and when the military may or may not temporarily supersede the usual civil authorities. None of these questions are involved in the present case. In fact, counsel for petitioner practically concede that the questions of the authority of the governor to declare martial law and suspend the writ of habeas corpus are not involved; because, they say, if he has such authority he has not assumed to exercise it; but it is immaterial what power in this respect may be vested in the governor, or whether he has, in fact, attempted to declare martial law or suspend the writ of habeas corpus. The petitioner was law-

fully arrested by the military authorities while the work of suppressing the insurrection in San Miguel county was in progress. Such arrest being lawful, his restraint by respondents until it is suppressed is not illegal.

The writ is discharged, and the petitioner remanded to the custody of the respondents.

Mr. Justice Steele dissented and denied the doctrine that the governor is the sole judge of the conditions constituting an insurrection, which can call into action the military power of the government, and that he can exercise all means necessary to effectually abate such conditions, and that the judicial department cannot inquire into the legality of his acts. "When it comes to superseding the civil power and exercising martial law, to disobeying the writ of habeas corpus or other process of the court, to detaining citizens upon suspicion, then the question of whether an insurrection exists is not to be determined by the governor's proclamation." Judge Steele also stated that, to his mind, the present proceedings amounted virtually to a suspension of the privilege of the writ of habeas corpus, and he proceeded to show that the power to suspend the privilege of such writ is not lodged in the executive branch of the government, but is solely a legislative power.

He also maintained that the governor has no power to arrest one who he may think will commit a crime, nor has the governor any right to authorize a military officer, nor has such officer any power in himself, to arrest a person on suspicion only and hold him without preferring any charge against him, because he fears that such person may commit an offense.

"Habeas corpus is the proper remedy to release from arbitrary arrest, and, unless its privileges have been suspended, one is not subject to arrest or suspicion merely, and detention beyond the time fixed by the statute for the return of the writ. As the privilege of the writ has not been suspended, as the courts are open, as martial law does not prevail, and as no charge has been preferred against the petitioner, he should be discharged."

For a Discussion of Questions kindred to those involved in the principal case, see the note to *Commonwealth v. Shortall*, 98 Am. St. Rep. 772, on martial law other than in time of war.

PEOPLE v. TOOL.

[35 Colo. 225, 86 Pac. 224.]

INJUNCTION to Prevent Election Frauds.—The state, through its attorney general, has a right to an injunction to restrain the commission of a conspiracy to violate the election laws by padding election lists, permitting repeating and falsifying returns. (p. 199.)

INJUNCTION to Restrain Crime.—Suits for injunction may be maintained by private parties to restrain crimes when their commission will injuriously affect their property rights. (p. 201.)

INJUNCTION to Restrain Crime.—The state may, by injunction, restrain the commission of a crime when its interests or the interests of those entitled to its protection, are injuriously affected. (p. 201.)

INJUNCTION to Restrain Conspiracy.—Individuals cannot invoke the power of a court of equity to enjoin a conspiracy to commit illegal acts affecting the entire state, but the state, in its sovereign capacity, as *parens patriae*, has a right to enjoin the commission of such acts and protect its citizens when they are incompetent to act for themselves. (p. 202.)

INJUNCTION at Suit of State.—When Acts, Though Constituting Crime, will interfere with the liberties, rights and privileges of citizens, the state not only has the right, but it is its duty, to restrain by injunction the commission of such acts. (pp. 203, 204.)

EQUITY JURISDICTION—Injunction—Power to Punish for Contempt.—A court having jurisdiction to issue an injunction, has inherent power to punish for contempt those who violate it, and if such violation constitutes a crime, the court by punishing for the contempt is not exercising the criminal laws, but only securing to suitors the rights to which it has adjudged them entitled. (p. 204.)

JURY TRIAL—Contempt.—The right of trial by jury does not extend to charges of contempt of court. (p. 204.)

ELECTIONS—Injunction to Prevent Frauds.—An application for an injunction to restrain election officers from committing election frauds presents a purely judicial, and not a political, question. (p. 205.)

ELECTIONS—Injunction—Original Jurisdiction.—The supreme court of a state has original jurisdiction to issue an injunction upon the application of the attorney general to restrain election officers from committing, or permitting others to commit, election frauds. (p. 206.)

INJUNCTION.—Denials of Averments of a bill upon which the right to injunctive relief is based do not necessarily demand the refusal of the writ, and they may be disregarded when the respondent does not assert a right to commit the acts sought to be enjoined. In all cases the comparative injuries which may result to the contending parties by granting or refusing to grant the writ may be considered. (p. 207.)

EQUITY JURISDICTION—Injunction to Prevent Election Frauds—Canvassing Returns.—If a court of equity has issued an injunction to prevent election frauds, it has inherent power to render the injunction effectual by undoing frauds committed in violation of it, and preventing advantage being taken of such frauds,

and to this end may restrain election officers from canvassing returns which are clearly the result of a fraud committed at such elections. (pp. 209, 210.)

ELECTIONS—Canvassing Returns.—If, in canvassing election returns, a discrepancy is found to exist between the tally list and the certificate of the officers of election as to the number of votes any candidate received, the certificate only can be considered by the canvassers of the returns. (p. 214.)

J. M. Waldron, T. Ward, Jr., and H. J. Hersey, for the petitioners.

C. J. Hughes, Jr., S. W. Belford, H. M. Teller, C. S. Thomas, T. J. O'Donnell, P. Hornbein, and J. G. Taylor, for the respondents.

²³¹ GABBERT, C. J. The object of this proceeding is to prevent the carrying out of a conspiracy to commit illegal and fraudulent acts which would result in the pollution of the ballot-box. It is instituted on behalf of the people on the information of the attorney general. According to the averments of the bill, a widespread conspiracy exists which, if not frustrated, will deprive the people of the constitutional right to an open, fair and honest election; that officials upon whom devolves the duty of conducting the election are engaged in this conspiracy, and that part of the nefarious scheme has already been consummated, in that thousands of fictitious names have been placed upon the registration lists which it is the purpose of the conspirators to have voted by repeaters and ²³² personators, with the connivance of judges and clerks of election. In short, that officials and instrumentalities of the state in control of the election machinery in the precincts mentioned have committed, and purpose to commit, frauds, in the way of permitting repeating and personating, and in counting the votes and certifying the returns which will render the election in these precincts a mere farce. The general purpose and scope of the relief demanded is to secure a judicial enforcement of the statutes relating to elections, so as to prevent the perpetration of these frauds. In other words, to require the respondents engaged in the conspiracy to commit the frauds contemplated to refrain therefrom by simply conducting the election honestly, and obeying the laws prescribed for the conduct of elections.

As reasons why this relief cannot be granted, it is contended on the part of respondents that, although the frauds

charged may be perpetrated, the most sacred rights of the citizens violated, and the election laws of the state set at naught, they cannot be enjoined from committing them because the commission of crimes may not be enjoined; that these frauds may be reached after their perpetration by the prosecution and conviction of those guilty of committing them, and through election contests; that political questions only are involved, and that the exercise of jurisdiction by this court in the premises would, in effect, amount to an assumption of powers which it does not possess.

The cardinal principle of our government is that it shall be controlled by the people through the medium of the ballot-box. Destroy this right, and the government itself is destroyed. The people are entitled to have an election honestly conducted, and the ballots cast honestly counted. The vote of the precincts in question constitutes a very considerable ²³³ proportion of the entire vote of the state. The purity of the ballot-box is threatened. The integrity of the election about to be held will be questioned. If these frauds are perpetrated, if they cannot be prevented, then the entire state, so far as the election is concerned, is practically at the mercy of those who control the election machinery in the city and county of Denver. The will of the people will thus be subverted by the acts of those who achieve this end by the commission of frauds which will result in depriving the people of their just rights. The relief demanded does not contemplate that a single right of the respondents will be infringed, or an act required of them which the law does not impose or require, for an observance of the mandates of the injunction prayed will require of the respondents nothing more or less than that they conduct an honest election in accordance with, and under the safeguards prescribed by, the laws of the state. As far as reported cases are concerned, relief of the character contemplated has not been granted or denied upon the facts disclosed by the bill, but it does not follow by any means that there are no precedents or authorities which are applicable or controlling. Precedents illustrate principles. They serve to demonstrate how and when they have been applied, but the true precedent is the correct principle applicable to the facts of a particular case. Whether or not the objections urged against the bill are good, and whether the relief demanded shall or shall not be granted, will be determined by a discus-

sion of the power of the state to protect the people in their constitutional rights and liberties, and the authority of this court in equity, when appealed to by the state in its sovereign capacity to grant relief which will afford such protection.

²³⁴ Suits may be maintained by private parties to restrain crimes when their commission will injuriously affect their property rights. This is permissible because interests are affected which the individual may thus protect. The state may restrain crime when its interests, or the interests of those entitled to its protection, are injuriously affected. For this reason it has been said that equity jurisdiction is divided into two branches: One which may be invoked by the state to redress and prevent public wrongs, and the other by private persons to prevent and redress private wrongs: *Attorney General v. Chicago etc. R. R. Co.*, 35 Wis. 425. In reality, however, there is no such distinction, for the basic principle in each branch is the same—that is to say, equity will afford protection by enjoining crime when rights and interests are injuriously affected thereby. In applying this principle, the distinction between the state and the private individual must be borne in mind, for this constitutes the distinguishing feature of the cases on the subject as between the sovereign power and the individual, not because of a difference in principle, but because of the difference in the rights, powers, duties and interests of each. In short, the principle applicable to actions of the character under consideration is, that they may be maintained by those whose interests or rights are injuriously affected or upon whom devolves the duty of protecting such interests and rights. All sovereign powers not limited by the federal constitution are vested in the states, except so far as the people of the respective states may have abridged these powers by their respective constitutions: *Sutherland's Notes on the United States Constitution*, 677. Sovereignty of a state embraces the power to execute its laws and the right to exercise supreme dominion and authority, except as limited by the fundamental law: 2 *Bouvier*, *Rawle's* ²³⁵ *Rev.*, 1016; *Anderson's Law Dictionary*, 960. These powers are exclusive and essential. It has been the boast of every political organization advocating policies entitled to consideration that the redress for wrongs was through the peaceful means of the ballot-box. The constitution provides that all elections shall be free and open. The respondents, although appealing to

this provision as a reason why this action cannot be maintained, are themselves guilty of acts—or, according to the averments of the bill, will commit acts—which, in spirit and in fact, will not only be a violation of the very law to which they appeal, but will render it nugatory. The state, in its sovereign capacity, by the very terms of its being, is intrusted with the powers and duties to be exercised and discharged for the general welfare, and for the protection of the rights and liberties of its citizens. In the exercise of these powers, and in the discharge of these duties, it is not restricted in the remedies which it may employ. The interest of the state in a pure election is not limited to the protection which may be afforded by the punishment of those, through criminal prosecutions, who violate the laws relating to elections by padding registration lists, permitting repeating, and falsifying election returns. If a conspiracy of the magnitude charged exists to commit frauds violative of the most sacred rights of the citizens of the state, then any attempt to prosecute and convict the wrongdoers would be futile. If, then, the state, in order to secure an honest election, should be limited to the prosecution and punishment of those who might be guilty of the frauds charged, the people of this commonwealth are at the mercy of those who have combined to commit these frauds. Government is not such a failure; the state is not so impotent. The result to be accomplished by a proceeding which the state may institute, rather than its ²³⁶ character, constitutes the test of its power. It has the right to appeal to this court for a determination and exercise of its powers by an appropriate process, to prevent wrongs which, in its sovereign capacity, it is its duty to prevent. Certainly, no good reason can be advanced why it is not as wise for the state, by means of a civil action, to prevent an offense, injuriously affecting its rights or the liberties of its citizens, as it would be to wait and punish, or attempt to punish, the offender for a crime after it has been committed.

It is the undoubted duty of the state to preserve, pure and unimpaired, every channel through which powers are exercised necessary for the protection of the rights and liberties of its citizens. Deny this power, and the supremacy of the state government is denied. The rights of citizens which will be impaired if the frauds threatened are committed, are of the most vital importance. If not prevented, then the interests of the

state, as well as the interests of those who it is bound to protect, will be injuriously affected. The power which the state may exercise in such circumstances is wholly independent of other remedies at law. It is the function of the attorney general, by information, to protect the rights of the public, and, in so doing, he has the right to resort to the more lenient remedy of injunction to prevent wrongs against the public rather than wait until after their commission, and then seek to punish the wrongdoers. The bill discloses that certain of the respondents have entered into a conspiracy to commit the illegal acts charged. These acts will affect the entire state. Individuals cannot invoke the power of a court of equity to enjoin these acts, but the state in its sovereign capacity as *parens patriae* has the right to invoke the power of a court of equity to protect its citizens when they are incompetent to act for ²³⁷ themselves. The state is not bound to wait until the object of the illegal combination is effected which will deprive the people of their liberties and constitutional rights, but may bring an action at once to prevent its consummation; and, while the writ of injunction may not be employed to suppress a crime as such, yet when acts, though constituting a crime, will interfere with the liberties, rights, and privileges of citizens, the state not only has the right to enjoin the commission of such acts, but it is its duty to do so: *In re Debs*, 158 U. S. 564, 15 Sup. Ct. Rep. 900, 39 L. ed. 1092; *Attorney General v. Railroad Co.*, 35 Wis. 425; *State v. Houser*, 122 Wis. 534, 100 N. W. 964; *Attorney General v. Blossom*, 1 Wis. 317; *Columbian Athletic Club v. State*, 143 Ind. 98, 52 Am. St. Rep. 407, 40 N. E. 914, 28 L. R. A. 727; *Louisville N. R. Co. v. Commonwealth*, 97 Ky. 675, 31 S. W. 476; *Commonwealth v. McGovern*, 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280; *People v. Truckee Lumber Co.*, 116 Cal. 397, 58 Am. St. Rep. 183, 48 Pac. 374, 39 L. R. A. 581; *In re Court of Honor*, 109 Wis. 625, 85 N. W. 497.

In the celebrated *Debs* case (158 U. S. 564, 15 Sup. Ct. Rep. 900, 39 L. ed. 1092), Mr. Justice Brewer, after discussing the interest which the government had in the action, out of which the proceedings for contempt against *Debs* arose, and having reached the conclusion that the government had a property right to protect, said: "We do not care to place our decision upon this ground alone. Every government, intrusted by the very terms of its being with powers and duties to be exer-

cised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other; and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court."

238 It is a favorite argument of wrongdoers to assert that an attempt to prevent them from committing criminal acts will invade their constitutional rights. Such an argument is specious. If carried to its logical conclusion, it would mean that the constitution protects parties in the commission of crimes against the sovereign state when it is sought to prevent their wrongful acts of a character that the interests of the state and the rights of its citizens are thereby injuriously affected. The respondents are, in effect, asserting that if they disobey the injunction, they will be guilty of a crime, as well as contempt. If they obey the injunction demanded, they will obey the law, and the injunction will not deprive them of any right. If they disobey the writ, they have only their own insubordination to answer for. They certainly have no right to commit the acts which are sought to be enjoined, and if they obey the law and observe the oaths which they are required to take, they will not be subjected either to a charge for contempt, or the commission of a crime. The right of trial by jury does not extend to charges for contempt. A court having jurisdiction to issue an injunction has the inherent power to punish for contempt those who violate its mandates. If such violation constitutes a crime, the court, by punishing for contempt, is not executing the criminal laws, but only securing to suitors the rights to which it has adjudged them entitled: *In re Debs*, 158 U. S. 564, 15 Sup. Ct. Rep. 900, 39 L. ed. 1092; *Eilenbecker v. Plymouth County*, 134 U. S. 31, 10 L. ed. 424, 33 L. ed. 801; *Attorney General v. Chicago etc. R. R. Co.*, 35 Wis. 425.

This question of the right of trial by jury has frequently received the attention of the courts in cases where authority was specially conferred upon, or exercised by, a court of equity to enjoin the continuance of a nuisance, with the result that practically the unbroken trend of authority is to the

effect ²³⁹ that laws authorizing such actions to be maintained do not invade constitutional rights: *State v. Saunders*, 66 N. H. 39, 25 Atl. 588, 18 L. R. A. 646; *Carlton v. Rugg*, 149 Mass. 550, 14 Am. St. Rep. 446, 22 N. E. 55, 5 L. R. A. 193; *Littleton v. Fritz*, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641; *Mugler v. Kansas*, 123 U. S. 623, 8 L. ed. 273, 31 L. ed. 205; *Commonwealth v. McGovern*, 116 Ky. 212, 75 S. W. 281, 66 L. R. A. 280.

These decisions are based upon the proposition that jurisdiction conferred upon a court of equity to abate nuisances can be lawfully exercised, and that conferring such jurisdiction does not deprive those maintaining such nuisances of the constitutional guaranty of the right of trial by jury.

The state has no interest in the success or defeat of any political organization. It is immaterial that it appears from the averments of the bill that one political organization is in control of the election machinery provided by law, and will employ illegal means to the detriment of the other; nor is it material that private relators are named who are candidates of the Republican party, and that respondents are engaged in a conspiracy which will result in fraudulently depriving the Republican candidates of votes, and give to the candidates of the Democratic ticket fraudulent and fictitious votes. These are but incidents by which it is made to appear that the elections will be dishonestly and fraudulently conducted, so that the ballots cast by the legal voters will not be counted as they should be, or have the effect they should have, because of frauds.

A political right is defined to be "a right exercisable in the administration of government": *Anderson's Law Dictionary*, 905. This proceeding does not contemplate that the respondents shall be deprived of the exercise of any function imposed upon them by law. It is not intended that they shall be required to perform any act which interferes with their duties as defined by the law relating to elections, but, on the contrary, it is only sought to compel them to obey ²⁴⁰ this law. The prevention of frauds which it is charged they intend to commit may have a political effect, in the sense that the success or defeat of a political organization may be affected, but that does not make the questions presented political instead of judicial. The action is not to have this court exercise functions which belong to any other depart-

ment of government, but merely to construe the law relative to the duty of the respondents and the power of the state to execute its laws, and to command obedience to them. The questions presented by the bill are, therefore, purely judicial: *State v. Houser*, 122 Wis. 534, 100 N. W. 964; *State v. Cunningham*, 83 Wis. 90, 35 Am. St. Rep. 27, 53 N. W. 35, 17 L. R. A. 145.

The final proposition presented by the questions under consideration is the jurisdiction of this court. Having reached the conclusion that the state, in its sovereign capacity, has the authority by a suit in equity to enforce its laws and command obedience to them when necessary for the protection of the rights and liberties of its citizens, the question of the jurisdiction of this court is limited to its authority in an original proceeding like the one at bar. The constitution (article 6, section 3) recites that the supreme court "shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction and other remedial writs, with the authority to hear and determine the same." At quite an early date this provision was considered by this court in *Wheeler v. Northern C. I. Co.*, 9 Colo. 248, 11 Pac. 103. In that case it was held that original jurisdiction was, by the constitutional provision referred to, conferred upon this court by virtue of the authority to issue the writs mentioned, for the purpose of protecting the sovereignty of the state, its prerogatives and the liberties of its citizens.

Wisconsin has a constitutional provision which is the exact counterpart of our own. The supreme ²⁴¹ court of that state, in considering and defining its purpose, has held, in effect, that it was designed to make that court one of the first resort on all judicial questions affecting the sovereignty of the state, its franchises and prerogatives, or the liberty of its citizens. It was said that the writs mentioned were prerogative "because these are the very armor of sovereignty. Because they are designed for the very purpose of protecting the sovereignty and its ordained offices from invasion or intrusion, and also to nerve its arm to protect its citizens in their liberties, and to guard its prerogatives and franchises against usurpation": *Attorney General v. Blossom*, 1 Wis. 317; *Attorney General v. Chicago etc. R. R. Co.*, 35 Wis. 425; *State v. Cunningham*, 83 Wis. 90, 35 Am. St. Rep. 27, 53 N. W. 35, 17 L. R. A. 145.

The supreme court of Missouri, in *Vaile v. Dinning*, 44 Mo. 210, thus expresses itself with respect to a constitutional provision similar to our own: "There may be occasions when not only the interest of the citizens, but the safety and welfare of the state, may depend upon the issuance from this tribunal of its original remedial process, and for such exigencies this provision was made."

The supreme court of Arkansas, in *State v. Ashley*, 1 Ark. 279, in considering a constitutional provision conferring upon the supreme court original jurisdiction, and which bears a striking resemblance to our own, announced that it was apparently the intention of the constitutional convention "to leave with the inferior tribunals the first, or original, cognizance of cases and controversies, between private parties, as well as all controversies in which the state might be a party or otherwise interested in which the sovereignty, or sovereign rights, powers and franchises of the state are not involved, but in cases involving the civil rights of the sovereign power of a state, affecting vitally its character and the proper ²⁴² administration of the government itself, in which the whole people and every individual member of the community has a direct, immediate and most sacred interest, when the exercise of a public right or a public franchise is the subject matter of controversy, the convention appears to have entertained a different view, and to have deemed it a proper subject to be investigated and determined in the first instance, before the highest judicial tribunal in the state."

The final question relates to the effect of the denial of the equities of the bill. Denials of the averments of a bill upon which the right to injunctive relief is based do not necessarily demand the refusal of the writ. The comparative injuries which may result to the contending parties by granting or refusing it may be considered: 1 High on Injunctions, sec. 13; *Everett v. Tabor*, 119 Ga. 128, 46 S. E. 72; *Charles v. City of Marion*, 98 Fed. 166.

Denials may also be disregarded when the respondents do not assert a right to commit the acts sought to be enjoined: *Herzog v. Fitzgerald*, 77 N. Y. Supp. 366, 74 App. Div. 110. Applying these rules, it is apparent that the denials of the equities of the bill are wholly immaterial. If the frauds committed in the conduct of an election are such that the legal cannot be separated from the illegal votes,

then the honest voters in the precincts where frauds of this character are committed are disfranchised, because of the impossibility of determining what that vote may have been. The respondents certainly have no right to commit the grossly illegal acts which the people seek to prevent, and no injury can result to them from the issuance of a writ which does no more than require them to obey the law.

The writ will issue, as prayed.

Steele, J., dissents.

²⁴³ The decision in this case was announced prior to April 5, 1905.

ON MOTION TO RESTRAIN THE ELECTION COMMISSIONERS FROM
CANVASSING RETURNS FROM CERTAIN PRECINCTS AND TO
EXCLUDE SUCH RETURNS IN MAKING UP THE OFFICIAL
ABSTRACT OF VOTES.

GABBERT, C. J. The injunction in this case, as indicated by the preceding opinion, was duly issued and served upon respondents prior to the election. After the election proceedings in contempt were instituted against certain of these parties. At their trial it developed that they had disobeyed the mandates of the writ by the perpetration of gross frauds, for which they were adjudged guilty of contempt. The facts upon which such conclusions were based are substantially as follows:

In precinct 8, ward 7, none of the ballots cast were counted, but in their place and stead ballots were substituted which were returned and certified.

In precinct 10, ward 7, upward of two hundred ballots were introduced into the box after the polls were closed, which ballots were counted and certified as having been duly cast.

In precinct 8, ward 5, the election officials knowingly and willfully permitted repeating to such an extent that it was impossible to determine the number of votes so fraudulently cast.

In precinct 7, ward 5, an examination of the ballot-box disclosed that upward of one hundred and fifty ballots were written by one person, and that the election officials knowingly and willfully permitted repeating.

²⁴⁴ In precinct 6, ward 5, repeating was also knowingly and willfully permitted by the election officials, it appearing that in some instances the same person voted as many as eight times.

In precinct 9, ward 5, after the polls were closed, the election officials mingled with the ballots cast a large number of false, fictitious and spurious ballots, which were subsequently counted, returned and certified by them.

In precinct 3, ward 4, the election officials also permitted repeating. The same is true with respect to precincts 1 and 2 of this ward.

In precinct 13, ward 3, in addition to the election officials knowingly and willfully permitting repeating, it appears that over eighty ballots were found in the box so folded that they could not have been introduced through the slot; that those ballots were counted and certified, and it also appeared that, according to the returns made, there had been a willful miscount of the votes found in the box.

In brief, it appeared from the facts established in the contempt proceedings, that the returns made by the election officials of the precincts mentioned were false; that in no instance did they represent the bona fide vote cast in either of these precincts; that this vote could only be determined by an investigation independent of the returns; that the respective election officials had knowingly and willfully committed frauds through which these results were accomplished, and that these several acts were in violation of the mandates of the injunction issued. After these proceedings the people, through the attorney general, moved for an order directing the election commission to exclude the returns from these precincts in making up the final abstract of votes. In opposition to this motion it is contended that an order of the character demanded will disfranchise the people ²⁴⁵ of the precincts embraced in the motion; that such an order will be an interference with the duties of the commission, because by law they are required to canvass the returns in the first instance; that it will affect candidates who were not parties to the original proceeding, and are not before the court on this motion, and that title to an office cannot be determined, or a contest inaugurated, in the manner contemplated by the motion. None of these questions are involved. Sustaining the motion will not disfranchise the voters in the precincts men-

tioned. If they have been disfranchised, it is because of the fraudulent acts of election officials. The motion does not make a case of an election contest, nor does it involve title to an office, so that candidates are neither proper nor necessary parties to the original proceeding, or to this motion. The election commission were parties to the original proceeding, and are parties to this motion. Two of the members of that body were charged with being parties to the fraudulent practices mentioned in the bill, and it now appears that the frauds committed at the election were, in part, at least, consummated by the aid of frauds previously committed in which these members of the commission took part. The only question is the power of a court of equity, after it has assumed jurisdiction of an action to prevent frauds, to effectuate its orders made for the purpose of preventing such frauds. By the writ issued, the court did not assume to do more than require the election officials to discharge the functions which the law requires them to exercise, and to refrain from committing the fraudulent acts which they have committed. The purpose of the original action was to secure an honest election in the precincts in question. Instead of obeying the mandates of the injunction issued for that purpose, the respondents have been guilty of ²⁴⁶ frauds to an extent and of a character so that it appears the returns made by them are absolutely false, and the truth cannot be deduced from them. When it clearly appears that frauds subversive of the purity of the ballot-box have been perpetrated by election officials, or have been perpetrated by others with their knowledge, connivance and consent, of a character and extent that they cannot be disclosed with reasonable certainty, the integrity of the entire return is destroyed, and it must be rejected: *Londoner v. People*, 15 Colo. 577, 26 Pac. 135. The reason for this rule is obvious. In such circumstances the returns are untrue, and the legal votes can only be determined by evidence aliunde.

The object of the action was to prevent frauds of the character practiced by the election officials. Having issued a writ of injunction with that end in view, the authority of the court is not limited merely to orders punitive in their nature, but to accomplish the end sought it has the authority to enter orders of a remedial character: 10 Ency. of Pl. & Pr. 1114. This doctrine is a familiar one in equity jurispru-

dence, and is as applicable to an election controversy as any other of which the court has jurisdiction. The object of a punitive order against one violating the injunctive process of a court is to vindicate its authority and insure respect and obedience for its process, while the purpose of a remedial order is to protect the rights of the party for whose benefit the injunction process was issued, and to prevent the party to whom such process was directed from securing an advantage or benefit resulting from its disobedience: *Bessette v. Conkey*, 194 U. S. 324, 24 Sup. Ct. Rep. 665, 48 L. ed. 997. This court did not assume jurisdiction of the action instituted by petitioners for the mere purpose of punishing those who might violate its orders, but to prevent fraud. To now limit ²⁴⁷ our authority to punitive orders would render the action practically nugatory, permit the respondents to commit the frauds inhibited, and leave them standing exactly on the same plane as though no action had been commenced, or process served upon them, save and except that they may be punished for disobeying the orders of the court. Frauds cannot be fully prevented unless the court assuming jurisdiction to prevent them has the power to inhibit advantage being taken thereof where they are committed in violation of its orders. A court of equity has the inherent power to effectuate its orders, and when it has properly obtained jurisdiction of a cause, it will retain that jurisdiction for the purpose of entering such orders as will effectuate the object of the action, although that may require matters to be passed upon of which, standing alone, it could not take cognizance: *Pool v. Docker*, 92 Ill. 501. So that, while it may be correct that in an original action a court would have no authority to grant the relief demanded by the motion, yet, when it has assumed jurisdiction for a specific purpose, it has the authority, by subsequent proceedings, to effectuate that purpose.

The order demanded will not disfranchise the people of the precincts in question, nor will it deprive candidates of the legal votes cast in their favor if, independent of the returns, the legal can be segregated from the illegal votes. Those are matters which can only be determined by a competent tribunal in case a contest is inaugurated by any of the candidates voted for at the election, to which character of proceeding all persons who are proper and necessary parties would be parties, and thus afforded an opportunity to be

heard and fully protect their rights. In brief, then, the purpose of the motion is merely to prevent the respondents from obtaining ²⁴⁸ any advantage of the frauds committed in violation of the injunction issued. An order to that effect does not disfranchise any voter, or deprive any candidate of the right, in an appropriate proceeding, to establish, by competent evidence, what the legal votes were, and have them counted accordingly. This court, by virtue of the authority resulting from assuming jurisdiction originally, has the inherent power to render its process effectual by undoing frauds committed in violation of the mandates of that process, and preventing advantage being taken of such frauds, so as to protect the party for whose benefit the process issued from being injured by a disobedience of such process: *People v. District Court*, 29 Colo. 182, 68 Pac. 242. The motion will, therefore, be sustained.

Motion sustained.

Steele, J., dissents.

The decision on the motion was announced prior to April 5, 1905.

ON MOTION.

GABBERT, C. J. The question raised by the motion under consideration is, whether the temporary election commission, in the capacity of a board of canvassers, may, in making up the returns, consider the tally list, or is this board, in making up such returns, limited to the certificate of the precinct election officials? In other words, in case of a discrepancy between the tally-list and such certificate, which shall control? Counsel presenting the motion contend that the certificate, alone, can be considered, while on the part of counsel for the election commission it is claimed that the tally list is a part of the returns, ²⁴⁹ and that such list, as well as the certificate, may be considered by the commission in canvassing the returns.

The election law, after directing the preliminary steps to be taken by precinct election officials in counting the ballots and making the returns, provides: "As the judges of election shall open and read the tickets, each clerk shall, upon tally lists prepared for that purpose, carefully mark down the votes each of the candidates shall have received, in separate lines, with the name of such candidate at the end of the

line, and the office it is designed by the voter such candidate shall fill": 3 Mills (Rev.), 1625f1.

The law further provides that: "As soon as all the votes shall have been read off and counted, the judges of election shall make out a certificate under their hands, and attested by the clerks, stating the number of votes each candidate received, designating the office for which such person received such vote or votes, and the number he did receive, the number being expressed in words at full length, and in numerical figures, such entry to be made, as nearly as circumstances will admit, in the following form." Then follows the form, from which it appears that it was the express purpose of the legislature in passing the foregoing provision that the number of votes cast for each candidate should be written out full length, and also in figures immediately following: 1 Mills' Ann. Stats. 1624.

This section further directs that the certificate of the election officials, together with one of the lists of voters and one of the tally lists, shall, on the completion of the count, be inclosed and sealed up, under cover, and directed to the official who has charge of making the canvass.

²⁵⁰ 1 Mill's Annotated Statutes, 1626, directs that the canvassing board "shall proceed to open the said returns, and make abstracts of the votes in the following manner." The direction following makes no reference as to what shall be considered in making this abstract, but is merely directory as to what such abstract shall show for the respective candidates.

1 Mills' Annotated Statutes, 1642, also provides that, "If, upon proceeding to canvass the vote, it shall clearly appear to the canvassers that in any statement produced to them certain matters are omitted in such statement which should have been inserted, or that any mistakes which are clerical merely, exist, they shall cause the said statements to be sent by one of their number to . . . the precinct . . . judges . . . from whom they were received, to have the same corrected, and the judges of election, . . . when so demanded, shall make such correction as the facts of the case require, but shall not change or alter any decision before made by them, but shall only cause their canvass to be correctly stated."

Questions affecting elections are of the most vital importance, and one of the important matters to be guarded in the conduct of an election, and one which our legislature

has been careful to prescribe conditions in relation to, is the record and return of the vote cast. If the provisions on this subject are open to construction, then they should receive from the courts such an interpretation, if possible, as is most likely to secure the object of their enactment. Tally lists shall be kept during the counting of the ballots by the precinct officials. These lists are intended as a preliminary to the making up of the official returns. They are convenient, and, perhaps, necessary for the use of the judges and clerks in casting up the vote; but, in case of a discrepancy ²⁵¹ between the tally lists and the returns written out in words, which shall control? It is hardly reasonable to presume that it was the intention of the General Assembly, in case of such discrepancy, to leave it to the members of the canvassing board to adopt whichever result might be most in harmony with their political affiliations or personal preferences. Such a construction would open the door to the perpetration of frauds. An intelligent interpretation of our statutes on the subject of canvassing votes requires that where there is a discrepancy between the tally list and the certificate proper, that the canvassers shall be bound by some rule that is reasonable and certain, and not subject to variation according to the discretion of the board of canvassers: *People v. Board of Canvassers*, 126 N. Y. 392, 27 N. E. 792. The law does not state that the board of canvassers shall not consider the tally list, and that the canvass shall be limited to the certificate. If, however, the tally list may be resorted to by the canvassers and their canvass based upon such lists rather than upon the certificates, then the lists are, in effect, to be regarded as controlling, or as the best evidence of the count made by the precinct election officials. The legislature has required a certificate to be made by the judges and clerks of election in such form that it could not be changed except it would show evidence of having been tampered with. In the face of this provision it certainly was not the purpose of the General Assembly to allow mere tally sheets, which are not certified, which contain nothing more than strokes of pen or pencil with respect to the number of votes cast for any candidate, and which can be readily changed, to be taken as evidence sufficient to contradict the certificates in case of a discrepancy between such certificates and the tally sheets.

²⁵² One line of authorities cited by counsel hold that tally sheets may be considered in connection with the certificates,

because they are part of the returns, while another line holds that such sheets cannot be considered, because they are not a part of the returns. It will be observed that the decisions in those cases are based upon the assumption that the tally lists do or do not constitute a part of the returns. We do not think those authorities are applicable, because our statutes on the subject of returns contemplate that the certificates can only be considered, and that they cannot be changed or altered by the board of canvassers by reference to the tally lists.

Counsel for the election commission rely upon the provisions of section 61, *supra*, which authorizes the canvassers to correct errors which are merely clerical. Mistakes in filling up the certificates cannot be corrected by the canvassers or precinct election officials by reference to the tally lists. Errors of this kind do not come within the provisions of the section relied upon. The result as expressed in the body of the certificates must control: *People v. Board of Canvassers*, 126 N. Y. 392, 27 N. E. 792. The motion to require the election commission to canvass the returns as shown by the certificates will be sustained.

Motion sustained.

Steele, J., dissenting (orally). I dissent from the judgment, because, in my opinion, it is unwarranted, without precedent and directly contrary to the law.

The decision on this motion was announced prior to April 5, 1905.

Although Equity has no Jurisdiction to restrain the commission of a crime (*State v. Zachritz*, 166 Mo. 307, 89 Am. St. Rep. 711), still an injunction will not be denied merely because the act sought to be enjoined is a crime: *Columbian Athletic Club v. State*, 143 Ind. 98, 52 Am. St. Rep. 407; *Vegetahn v. Guntner*, 167 Mass. 92, 57 Am. St. Rep. 443; *Hamilton-Brown Shoe Co. v. Saxey*, 131 Mo. 212, 52 Am. St. Rep. 622; *Klein v. Livingston Club*, 177 Pa. 224, 55 Am. St. Rep. 717.

IN RE SHAPTER'S ESTATE.

[35 Colo. 578, 85 Pac. 688.]

WILLS—Evidence of Testamentary Capacity.—A will which disposes of testator's property in a manner consistent with, and such as naturally would be expected from a person in the testator's situation, and in accordance with his privately expressed wishes, is of itself evidence of his testamentary capacity. (p. 218.)

WILLS—Testamentary Capacity—Reading Will—Presumption. If a will is prepared at the testator's special request and is then left in his possession several hours prior to its execution, and he then signs it in the presence of attesting witnesses, who are present at his request for that purpose, it will be presumed that he read it, or that its contents were in some way made known to him. (p. 218.)

WILLS—Testamentary Capacity—Burden of Proof.—The law presumes testamentary capacity, due execution, and that the will contains the unrestrained wishes of the testator, and the burden of proof is upon the person attacking it to show otherwise. (p. 219.)

WILLS—Subscribing Witnesses—Time of Signing.—The fact that subscribing witnesses signed the will before the testator does not invalidate the will. (p. 220.)

WILLS—Subscribing Witnesses Attesting a will in the presence of the testator thereby impliedly state that he is of sound mind and competent to make a will. (p. 220.)

WILLS—Testamentary Capacity—Testimony of an Attesting Witness that he did not believe that the testator was conscious or knew what he was doing when he made his will, does not impair the efficacy of such witness' attestation. (p. 220.)

WILLS—Proof of Execution—Subscribing Witnesses.—It is not incumbent upon the proponent to prove all the facts constituting due execution of a will by the concurring testimony of the two subscribing witnesses, and while both of such witnesses must be examined, the will may be established even in opposition to the testimony of both of them. (p. 220.)

WILLS—Witnesses—Competency—Interest.—A party to the contest of the probate of a will is, under the statute, incompetent to testify on the ground of interest. (p. 221.)

EVIDENCE—Privileged Communications.—The physician and attorney of a testator are competent to testify in a proceeding to probate his will as to facts ascertained in their attendance upon him in their professional capacity. (p. 222.)

WILLS—Witnesses—Beneficiary.—If a will provides compensation for legal services rendered, and reimbursement for expenses of an attorney in administering a trust as executor, he is not such a beneficiary under the will as will render him incompetent to testify in proceedings to contest the will. (p. 222.)

WITNESSES—Competency of Executors.—A statute rendering parties to a proceeding incompetent to testify therein applies to an executor made a party to a proceeding to contest the probate of a will. (p. 222.)

Thomas, Bryant & Lee and E. W. Parks, for the appellants.

S. E. Robinson and A. W. Gillette, for the appellees.

580 GODDARD, J. The most important objection to the validity of the judgment presented by the assignment of errors is predicated upon the action of the trial court in directing a verdict. From an examination of the testimony introduced, we are of the opinion that there was evidence upon which the jury should have been permitted to pass and which, if accepted by them as true, was sufficient to sustain the conclusion that the instrument presented was executed in conformity with the requirements of the statute, and with sufficient knowledge and understanding on the part of the testator to constitute a valid testamentary disposition of his property. In the circumstances of this case, it was peculiarly within the province of the jury to determine whether the testator, notwithstanding his enfeebled condition at the ⁵⁸¹ time the paper was signed, realized what he was doing. This essential fact could only be ascertained by taking into consideration not only the direct proof, but as well all collateral and relative facts and surrounding circumstances that tended to throw light upon the mental capacity of the testator at that time, and from which inferences might be drawn and presumptions raised as to whether or not he was mentally capable of making a will, and whether the disposition made of his property was consistent with his situation and in accordance with his previously expressed wishes and intentions, and such as he would naturally make under the circumstances, or adopt, or acquiesce in, if not wholly deprived of consciousness.

In *Brogden v. Brown*, 2 Add. Ecc. 449, the will under consideration was prepared by Mr. Brogden in pursuance of instructions which, it was pleaded, the testatrix gave him in an interview at which they alone were present and which, it was claimed, was signed by her while delirious and incapable. Brogden, being a party in the cause, was incompetent to testify as to the instructions; hence they were incapable of direct proof. Sir John Nicholl, in speaking of the presumptions that prevail in such circumstances, used this language: "The rule that, where capacity is at all doubtful, there must be direct proof of instructions . . . has really no application to a will prepared by an agent . . . and of which, at the same time, the dispositive part is so just and so proper, so consonant to the deceased's natural affections and moral duties that it speaks for itself, and carries, upon the face

of it, its own recommendation. Such an alleged will, if suggested, the court may readily presume that the alleged testator would acquiesce in, and adopt, if not wholly deprived of consciousness; ⁵⁸² and mere acquiescence and adoption, in such a case, would so compensate for any want of direct evidence of instructions given, a priori, that proof of these alone, in conjunction with proof of almost any, whatever, glimmering of capacity at the time of the execution, would be good to support the will, and would sufficiently indicate mind and volition to justify a court of probate in pronouncing for it as a genuine and valid will."

As said by Senator Verplanck in *Stewart's Exr. v. Lispenard*, 26 Wend. 255: "If the testamentary disposition be in itself consistent with the situation of the testator, and in congruity with his affections and previous declarations; if it be such as might have been naturally expected from one so situated, this is itself rational and legal evidence of no small weight to testamentary capacity. . . . The rationality of the act goes to show the reason of the person. This rule has been repeatedly applied in English courts in cases of doubtful capacity, from age or deathbed disease."

The instrument under consideration possesses all these characteristics. The disposition of the property therein provided is consistent with, and such as would naturally be expected from, a man in the situation of the testator. He had lived in this country for many years, was unmarried, and it in no way appears that the contestants, although his relatives and heirs, ever concerned themselves about his welfare and condition. On the other hand, some of those remembered in the will had shown him kindness and attention when sorely needed. And others are of a class whose care and comfort would naturally appeal to the sympathy of an old man who was desirous of devoting his property to a worthy charity.

⁵⁸³ From the fact that the will was prepared at the testator's express request, that the instrument so prepared was left with him and was in his possession several hours before it was alleged to have been executed, and that he signed it in the presence of attesting witnesses who were present at his request for that purpose, in the absence of any showing to the contrary, it will be presumed that he had read it, or that its contents had, in some way, been made known to him. "The onus of proving the contrary is thrown upon him who

alleges it": *Hemphill v. Hemphill*, 2 Dev. 291, 21 Am. Dec. 331.

"Generally speaking, the law presumes testamentary capacity, due execution, and that the will contains the unrestrained wishes of the testator. Hence it is usually held that the burden upon the whole evidence is on the party attacking it on the ground of improper execution, lack of capacity, or undue influence, to prove the facts which he alleges": 4 Current Law, p. 1892, and cases cited in note.

But it is insisted that, if the instrument was, in fact, written at the direction of Shapter and embodied his instructions, it should be refused probate, for the reason that it was not executed or attested in the manner required by our statute. In support of this contention, counsel for contestants cite excerpts from the testimony of the attesting witnesses which they claim show that Shapter was not conscious of what he was doing at the time his name was affixed to the instrument, and that the signatures of attesting witnesses were subscribed to the will before the signature of Mr. Shapter was made.

We think, from the entire testimony introduced upon the trial, the jury might have found that the deceased was aware of what he was doing, and assented to the manner in which his signature was ⁵⁸⁴ made, and that the question as to whether he was conscious and possessed of testamentary capacity should have been left to them to determine from the facts and circumstances surrounding the transaction. The fact, if it be a fact, that the subscribing witnesses signed the will before the testator signed it does not invalidate the will: *Gibson v. Nelson*, 181 Ill. 122, 72 Am. St. Rep. 254, 54 N. E. 901; *O'Brien v. Gallagher*, 25 Conn. 229.

They did attest the will in the presence of the testator, and thereby impliedly stated that the testator was of sound mind and competent to make a will: *Stevens v. Leonard*, 154 Ind. 67, 77 Am. St. Rep. 446, 56 N. E. 27. And the statement of Mr. Young in the latter trial, to the effect that he was of the opinion that Shapter was not in a condition to make a will, and was too far gone to be conscious of what he was doing, did not impair the efficacy of his attestation, and should be taken only for what it is worth as an attempt tending to weaken the force of such attestation as evidence of the mental soundness of the testator, and the weight to be given

to it for that purpose was entirely within the province of the jury.

In *Stevens v. Leonard*, 154 Ind. 67, 77 Am. St. Rep. 446, 56 N. E. 27, Dowling, J., speaking on the subject, said: "It cannot be thought possible that an honest man, of ordinary intelligence, would subscribe his name as a witness to an instrument executed by a person whom he believed to be of unsound mind, or under coercion or constraint. The fact that such a man voluntarily identifies himself with the transaction as a witness is an indication that, in his opinion, the person executing the instrument is competent to do so. The witness must be understood to attest not merely the act of signing, but also the mental capacity of the testator to sign. A subscribing witness may, it is true, be heard to impeach the will; but, if he assumes that attitude toward it, he does so at the ⁵⁸⁵ peril of his reputation for candor and veracity. . . . The credibility of the witness becomes at once a matter of serious inquiry, and his desertion of his position as a sustaining witness is an important fact for the consideration of the jury."

It is not incumbent upon the proponent to prove all the facts constituting due execution of a will by the concurring testimony of the two subscribing witnesses. Both of these witnesses must be examined, but the will may be established even in opposition to the testimony of both of them: *Trustees of Auburn Seminary v. Calhoun*, 25 N. Y. 422; *Tarrant v. Ware*, 25 N. Y. 425, note; *Orser v. Orser*, 24 N. Y. 51.

In the latter case, the only surviving witness testified that the will was not signed, or the signature of the testator acknowledged, in his presence. A verdict against the will was set aside and a new trial granted, because the circumstances from which a due execution might be inferred had not been properly left to the jury.

It is further urged that the court erred in excluding the testimony of Mrs. Corbett on the ground that she was an interested party, and incompetent to testify under the provisions of section 4816 of 2 Mills' Annotated Statutes. Perhaps the weight of authority is in favor of appellants' contention that the probating of a will is a proceeding in rem and ex parte, and in which heirs and devisees are competent to testify, notwithstanding the inhibition of the statute as to parties in interest, but those decisions are predicated upon statutes materially different from our own, which was taken from

Illinois, and is identical with the statute of that state. The rule is well settled that in adopting the statute of another state we adopt the construction given it by the courts of that state.

In several cases decided in the appellate courts of Illinois, before and since our adoption of the ⁵⁸⁶ statute, the competency of interested parties to testify in an action to contest, and in proceedings to probate, wills, has been considered, and it has been uniformly held that the provisions of the statute under consideration render them incompetent to testify: *Holloway v. Galloway*, 51 Ill. 159; *Crowley v. Crowley*, 80 Ill. 469; *Brace v. Black*, 125 Ill. 33, 17 N. E. 66; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Volbracht v. White*, 197 Ill. 298, 64 N. E. 324.

While most of those cases were actions to contest the will after probate, we can see no reason why the same rule should not apply in proceedings to contest the probate of a will. The purpose of the proceeding is the same in each instance, to wit, to divest the legatees and devisees of all right in the estate of the testator, and vest the property in his heirs at law. In *Crowley v. Crowley*, 80 Ill. 469, the contest, as in the case at bar, originated in the county court, and was tried on appeal to the circuit court before a jury, and the testimony of a witness who was a devisee under the will was held inadmissible.

Under the construction, therefore, that we are compelled to give this statute, the action of the trial court in excluding the testimony of Mrs. Corbett must be upheld.

Counsel for contestants contend that the testimony of Dr. Burnham and Dr. Grant was improperly admitted, for the reason that they acquired their information as to the condition of Shapter while attending him as his physicians, and such information was, therefore, privileged under subdivision 4 of section 4824, and that Mr. McNeal was disqualified by subdivision 2 of said section, to testify to communications made to him by Shapter, because received by him in his capacity as attorney, and for the further reason that he was a beneficiary under the will.

⁵⁸⁷ The purpose of the statute in regard to privileged communications made to an attorney or physician is to protect the client or patient: *O'Brien v. Spaulding*, 102 Ga. 490, 66 Am. St. Rep. 202, 31 S. E. 100; *Doherty v. O'Callaghan*, 157 Mass. 90, 34 Am. St. Rep. 258, 31 N. E. 726, 17 L. R. A. 188;

Glover v. Patton, 165 U. S. 394, 17 Sup. Ct. Rep. 411, 41 L. ed. 760; Thompson v. Ish, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510.

In *Doherty v. O'Callaghan*, 157 Mass. 90, 34 Am. St. Rep. 258, 31 N. E. 726, 17 L. R. A. 188, it is said: "Undoubtedly, while the testator lives, the attorney drawing his will would not be allowed, without the consent of the testator, to testify to communications made to him concerning it, or to the contents of the will itself; but after his death, and when the will is presented for probate, we see no reason why, as matter of public policy, the attorney should not be allowed to testify as to directions given to him by the testator, so that it may appear whether the instrument presented for probate is or is not the will of the alleged testator."

In *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510, in which the competency of a physician to testify under a statute similar to ours was under consideration, Black, Justice, after citing and commenting on several cases, used this language: "We conclude . . . that when the dispute is between the devisee and heirs at law, all claiming under the deceased, either the devisee or heirs may call the attending physician as a witness."

The objection that Mr. McNeal was rendered incompetent because an alleged beneficiary under the will is equally untenable. The provision in his favor is to compensate him for his services, and to reimburse him for his expense in administering the trust as executor, and does not make him a beneficiary under the will: *Reeve v. Crosby*, 3 Redf. 74; *Meyer v. Fogg*, 7 Fla. 292, 68 Am. Dec. 441.

The further objection that Mr. McNeal was rendered incompetent to testify by the express terms of section 4816 of 2 Mills' Annotated Statutes, because a party ⁵⁸⁸ to the proceeding, is supported by the Illinois decisions construing the statute in like cases: *Smith v. Smith*, 168 Ill. 488, 48 N. E. 96; *Bardell v. Brady*, 172 Ill. 420, 50 N. E. 124.

We are, therefore, compelled to hold that he is not a competent witness while a party to the proceeding; but, with his testimony eliminated from the record, we think there still remains evidence tending to uphold the will which should have been submitted to the jury.

Our conclusion is, that the proponents are entitled to have the question in issue submitted to the jury under proper in-

structions as to the law governing the testamentary disposition of property.

The judgment is reversed. and the cause remanded.

Chief Justice Gabbert and Mr. Justice Bailey concur.

The Attestation and Witnessing of Wills are discussed in the recent note to *Lane v. Lane*, 114 Am. St. Rep. 209.

A Will Itself is Strong Proof of the Capacity of the Testator when made in conformity to a fixed determination entertained and expressed for years: *Couch v. Couch*, 7 Ala. 519, 42 Am. Dec. 602. And the reasonableness of a will is a circumstance in favor of the testator's capacity: *Tompkins v. Tompkins*, 1 Bail. 92, 19 Am. Dec. 656.

The Effect of the Testimony of Subscribing Witnesses, supporting or opposing the will which they have witnessed, is considered in the note to *Stevens v. Leonard*, 77 Am. St. Rep. 459.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

STEINMEYER v. SCHROEPPPEL.

[226 ILL. 9, 80 N. E. 564.]

MISTAKE OF FACT, Canceling Contracts for.—Mutual consent is requisite to the creation of a contract, and if there is a mistake of fact of one of the parties, going to the essence of the contract, no agreement in fact is made, and equity will grant the remedy of cancellation. (p. 225.)

MISTAKE OF FACT Due to Want of Care and Diligence.—To warrant relief in equity because of a mistake of fact, it must not have resulted from want of the care and diligence exercised by persons of reasonable prudence under the same circumstances. (p. 226.)

A MISTAKE Which will Justify Relief in Equity must affect the substance of the contract, and not a mere incident or the inducement for entering into it. (p. 227.)

MISTAKE OF FACT—Error in Adding Figures.—An error of more than four hundred dollars in adding prices of articles correctly set down on a paper, whereby the person for whom such adding was made was caused to enter into a contract to furnish such articles for a sum more than four hundred dollars less than if the adding had been correct, is not a mistake of fact for which equity will cancel the contract. (p. 227.)

Warnock, Williamson & Burroughs and William G. Burroughs, for the appellants.

Hadley & Wheeler and C. H. Burton, for the appellee.

¹¹ **CARTWRIGHT, J.** Appellants are in the lumber business at Collinsville, Illinois, and appellee is a building contractor at the same place. On June 10, 1905, appellee was about to erect a building for himself, and left at the office of appellants an itemized list of lumber, containing thirty-four items, on which he desired them to give him a price. Appellants' bookkeeper set down upon that list, opposite each item, the selling price, but did not add up the column. If correctly added the column ¹² would have footed up \$1,867.

One of the appellants made the addition and by mistake made the total \$1,446. The bookkeeper copied the list on one of appellants' billheads without the prices opposite the different items, and wrote at the bottom, "Above for \$1,446," and delivered the paper to appellee the same evening. Appellee received bids for the lumber from two other firms, which were in the neighborhood of \$1,890. On June 16th appellee called at the office of appellants and accepted their offer. He did not bring the paper with him, but the bookkeeper made another copy and at the bottom of it wrote the same memorandum, "Above for \$1,446." One of the appellants signed it, and a memorandum was then written below to the effect that if delivery was made within thirty days the appellants were to have \$20 more than the estimate, but if delivery was made after thirty days, appellee was to have a rebate of \$20 from the estimate, and this was signed by both parties. The same evening one of the appellants, looking over the bill, found that he had not added the amounts correctly, and the next morning one of them notified appellee by telephone of the mistake and refused to furnish the lumber for less than \$1,867. Appellants also sent appellee a notice that they had found an error of \$421, and the estimate should read \$1,867 instead of \$1,446. Appellants did not furnish the lumber, and appellee purchased it at the next lowest bid from another firm and sued appellants for the difference between what he paid for the lumber and what they had agreed to furnish it for. Appellants then filed a bill to enjoin the prosecution of the suit at law and to have the contract canceled on account of the mistake. The suits were consolidated and tried together without a jury. The circuit court entered a decree canceling the contract and restraining appellee from prosecuting his suit at law. The appellate court for the fourth district reversed the decree and remanded the cause to the circuit court, with directions to dissolve the injunction and dismiss the bill for want of equity. Appellants applied to ¹² the appellate court for a certificate of importance, which was granted, and this appeal was prosecuted.

The jurisdiction of equity to grant the remedy of cancellation because of a mistake of fact by one party to a contract is well recognized. Mutual consent is requisite to the creation of a contract, and if there is a mistake of fact by one of the parties going to the essence of the contract, no agreement is, in fact, made: 2 Kent's Commentaries, 477. If

there is apparently a valid contract in writing, but by reason of a mistake of fact by one of the parties, not due to his negligence, the contract is different with respect to the subject matter or terms from what was intended, equity will give to such party a remedy by cancellation where the parties can be placed in statu quo. The ground for relief is, that by reason of the mistake there was no mutual assent to the terms of the contract: 24 Am. & Eng. Ency. of Law, 2d ed., 618. The fact concerning which the mistake was made must be material to the transaction and affect its substance, and the mistake must not result from want of the care and diligence exercised by persons of reasonable prudence under the same circumstances: *Bonney v. Stoughton*, 122 Ill. 536, 13 N. E. 833. In this case the mistake was in the addition of the figures set down by the bookkeeper. The price of each item was written correctly, but appellants claimed that one item of about \$400 was placed somewhat to the right, and in adding the column the 4 was counted in the ten column instead of the hundred column. If that was done it does not account for the difference of \$421. But if it did, it would only show a want of ordinary care and attention. If the figures were not exactly in line, the fact could hardly escape notice by a competent business man giving reasonable attention to what he was doing. There was no evidence tending to prove any special circumstances excusing the blunder.

The case of *Board of School Commrs. v. Bender*, 72 N. E. 154 (decided by the appellate court of Indiana, division No. 2), relied on by appellants, differs from this in ¹⁴ various respects, one of which is that *Bender* was excusable for the mistake. His complaint alleged that he was misinformed by the architect that his bid must be in at or before 4 o'clock, when, in fact, he was allowed until 8 o'clock; that in ignorance of the fact and for want of time he was hurried in submitting his bid and had no opportunity for verification of his estimate, and that under those circumstances he turned two leaves of his estimate book by mistake and omitted an estimate on a large part of the work. The case involved the question whether the bidder had forfeited a sum deposited as a guaranty that he would enter into a contract, and when notified that his bid was accepted, having discovered his mistake, he informed the architect and immediately gave notice that he would not enter into the contract. By the terms of the bid it was intended that if the bid was accepted a con-

tract would be made, but the bid was not the contract contemplated by the parties and the bidder never did enter into the contract. The court concluded that the minds of the parties never, in fact, met, because the bidder fell into the error without his fault.

In the case of *Harron v. Foley*, 62 Wis. 584, 22 N. W. 837, there was no agreement, for the reason that the minds of the parties never met. The plaintiff claimed to have purchased of the defendant some cattle for \$161.50, but the defendant intended to state the price at \$261.50. When the defendant was informed that the plaintiff understood the price to be \$161.50 he refused to deliver the cattle and tendered back \$20 received on the purchase price. No agreement was, in fact, made, since the statement of the price by the seller was clearly a mistake.

A mistake which will justify relief in equity must affect the substance of the contract, and not a mere incident or the inducement for entering into it. The mistake of the appellants did not relate to the subject matter of the contract, its location, identity or amount, and there was neither belief in the existence of a fact which did not exist or ignorance¹⁵ of any fact material to the contract which did exist. The contract was exactly what each party understood it to be and it expressed what was intended by each. If it can be set aside on account of the error in adding up the amounts representing the selling price, it could be set aside for a mistake in computing the percentage of profits which appellants intended to make, or on account of a mistake in the cost of the lumber to them, or any other miscalculation on their part. If equity would relieve on account of such a mistake there would be no stability in contracts, and we think the appellate court was right in concluding that the mistake was not of such character as to entitle appellants to the relief prayed.

The judgment of the appellate court is affirmed.

FOR WHAT MISTAKES WRITTEN INSTRUMENTS MAY BE CANCELED OR CORRECTED IN EQUITY.

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I. Scope of Note.

Inasmuch as the general principles of law applicable to the subject of this note have been exhaustively considered in the monographic notes to Alabama etc. *Ry. Co. v. Jones*, 55 Am. St. Rep. 512, and *Williams v. Hamilton*, 65 Am. St. Rep. 481-522, we will not in this note go into that part of the subject except in an incidental manner, and hence will confine ourselves to a consideration of the cases applying the general principles to various kinds of mistakes. The distinction between ignorance of law and mistake of law was discussed in the note to *Lawrence v. Beaubieu*, 23 Am. Dec. 164.

II. The General Rule With Respect to Reformation and Cancellation of Instruments for Mistakes.

a. In General.—In a general way, it may be said that mutual mistakes, either of fact in making a contract or of law or fact in reducing it to writing, may be remedied in the absence of waiver or estoppel: *Bowell v. Smith*, 123 Wis. 510, 102 N. W. 1. But in cases of mistake in respect to written instruments, courts of equity can interfere only as between the original parties or those claiming under them in privity: *Adams v. Baker*, 24 Nev. 162, 77 Am. St. Rep. 799,

51 Pac. 252. Though reformation will be refused where the rights of innocent third persons would be affected: *Boone v. Graham*, 215 Ill. 511, 74 N. E. 559; *Green v. Stone*, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099.

The general rule is that if a written contract or conveyance omits or contains terms or stipulations contrary to the intention, agreement or understanding of the parties, a court of equity will, upon the proper showing of mutual mistake or fraud, reform the written instrument so as to make it conform to such intention, agreement or understanding: Monographic note to *Williams v. Hamilton*, 65 Am. St. Rep. 482. The authorities are, however, apparently divided upon the question whether a court of equity will reform a written instrument for a mistake of law. Probably the true rule is that a court of equity will not reform a written instrument because of a mistake of legal rights or of law when the mistake was made with a full knowledge of the facts and without fraud, although they will reform such an instrument when its terms result in a contract different from the one really entered into by reason of a misapprehension of its legal effect: Monographic note to *Williams v. Hamilton*, 65 Am. St. Rep. 488.

“Parties to an agreement may be mistaken as to some material fact connected therewith which formed the consideration thereof or inducement thereto on the one side or the other; or they may simply make a mistake in reducing their agreement to writing. In the former case, before the agreement can be reformed it must be shown that the mistake is one of fact and mutual; in the latter case it may be a mistake of the draftsmen, or one party only, and it may be a mistake of law or of fact. Equity interferes in such a case to compel the parties to execute the agreement which they have actually made. Sometimes it happens that parties agree, as in the case above cited from *Peters* [*Hunt v. Rousmanier*, 1 Pet. 13, 17 L. ed. 27], to carry out their agreement by an instrument which, by their mistake of the law, will not effectuate their intention. In such a case equity will not reform the instrument, or substitute another instrument which will in law give effect to their intention, because they adopted and agreed upon the particular instrument, and equity will not compel them to execute an agreement which they never agreed to execute, and thus make an agreement for them. But in this case the parties intended, according to the answer, to reduce their parol agreement to writing, and to embody it in the instrument; and either because they or their draftsmen did not understand the force of language, or because some language which they intended should have been inserted in the instrument was omitted by mistake, their intention was not carried into effect and the instrument failed to embody their agreement”: *Pitcher v. Hennessey*, 48 N. Y. 415.

Of course in order to reform a written contract on the ground of mistake, there must be proof that there was a definite agreement which on account of mutual mistake was incorrectly reduced to writing: *Auer v. Mathews*, 129 Wis. 143, 108 N. W. 45.

b. **Necessity for Mutuality of the Mistake.**—A court of equity can reform an instrument only for the purpose of having it express the understanding and agreement of the parties. Hence the mistake must be mutual: *Ward v. Yorba*, 123 Cal. 447, 56 Pac. 58. Therefore, where part of the previous oral agreement is omitted from the drafted contract in the belief that it can be enforced as a separate agreement, no reformation of the written contract will be allowed: *Ware v. Cowles*, 24 Ala. 446, 60 Am. Dec. 482; *Dunham v. New Britain*, 55 Conn. 378, 11 Atl. 354; *Dwight v. Pomeroy*, 17 Mass. 303, 9 Am. Dec. 148; *Martin v. Hamlin*, 18 Mich. 354, 100 Am. Dec. 181; *Seitz Brewing Co. v. Ayres*, 60 N. J. Eq. 190, 46 Atl. 535; *Mead v. Norfolk etc. B. Co.*, 89 Va. 296, 15 S. E. 497; *Braun v. Wisconsin Rendering Co.*, 92 Wis. 245, 66 N. W. 196. A written contract cannot be reformed so as to express stipulations which were not assented to by the parties, even though one of the parties intended to have it made a part of the contract: *Tyson v. Chestnut*, 100 Ala. 571, 13 South. 763; *McGuigan v. Gaines*, 71 Ark. 614, 77 S. W. 52; *Loftus v. Fischer*, 106 Cal. 616, 39 Pac. 1064; *Ward v. Yorba*, 123 Cal. 447, 56 Pac. 58; *Williams v. Hamilton*, 104 Iowa, 423, 65 Am. St. Rep. 475, 73 N. W. 1029; *Bowman v. Besley*, 122 Iowa, 42, 97 N. W. 60; *Buckley v. Frankfort (Ky.)*, 44 S. W. 139; *Byrne v. Gunning*, 75 Md. 30, 23 Atl. 1; *Whitworth v. Lowell*, 178 Mass. 43, 59 N. E. 760; *Green v. Stone*, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099; *Harbeck v. Prepin*, 145 N. Y. 70, 39 N. E. 722; *Mitchell v. Holman*, 30 Or. 280, 47 Pac. 616; *Phillips v. Port Townsend Lodge*, 8 Wash. 529, 36 Pac. 476; *Kropp v. Kropp*, 97 Wis. 137, 72 N. W. 381. Thus the mere fact that one party thought that a certain conveyance of four acres along a section line included a certain area along such line affords no ground for reformation: *Clark v. Mossman*, 58 Neb. 87, 78 N. W. 399. Nor does the fact that the grantee of a deed thinks that the deed does not contain a clause whereby he assumes a certain mortgage, the grantor not knowing of the mistaken idea of the grantee, afford ground for reformation: *Green v. Stone*, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099. Likewise where one of the parties intended that certain clauses in the printed form of a contract be stricken out, a reformation was refused: *Crane v. McCormick*, 92 Cal. 176, 28 Pac. 222. And where two mortgages exist on property, but the grantor when executing a conveyance does not know of the second mortgage and has the grantee merely assume the first mortgage, he cannot have the deed reformed so as to require the grantee to assume the second mortgage: *Moore v. Groves*, 97 Iowa, 4, 65 N. W. 1008. Neither will reformation be granted because one party, thinking that the area

of a lot offered for sale is less than it really is, sells it for less than it is in fact worth: *Chute v. Quincy*, 156 Mass. 189, 30 N. E. 550. Nor will reformation be allowed because one party to a land transaction has an idea that he is buying a larger tract of land than the other thinks he is selling: *Page v. Higgins*, 150 Mass. 27, 5 L. R. A. 152, 22 N. E. 63. Likewise reformation will be refused where the only showing is that one party thought that a tract of land covered by a mortgage did not include certain lots actually covered by it: *Ocean Beach Assn. v. Trenton Safe Deposit Co.* (N. J. Eq.), 48 Atl. 559. Reformation will not be granted because the amount of goods set forth in a contract is different from that which one of the parties believed was ordered: *Coates v. Buck*, 93 Wis. 128, 67 N. W. 23. The fact that one party intended to insert a clause in a contract that certain goods are to be invoiced at the actual wholesale cost whereas the contract as written is for an invoice "at wholesale cost as shown by the cost marks on the goods," is no ground for reformation: *Simpson v. Kane*, 98 Iowa, 271, 67 N. W. 247. The fact that one party to a construction contract understood that the price set forth is only for part of a building when the contract states it to be for the whole of the building is not sufficient to grant reformation: *Whitworth v. Lowell*, 178 Mass. 43, 59 N. E. 760. And the mere fact that one of the parties to the contract intended to insert a clause allowing him to draw certain additional funds but it was not done is not ground for reformation: *Mitchell v. Holman*, 30 Or. 280, 47 Pac. 616.

But a court of equity will correct a written contract where a mistake exists on the part of one of the parties and the other party is aware of his mistake, or where one party by his conduct or representations has led the other party into the mistake: *Higgins v. Parsons*, 65 Cal. 280, 3 Pac. 881; *Deischer v. Price*, 148 Ill. 383, 36 N. E. 105; *Roszell v. Roszell*, 109 Ind. 354, 10 N. E. 114; *Williams v. Hamilton*, 104 Iowa, 423, 65 Am. St. Rep. 475, 73 N. W. 1029; *Goednow v. Curtis*, 18 Mich. 298; *Crookston Imp. Co. v. Marshall*, 57 Minn. 333, 47 Am. St. Rep. 612, 59 N. W. 294; *Fritz v. Fritz*, 94 Minn. 264, 102 N. W. 705; *Sanford v. Gates*, 21 Mont. 277, 53 Pac. 749; *Husted v. Van Ness*, 158 N. Y. 104, 52 N. E. 645; *Jones v. Warren*, 134 N. C. 390, 46 S. E. 740; *Archer v. California Lumber Co.*, 24 Or. 341, 33 Pac. 526; *McCormick etc. Co. v. Woulph*, 11 S. Dak. 252, 76 N. E. 939; *McCormick v. Batcliffe* (Tenn. Ch.), 64 S. W. 332; *Kyle v. Fehley*, 81 Wis. 67, 29 Am. St. Rep. 866, 51 N. W. 257; *Home Ins. Co. v. Virginia-Carolina Chemical Co.*, 109 Fed. 681; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. Rep. 239, 35 L. ed. 1063. Thus reformation will be granted where one party is buying a certain subject matter which the other party knows that he will not receive under the terms of the contract as written: *Stevens v. Holman*, 112 Cal. 345, 53 Am. St. Rep. 216, 44 Pac. 670. So, also, reformation will be granted where the grantee knows that the gran-

tor believes that a certain coal vein is excepted and reserved from the deed while in fact it is not: *Cook v. Liston*, 192 Pa. 19, 43 Atl. 389.

c. *Mistakes for Which Cancellation may be Had.*—A court of equity will not interfere to decree a cancellation of a written instrument unless some special circumstance is shown to exist, establishing the necessity of a resort to equity to prevent irreparable injury: *County of Ada v. Bullen Bridge Co.*, 5 Idaho, 188, 95 Am. St. Rep. 180, 47 Pac. 818, 36 L. R. A. 367. The causes for rescission are mistakes of fact which are essential considerations to the contract. As, for instance, where the adding of two stories by the lessee was essential to his being capable of paying the rent stipulated, and it was thought at the time that the building would support the additional stories, but it is afterward ascertained that the walls and foundations are not sufficiently strong to support them, rescission may be had: *Hoops v. Fitzgerald*, 204 Ill. 325, 68 N. E. 430. In the principal case it was declared that equity will cancel a contract which is apparently valid for a mistake of fact not due to negligence where the contract is different with respect to the subject matter or terms from what was intended where the parties can be placed in statu quo: *Steinmeyer v. Schroepfel*, 226 Ill. 9, ante, p. 224, 80 N. E. 564. In other words, a mutual mistake in respect to the subject matter makes the contract inoperative and void: *Fink v. Smith*, 170 Pa. 124, 50 Am. St. Rep. 750, 32 Atl. 566; *Bedell v. Wilder*, 65 Vt. 406, 36 Am. St. Rep. 871, 26 Atl. 589. The power of cancellation is not exercised in order to interfere with the freedom of contract or with proper legal liability for bad bargains, but only to supplement the powers of courts of law where there is exceptional equity of a settled and recognized kind: *Du Bois Borough v. Du Bois City Waterworks Co.*, 176 Pa. 430, 53 Am. St. Rep. 678, 35 Atl. 248, 34 L. R. A. 92. The general rule is that where a written contract is executed under a mistake by one of the parties in respect to some matter which is of the essence of the contract, a court of equity will not reform the contract, since that would be making a new contract for the parties under the circumstance, but the courts rescind and cancel the written contract and thus place the parties in statu quo: *Werner v. Rawson*, 89 Ga. 619, 15 S. E. 813; *Backemann v. Riverbank Imp. Co.*, 167 Mass. 1, 57 Am. St. Rep. 427, 44 N. E. 990; *Keene v. Demelman*, 172 Mass. 17, 51 N. E. 188; *Nelson v. Carlson*, 54 Minn. 90, 55 N. W. 821; *Crowe v. Lewin*, 95 N. Y. 423; *Dunan v. Providence etc. R. Co.*, 5 R. I. 130; *Brown v. Lamphear*, 35 Vt. 252.

III. What Contracts or Instruments are Reformable.

The reformation of instruments because of mistakes committed in reducing the agreement of the parties to writing is not confined to any one class of instruments: Monographic note to *Williams v. Hamilton*, 65 Am. St. Rep. 504 et seq. But reformation will not be granted

where the instrument, if reformed, would be inoperative: *East St. Louis v. L. M. Rumsey Mfg. Co.*, 34 Ill. App. 458; *Williamson v. Hitner*, 79 Ind. 233; *Williams v. Cudd*, 26 S. C. 213, 4 Am. St. Rep. 714, 2 S. E. 14; *Persinger v. Chapman*, 93 Va. 349, 25 S. E. 5; *Thompson v. Phoenix Ins. Co.*, 25 Fed. 296.

IV. For What Mistakes Equity will Allow Either the Cancellation or Correction of a Written Instrument.

a. *Mistakes Going to the Inducement for the Contract.*—"A court of equity will not give relief in all cases of mistake. There are many extrinsic facts surrounding every business transaction which have an important bearing and influence upon its results. Some of them are generally unknown to one or both of the parties, and if known might have prevented the transaction. In such cases, if a court of equity could intervene and grant relief, because a party was mistaken as to such a fact which would have prevented him from entering into the transaction if he had known the truth, there would be such uncertainty and instability in contracts as to lead to much embarrassment. As to all such facts, a party must rely upon his own circumspection, examinations and inquiry; and if not imposed upon or defrauded, he must be held to his contracts. In such cases, equity will not stretch out its arm to protect those who suffer for the want of vigilance": *Damburann v. Schulting*, 75 N. Y. 55.

Consequently, it is said that a contract will not be rescinded by a court of equity for a mistake of fact connected with the transaction where the mistake results from a process of reasoning or motive of one of the parties: *Segur v. Tingley*, 11 Conn. 134; *Paulison v. Van Iderstine*, 28 N. J. Eq. 306; *Stettheimer v. Killip*, 75 N. Y. 282; *Triggs v. Read*, 5 Humph. 529, 42 Am. Dec. 447. And a mistake as to some collateral fact which may have prevented the making of the contract is not deemed sufficient ground for reforming the contract where the contract is correctly reduced to writing: *Phillip Zorn Brewing Co. v. Malott*, 151 Ind. 371, 51 N. E. 471; *Dever v. Dever (Ky.)*, 44 S. W. 986; *Wise v. Brooks*, 69 Miss. 891, 13 South. 836; *Curtis v. Albee*, 167 N. Y. 360, 60 N. E. 660; *De Voire v. De Voire*, 76 Wis. 66, 44 N. W. 839.

Thus, for instance, the fact that the holder of United States bonds, not knowing their actual market value, sold them for less than such market value but for a sum covering their face value, is not ground for avoiding the sale: *Sankey's Exr. v. First Nat. Bank*, 78 Pa. 48. And likewise where a person acting as agent for another purchased corporation stock at a price far above its market value, through some mistake in interpreting the instructions of his principal, it was held that equity would not rescind the sale: *Comer v. Granniss*, 75 Ga. 277. A release of one partner for liability cannot be reformed because it is subsequently found that a certain person who is finan-

cially responsible is a dormant partner: *Harbeck v. Pupin*, 145 N. Y. 70, 39 N. E. 722. An assignment of a claim in insolvency cannot be reformed because of an unknown payment upon the claim: *Curtis v. Albee*, 167 N. Y. 360, 60 N. E. 660. The lessee of certain mineral rights cannot have reformation because he did not know of an ancient reservation in a deed giving him such rights: *Duke of Sutherland v. Heathcote*, [1892] 1 Ch. 475. And where parties agree on a specific boundary line, believing it to be the true one, the court will not assume that they intended to locate the boundary line at the true line: *Phillip Zorn Brewing Co. v. Malott*, 151 Ind. 371, 51 N. E. 471. But where the correspondence between the insured and the insurer constitutes a preliminary agreement to insure a vessel to a port of loading, a policy insuring it to the port of discharge may be reformed: *Equitable Safety Ins. Co. v. Hearne*, 20 Wall. 494, 22 L. ed. 398. Likewise, a clause may be inserted in an insurance policy permitting mortgages to be placed upon the personal property insured without notice to the insurer, where that was the agreement between the parties: *Western Assur. Co. v. Ward*, 75 Fed. 338, 21 C. C. A. 378.

In order for a mistake to justify relief in equity, it must affect the substance of the contract and not be a mere incident or inducement for entering into it: *Steinmeyer v. Schroepfel*, 226 Ill. 9, ante, p. 224, 80 N. E. 564. Where certain facts forming the basis of the contract are assumed to exist, and those facts do not exist as a matter of fact, there is no agreement, and equity will furnish relief: *Griffith v. Sebastian County*, 49 Ark. 24, 3 S. W. 886; *Ander-son v. Armstead*, 69 Ill. 452; *Fleetwood v. Brown*, 109 Ind. 567, 9 N. E. 352, 11 N. E. 779; *Fritzler v. Robinson*, 70 Iowa, 500, 31 N. W. 61; *Goodwyn v. Perry*, 25 La. Ann. 292; *Rice v. Dwight Mfg. Co.*, 2 Cush. 80; *Gribben v. Atkinson*, 64 Mich. 651, 31 N. W. 570; *Geib v. Reynold*, 35 Minn. 331, 28 N. W. 923; *Woodworth v. McLean*, 97 Mo. 325, 11 S. W. 43; *Gebel v. Weiss*, 42 N. J. Eq. 521, 8 Atl. 889; *Duncan v. New York Mut. Ins. Co.*, 138 N. Y. 88, 33 N. E. 730, 20 L. R. A. 386; *Scioto Fire Brick Co. v. Pond*, 38 Ohio St. 65; *Fink v. Smith*, 170 Pa. 124, 50 Am. St. Rep. 750, 32 Atl. 566; *King v. Doolittle*, 1 Head, 77; *Bedell v. Wilder*, 65 Vt. 406; 36 Am. St. Rep. 871, 26 Atl. 589; *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493. The court in *Damburann v. Schulting*, 75 N. Y. 55, in denying relief, said: "There was no mistake of any extrinsic fact essential to the contract or involved therein. The defendant's financial condition was an extrinsic fact which might have influenced the plaintiff's action if he had known it. But ignorance of a mistake as to such a fact is not ground for affirmative equitable relief. The following illustrations of mistakes as to extrinsic facts essential to contracts, against which courts of equity will relieve, are found in the books: A buys an estate of B to which the latter is supposed to have an unquestionable title. It turns out, upon due investiga-

tion of the facts, that B has no title; in such a case equity will relieve the purchaser and rescind the contract: *Bingham v. Bingham*, 1 Ves. 126. If a horse should be purchased, which is by both parties believed to be alive, but is, at the time, in fact dead, the purchaser would, upon the same ground, be released by rescinding the contract: *Allen v. Hammond*, 11 Pet. 63, 9 L. ed. 633. If a person should execute a release to another party upon the supposition, founded on a mistake, that a certain debt or annuity had been discharged, although both parties were innocent, the release would be set aside: *Hove v. Becher*, 12 Sim. 465. If one should execute a release so broad in its terms as to release his rights in property, of which he was wholly ignorant, and which was not in contemplation of the parties at the time the bargain for the release was made, a court of equity might either cancel the release or restrain its application as intended: *Cholmondeley v. Clinton*, 2 Mer. 352; *Dungers v. Angove*, 2 Ves. 304. On the other hand, if the vendee is in possession of facts which will materially enhance the price of the commodity, and of which he knows the vendor to be ignorant, he is not bound to communicate those facts to the vendor, and the contract will be held valid: *Laidlaw v. Organ*, 2 Wheat. 178, 4 L. ed. 214. In such a case the facts unknown to the vendee are extrinsic to the contract and are not of its substance; and hence there is no ground for the interference of a court of equity."

Other illustrations of circumstances where cancellation is allowable are where a person agrees to sell an article or a piece of property, and at the time of the sale the article or property is no longer in existence but the parties are ignorant of that fact: *Bradford v. Chicago*, 25 Ill. 411; *Anderson v. Armstead*, 69 Ill. 452; *Thompson v. Gould*, 20 Pick. 134; *Allen v. Hammond*, 11 Pet. 63, 9 L. ed. 633; *Couturier v. Hastie*, 5 H. L. Cas. 673. And where a person sells goods for one hundred and sixty-five dollars while the buyer thinks he is buying the goods for sixty-five dollars, there is no agreement between the parties: *Rupley v. Daggett*, 74 Ill. 351. In such cases the minds of the parties do not meet: *Fullerton v. Dalton*, 58 Barb. 236. So, also, where a person buys a lot on Prospect street and there are two streets of that name in the town, and the parties do not have the same Prospect street in mind, there is no contract and the contract may be canceled: *Kyle v. Kavanaugh*, 103 Mass. 356, 4 Am. Rep. 560.

But a court of equity will afford no relief because both of the parties to the sale of a specific tract of land thought that it contained less area than it in fact does: *Thompson v. Jackson*, 3 Rand. 504, 15 Am. Dec. 721; nor where both parties to the sale of a stone considered it of small value whereas it was in fact very valuable: *Wood v. Boynton*, 64 Wis. 265, 54 Am. Rep. 610, 25 N. W. 42. It was, however, held in a Massachusetts case that the mistake of the parties as to value of a private gold coin which was much more valu-

able than they supposed was ground for the recovery of the coin in an action for its conversion: *Chapman v. Cole*, 12 Gray, 141, 71 Am. Dec. 739. And where a blooded cow was sold for eighty dollars under the mutual mistake of the parties that she was barren, but before the time for delivery to the purchaser it was discovered that she was with calf, which fact made her worth ten times as much as she was sold for, it was held that that fact was ground for avoiding the sale: *Sherwood v. Walker*, 66 Mich. 568, 11 Am. St. Rep. 531, 33 N. W. 919. So, also, where an insurance policy was surrendered for a paid-up policy of a smaller amount, the parties to the transaction not knowing of the death of the insured, the original policy was reinstated: *Riegel v. Am. Life Ins. Co.*, 140 Pa. 193, 23 Am. St. Rep. 225, 21 Atl. 392, 17 L. R. A. 857. And equity will restore a mortgage which has been released through mistake: *Bruse v. Nelson*, 35 Iowa, 157. Reformation has been allowed where partners, on a dissolution and accounting, settled on the basis of a statement of assets and liabilities drawn by their bookkeeper, which statement they believed to be correct but which by a mistake was not correct: *House v. Wechsler*, 104 App. Div. 124, 93 N. Y. Supp. 593. In this connection, see, also, the next subdivision.

b. Mistakes in Computation With Respect to the Subject Matter or the Consideration.—In the principal case it was held that where in adding the items going to make a bill of goods for which an estimate is asked, a mathematical mistake is made and the mistaken amount is taken as the agreed price in a contract for the sale of the goods, the mistake is not one for which equity will cancel or correct the contract. The court in discussing that phase of the subject observed: "The mistake of the appellants did not relate to the subject matter of the contract, its location, identity or amount, and there was neither belief in the existence of a fact which did not exist or ignorance of any fact material to the contract which did exist. The contract was exactly what each party understood it to be, and it expressed what was intended by each. If it can be set aside on account of the error in adding up the amounts representing the selling price, it could be set aside for a mistake in computing the percentage of profits which appellants intended to make or on account of a mistake in the cost of the lumber to them, or any miscalculation on their part. If equity would relieve on account of such a mistake there would be no stability in contracts, and we think the appellate court was right in concluding that the mistake was not of such a character as to entitle the appellants to the relief prayed for": *Steinmeyer v. Schroepfel*, 226 Ill. 9, ante, p. 224, 80 N. E. 564. And in another case in Illinois where, in making an estimate for the construction of a building, an item for one hundred and thirty-one thousand bricks at twelve dollars per thousand was by mistake carried out at twelve hundred and thirty-

six dollars when the true sum was fifteen hundred and seventy-two dollars, thereby changing the aggregate cost of the building, the court refused to reform the contract since there was a want of mutuality in the mistake and the court has no power to make a contract: *Douglas v. Grant*, 12 Ill. App. 273. But where a contractor in making his bid on work is obliged to hurry in the making of his bid in order to get it in in time, and in making up his bid from his estimates of the different parts of the work turns two pages of his "estimate book," and in that way omits an estimate on one part of the work, in consequence of which his bid is over four thousand dollars lower than he intended, the acceptance of the bid is no contract, since the minds of the parties never met, and equity will grant rescission: *Board of School Commrs. v. Bender*, 36 Ind. App. 164, 72 N. E. 154. And where an agreement is had to pay a certain sum per yard for excavation, but the contract states the total amount incorrectly because of a mistake in computing the number of yards, reformation may be had: *Dunn v. O'Mara*, 70 Ill. App. 609. And where partners on dissolving their partnership make a palpable mistake in computing the amount for which one partner should give his note to the other in settlement of the amount due by him to the firm, and by reason of the miscalculation gives his note for twice the amount which he should, equity will grant relief and require the repayment of any sum paid in excess of that equitably due: *Gould v. Emerson*, 160 Mass. 438, 39 Am. St. Rep. 501, 35 N. E. 1065. But where one agrees to buy the interest of his partner and an invoice is made of the partnership assets and there is a mistake of five hundred dollars in the invoice, and a price is agreed upon based upon such invoice, reformation will not be allowed: *De Vain v. De Vain*, 76 Wis. 66, 44 N. W. 839. See, also, the preceding subdivision in this general connection.

c. **Mistakes in the Date, Term or Expiration of the Agreement or Obligation.**—A mistake in the date of an instrument may be corrected by a court of equity: *Lewiston v. Gague*, 89 Me. 395, 56 Am. St. Rep. 432, 36 Atl. 629; *O'Donnell v. Harmon*, 3 Daly, 424; *First Nat. Bank v. Pearson*, 119 N. C. 494, 26 S. E. 46. If a lease was executed under a mistake of the lessor as to the term of the lease, known or suspected by the lessee, the lessor will not be precluded from obtaining reformation of the case merely because of inattention to the reading of the lease by the notary who took the acknowledgment of the lessor: *Wilson v. Moriarty*, 88 Cal. 207, 26 Pac. 85. A mistake of date for the performance of a contract may be corrected even though the time is inferable by persons familiar with the business: *Cameron v. White*, 74 Wis. 425, 43 N. W. 155, 5 L. R. A. 493. The omission of the time for which a teacher is employed may be inserted by reformation: *Marion School Township v. Carpenter*, 12 Ind. App. 191, 39 N. E. 878. So, also, a mistaken state-

ment of when a debt secured by mortgage matures is correctible in equity: *Commercial Nat. Bank v. Johnson*, 16 Wash. 536, 48 Pac. 267.

d. Mistakes in the Name of Any of the Parties or Other Persons Mentioned in the Instrument.—Where the name of a corporation is incorrectly stated in a deed, it may be corrected by a court of equity: *Rosser v. Georgia etc. Ry. Co.*, 102 Ga. 164, 29 S. E. 171. Equity will correct a mistake in an auctioneer's memorandum of sale of land in entering the name of the owner of the real estate sold: *Pugh v. Chesseldine*, 11 Ohio, 109, 27 Am. Dec. 414. An executor's bond may be reformed to show the correct name of the decedent: *Foley v. Hamilton*, 89 Iowa, 686, 57 N. W. 439. The name of the holder of the equitable title may be inserted by reformation in a land contract instead of that of the holder of the equitable owner in clauses imposing penalties for nonperformance of the conditions named in the contract: *Smith v. Watson*, 88 Iowa, 73, 55 N. W. 68. A mistake in the name of the beneficiary in an insurance policy is reformatory: *Woodbury etc. Assn. v. Charter Oak etc. Ins. Co.*, 31 Conn. 517; *Keith v. Globe Ins. Co.*, 52 Ill. 518, 4 Am. Rep. 634; *German Fire Ins. Co. v. Gueck*, 130 Ill. 345, 23 N. E. 112, 6 L. R. A. 835; *Cook v. Westchester Fire Ins. Co.*, 60 Neb. 127, 82 N. W. 315; *Scott v. Provident etc. Relief Assn.*, 63 N. H. 556, 4 Atl. 792; *Snell v. Atlantic Fire etc. Ins. Co.*, 98 U. S. 85, 25 L. ed. 52.

e. Mistakes in the Kind or Character of the Consideration for the Agreement.—The omission of the consideration from a deed is reformatory in equity: *Huss v. Morris*, 63 Pa. 367. And a statement that the consideration in a deed is love and affection may be corrected to show that it was in fact a valuable consideration: *Orr v. Echols*, 119 Ala. 340, 24 South. 357. A mistake as to the kind of money in which payment is to be made is correctible in equity: *Burdett v. Sims*, 3 J. J. Marsh. 190; *Talley v. Courtney*, 1 Heisk. 715. And an omission of a provision for ascertaining the amount of corn to be delivered as rent may be corrected by a court of equity: *Reed v. Cook*, 88 Iowa, 717, 54 N. W. 353. Likewise a covenant for the payment of "a semi-annual rent of three hundred dollars" instead of an annual rent of three hundred dollars payable in semi-annual installments is reformatory: *Snyder v. May*, 19 Pa. 235. A mistake in the amount on which interest is to be computed may be corrected in equity: *Rider v. Powell*, 28 N. Y. 310. A mistake in the rate of interest may also be corrected: *Loudermilk v. Loudermilk*, 98 Ga. 780, 25 S. E. 927; *Greene v. Smith*, 160 N. Y. 533, 55 N. E. 210.

f. Mistakes in Respect to the Legal Effect of Words Used in the Instrument.—It is sometimes stated that a court of equity will not reform an instrument for a mistake of law, but the remedy of reformation has been administered or recognized in many cases where the mistake was in the legal effect of the terms of the instrument. It is probable, however, that both a mistake of fact and law will

be found in many of the cases in which reformation has been allowed: See monographic note to *Williams v. Hamilton*, 65 Am. St. Rep. 487. Reformation was refused of a right of way deed to make it allow damages sustained by the grantors from the maintenance of the roadbed, even though the deed was based on a nominal consideration: *Eldridge v. Dexter etc. R. Co.*, 88 Me. 191, 33 Atl. 974. Neither will an insurance policy payable to the owner who takes it under the idea that it will protect the interest of a contractor who is erecting the building insured be reformed: *St. Clara Female Academy v. Delaware Ins. Co.*, 93 Wis. 57, 66 N. W. 1140. Reformation will not be granted where a guardian under a mistake as to the legal effect of words used executes a mortgage intended to bind his ward's property only, but in fact making himself personally liable: *Andrus v. Blazzard*, 23 Utah, 233, 63 Pac. 888, 54 L. R. A. 354. Nor will a contract by a party who believes that it does not make him liable as a partner be reformed: *Woolworth v. McPherson*, 55 Fed. 558. And where an insurance policy is applied for and taken in the name of a mortgagee under the idea that it will operate as if taken out by the owner of the building under a clause making the loss payable to the mortgagee, it will not be reformed: *Ordway v. Chace*, 57 N. J. Eq. 478, 42 Atl. 149. Neither will it be reformed where the policy is taken in the name of the husband under the idea that it will protect the interests of the wife who is the owner of the building: *Schmid v. Virginia Fire etc. Ins. Co. (Tenn. Ch.)*, 37 S. W. 1013. But reformation has been allowed where a husband and wife agreed to convey a homestead and by mistake, as to the legal effect of the conveyance, the husband executes it alone: *Whitmore v. Hay*, 85 Wis. 240, 39 Am. St. Rep. 838, 55 N. W. 708. For other instances in which the legal effect of the instrument was naturally drawn in question, see subdivisions g, h and i.

g. Mistakes in Regard to the Kind of Legal Instrument Necessary to Effectuate the Object of the Parties.—Where an instrument intended to reserve a life estate in a conveyance is so phrased as to constitute a will, reformation may be had: *Pinkham v. Pinkham*, 60 Neb. 600, 83 N. W. 837. And reformation may be had where a receipt for an advancement has by mistake as to its legal effect been drawn in the form of a note: *Hausbrandt v. Hoffer*, 117 Iowa, 103, 94 Am. St. Rep. 289, 90 N. W. 494. But where an irrevocable power of attorney was executed instead of a mortgage, it will not be reformed: *Hunt v. Rousmanier*, 8 Wheat. 174. Likewise where a bill of sale is executed instead of a chattel mortgage, reformation will not be granted: *Herobey v. Luce*, 56 Ark. 320, 19 S. W. 963, 20 S. W. 6.

h. Mistake in Regard to the Capacity in Which the Party Has Signed the Instrument.—The question as to the capacity in which a person signs an instrument is often considered as a question of con-

struction rather than one of reformation: *Second Nat. Bank v. Midland Steel Co.*, 155 Ind. 581, 52 L. R. A. 307, 58 N. E. 833. In this connection see the note attached to *Greenberg v. Whitcomb Lumber Co.*, 48 Am. St. Rep. 919. As a general rule, where no personal liability was intended, but in reducing the contract to writing by mistake as to the legal effect of executing it, a party to it signs it in such a way as to incur personal liability, the signature may be corrected so as to give the proper legal effect: *Fisher v. Barnett*, 56 Ill. App. 649; *Second Nat. Bank v. Midland Steel Co.*, 155 Ind. 581, 52 L. R. A. 307, 58 N. E. 833; *Prescott v. Hixon*, 22 Ind. App. 139, 72 Am. St. Rep. 291, 53 N. E. 391; *Lee v. Percival*, 85 Iowa, 639, 52 N. W. 543; *Richmond v. Ogden St. Ry. Co.*, 44 Or. 48, 74 Pac. 333; *Moser v. Libenguth*, 2 Rawle, 428. And in like manner the signature may be corrected so as to make the party signing it personally liable where the agreement was that he should incur a personal liability: *McNaughten v. Partridge*, 11 Ohio, 223, 38 Am. Dec. 731. Thus where one signs "A, agent of B," he may by reformation relieve himself from personal liability: *Western Wheeled Scraper Co. v. Stickleman*, 122 Iowa, 396, 98 N. W. 139; *Western Wheeled Scraper Co. v. McMillen*, 71 Neb. 686, 99 N. W. 512. And where a person signs his name individually with such words as "president," "secretary," or the like, intending to bind only a corporation of which he is such an officer, the signature may be corrected by a court of equity: *Prescott v. Hixon*, 22 Ind. App. 139, 72 Am. St. Rep. 291, 53 N. E. 391. And where a person signs an instrument as township trustee when he means to sign as trustee for a school township, he holding the latter office ex-officio as township trustee, reformation may be had to make the school township liable: *Sparta School Township v. Mendell*, 138 Ind. 188, 37 N. E. 604.

In some cases, equity has refused to reform against a mistake as to the legal effect of a signature to an instrument, but those decisions are generally distinguishable on the ground that no prior oral agreement was shown in which the exact liability of the party was agreed upon: *San Bernardino Nat. Bank v. Anderson* (Cal.), 32 Pac. 168; *Mabb v. Merriam*, 129 Cal. 663, 62 Pac. 212; *Murphy v. First Nat. Bank*, 95 Iowa, 325, 63 N. W. 702; *Morehead Banking Co. v. Morehead*, 124 N. C. 622, 32 S. E. 967; *Andrus v. Blazzard*, 23 Utah, 233, 54 L. R. A. 354, 63 Pac. 888.

1. **Mistake in Regard to the Nature or Character of the Estate Intended to be Conveyed or Assigned.**—Reformation may be had where a conveyance which should have been to one person alone is made to that person and another: *Stedwell v. Anderson*, 21 Conn. 139; *McLeod v. Free*, 96 Mich. 57, 55 N. W. 685. And likewise where a husband buys land with the intention of having the deed made to himself and wife as joint grantees, so as to convey an estate by the entirety, and he so instructs the scrivener, but through

mistake the deed is made to the wife alone, reformation may be had: *Corrigan v. Tiernay*, 100 Mo. 276, 13 S. W. 401. And where a deed intended to convey an undivided interest is by mistake drawn to pass the entire estate, reformation may be had: *Canedy v. Marcy*, 13 Gray, 373; *Green Bay etc. Co. v. Hewitt*, 62 Wis. 316, 21 N. W. 216, 22 N. W. 588. Thus reformation will be granted where the agreement is for a conveyance of an undivided four-fifths interest in certain realty, but by a mistake as to the legal effect the deed conveys only an undivided three-fifths: *Parish v. Camplin*, 139 Ind. 1, 37 N. E. 607.

If, by mistake, words are omitted or inserted creating a greater estate than that agreed upon, a court of equity will correct the mistake: *Dulo v. Miller*, 112 Ala. 687, 20 South. 481; *Purvines v. Harrison*, 151 Ill. 219, 37 N. E. 705; *Cooke v. Husbands*, 11 Md. 981; *Clayton v. Freet*, 10 Ohio St. 544. Thus if by mistake a less estate is created than was agreed upon, reformation of the conveyance may be had: *Ryner v. Ball*, 182 Ill. 171, 54 N. E. 925; *Nicholson v. Caress*, 59 Ind. 39; *Holme v. Shinn*, 62 N. J. Eq. 1, 49 Atl. 151; *Vickers v. Leigh*, 104 N. C. 248, 10 S. E. 308; *Brock v. O'Dell*, 44 S. C. 22, 21 S. E. 976; *Lardner v. Williams*, 98 Wis. 514, 74 N. W. 346. And where words creating a fee are omitted by mistake, equity may correct the mistake: *Truesdell v. Lehman*, 47 N. J. Eq. 218, 20 Atl. 391; *Springs v. Harven*, 3 Jones Eq. 96. But if parties intend to convey a fee, but deliberately select words passing a lesser estate, it is held that reformation will be refused: *Wilson v. Watkins*, 48 S. C. 341, 26 S. E. 663.

Where property was to be conveyed to a married woman for her separate use, but by a mistake is conveyed so as to be her general property, the conveyance may be reformed: *Stone v. Hill*, 17 Ala. 557, 52 Am. Dec. 185; *Larkins v. Biddle*, 21 Ala. 252. And where a deed conveyed an estate in fee simple, it may, where that was the intention of the parties, be reformed to convey a life estate to the grantee with remainder to her children: *Clayton v. Freet*, 10 Ohio St. 544. The omission of the words "and their heirs forever" may be inserted by way of correction by a court of equity: *Vickers v. Leigh*, 104 N. C. 248, 10 S. E. 308. And where the words "their bodily heirs" are used for "their heirs," reformation may be had: *Kyner v. Ball*, 182 Ill. 171, 54 N. E. 925. Likewise where the word "successors" is used for the word "heirs" in a conveyance to certain persons who are trustees of a church, reformation may be had: *Visitors etc. Church v. Town*, 47 N. J. Eq. 400, 20 Atl. 488. But reformation has been denied where the conveyance was to a certain person and his "minor heirs" under an idea that the word "heirs" is equivalent to the word "children": *Seymour v. Bowles*, 172 Ill. 521, 50 N. E. 122. And where the conveyance was to certain grantees "and their bodily heirs," reformation by way of changing the word "their" to the word "her" was refused where

it was shown that the parties discussed the propriety of using the word "her" and decided that the word "their" expressed the legal effect they wished: *Atherton v. Roche*, 192 Ill. 252, 61 N. E. 357, 55 L. R. A. 591.

Where by mistake a condition subsequent is omitted, it may be inserted by way of reformation: *Hamilton County v. Owens*, 138 Ind. 183, 37 N. E. 602. And a deed may be reformed so as to exclude an interest in a certain mining claim which was included by mutual mistake: *Shields v. Mongollon Exploration Co.*, 137 Fed. 539, 70 C. C. A. 123.

j. Mistakes in Regard to the Identity of Property Sold or in the Description of Property Conveyed, Leased, Mortgaged or Insured.

1. **In General.**—Where the mistake of the parties in the sale or leasing of property goes to the identity of the property itself, reformation will be denied although the contract may be rescinded, since there was no meeting of the minds of the parties: *Page v. Higgins*, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152; *Morris v. Kettle*, 56 N. J. Eq. 826, 34 Atl. 376; *Stewart v. Gordon*, 60 Ohio St. 170, 53 N. E. 797. But where there is no mistake as to the identity of the property, but merely a misdescription of it in the written agreement in relation to it, reformation will be allowed: *Eberle v. Heaton*, 124 Mich. 205, 82 N. W. 820; *Smith v. Jordan*, 13 Minn. 264, 97 Am. Dec. 232; *Jenkins v. Jenkins University*, 17 Wash. 173, 49 Pac. 247, 50 Pac. 785; *Walden v. Skinner*, 101 U. S. 577, 25 L. ed. 963. Thus reformation will be granted where the agreement was that a party would accept such amount of steel prior to January 1, 1890, as he needed in his work, not to exceed fifteen tons, but the contract recited that he was to take fifteen tons prior to January 1, 1890: *Park v. Blodgett*, 64 Conn. 28, 29 Atl. 133.

The power of a court of equity to reform an instrument conveying, leasing or mortgaging a specific tract of land which through a mistake of the parties has been erroneously described in the instrument, is universally recognized: *Parker v. Parker*, 88 Ala. 362, 16 Am. St. Rep. 52, 6 South. 740; *Fields v. Clayton*, 117 Ala. 538, 67 Am. St. Rep. 189, 23 South. 530; *Stinson v. Ray*, 79 Ark. 592, 96 S. W. 141; *Stonesifer v. Kilburn*, 122 Cal. 659, 55 Pac. 587; *Busey v. Moraga*, 130 Cal. 586, 62 Pac. 1081; *Blakeman v. Blakeman*, 39 Conn. 320; *Allen v. Elder*, 76 Ga. 674, 2 Am. St. Rep. 63; *Phillips v. Boquemore*, 96 Ga. 719, 23 S. E. 855; *Kelly v. Galbraith*, 186 Ill. 593, 58 N. E. 431; *Merchants' etc. Assn. v. Scanlan*, 144 Ind. 11, 42 S. E. 1008; *Herring v. Peaslee*, 92 Iowa, 391, 60 N. W. 650; *Burton L. & T. Co. v. Handy*, 54 Kan. 13, 37 Pac. 108; *Wilson v. Jasper*, 90 Ky. 211, 13 S. W. 885; *Penn v. Rodriguez*, 115 La. 174, 38 South. 955; *Perry v. Knight*, 85 Me. 184, 27 Atl. 96; *Goode v. Riley*, 153 Mass. 585, 28 N. E. 228; *Johnson v. Wilson*, 111 Mich. 114, 69 N. W. 149; *Perkins v. Canine*, 113 Mich. 72, 71 N. W. 457; *Olson v. Erickson*,

42 Minn. 440, 44 N. W. 317; *Bunson v. Berry* (Miss.), 7 South. 322; *Harding v. Wright*, 138 Mo. 11, 39 S. W. 456; *Epperson v. Epperson*, 161 Mo. 577, 61 S. W. 853; *Sellwood v. Henneman*, 36 Or. 575, 60 Pac. 12; *Elder v. First Nat. Bank*, 91 Tex. 423, 44 S. W. 62; *Avery v. Hunton*, 23 Tex. Civ. App. 353, 56 S. W. 210; *Land Mortgage Bank v. Nicholson*, 24 Wash. 258, 64 Pac. 156; *Baxter v. Tanner*, 35 W. Va. 60, 12 S. E. 1094; *Fischer v. Laack*, 85 Wis. 280, 55 N. W. 398; *Ingles v. Merriman*, 96 Wis. 400, 71 N. W. 368. Mistakes in the description of property insured are also reformable: *Home Ins. Co. v. Myer*, 93 Ill. 271; *German Fire Ins. Co. v. Gueck*, 130 Ill. 345, 23 N. E. 112, 6 L. R. A. 835; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283.

2. **Correction of Street Numbers, Blocks, Lots, Corners, Quarter Sections, Boundary Lines and Field-notes.**—In accordance with the general rule announced in the preceding subdivision, courts of equity correct erroneous street numbers mentioned as the premises leased: *Kelly v. Galbraith*, 186 Ill. 593, 58 N. E. 431; also erroneous lot numbers: *Skerrett v. Presbyterian Soc.*, 41 Ohio St. 606; *Avery v. Hunton*, 23 Tex. Civ. App. 353, 56 S. W. 210. Thus even though a party to a deed knew it described the property as lot 4, yet if both of the parties to the transaction thought that the instrument was a reconveyance of a certain lot, which was a lot of another number, the deed may be reformed: *Metcalf v. Lowenstein* (Tex. Civ. App.), 81 S. W. 362. So, also, where two lots numbered 4 and 5 were inclosed by one fence, lot 4 being sixty-six feet wide and lot 5 being forty-nine and one-half feet wide, and the owner sold the west half of the inclosure, describing it as lot 4, and both of the parties believing the lots to be of equal width and putting a stake to indicate the equal division of the inclosed land, equity will reform the deed so as to conform the description to the real transaction: *Thompson v. Ladd*, 169 Ill. 73, 42 N. E. 174. A court of equity will correct a block number which is erroneously described in a conveyance: *Bussey v. Moraga*, 130 Cal. 586, 62 Pac. 1081; it will also correct an erroneous description of a corner: *Moye v. Lane* (Ky.), 12 S. W. 154; *Eberle v. Heaton*, 124 Mich. 205, 82 N. W. 820; or a misdescription of a quarter section: *Thalheimer v. Lockhart*, 76 Ark. 25, 88 S. W. 591; *Epperson v. Epperson*, 161 Mo. 577, 61 S. W. 853; *McCormick H. M. Co. v. Woulph*, 11 S. Dak. 252, 76 N. W. 939. And where a deed conveyed the west half of a section instead of the north half, which latter was the only land in the section owned by the grantor, and the grantee took possession of the north half, reformation will be allowed: *Moore v. Crump*, 84 Miss. 612, 37 South. 109. So, also, where a boundary line erroneously describes the land intended to be conveyed, equity will grant reformation: *Monogue v. Bryant*, 15 App. D. C. 245; *Le Comte v. Freshwater*, 56 W. Va. 336, 49 S. E. 238. And where land is described by the use of field-

notes which by a mistake are reversed so as to make a misdescription of the land, equity will allow a reformation: *Hill v. Kuhlman*, 87 Fed. 498, 31 C. C. A. 87.

3. Mistakes by Which Land is Omitted Which was Intended to be Included.—Where, by a mistake of the parties, lands which were to have been conveyed or mortgaged are omitted from the instrument, equity will reform the instrument so as to include them: *Stevens v. Holman*, 112 Cal. 345, 53 Am. St. Rep. 216, 44 Pac. 670; *Stonesifer v. Kilburn*, 122 Cal. 659, 55 Pac. 587; *Smith v. Schweigerer*, 129 Ind. 363, 28 N. E. 696; *Brinson v. Berry* (Miss.), 7 South. 322; *Ezell v. Peyton*, 134 Mo. 484, 36 S. W. 85; *Slack v. Craft* (N. J. Eq.), 57 Atl. 1014; *Abbott v. Flint's Admr.*, 78 Vt. 274, 62 Atl. 721; *Land Mortgage Bank v. Nicholson*, 24 Wash. 258, 64 Pac. 156; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. Rep. 239, 35 L. ed. 1063. And where one person agrees to mortgage all of his land not exempt, but both himself and the mortgagee believe that a certain tract is exempt, and accordingly omit such tract, it has been held that reformation would be allowable to include it: *Lear v. Prather*, 89 Ky. 501, 12 S. W. 946. And where a title bond provided for a "lien upon" without stating what property, it was held that the bond would be reformed by adding the words "the said property above described," where the lien was agreed to be upon the property set forth in the forepart of the bond and was omitted in the latter part of the bond by mistake: *Smith v. Brunt*, 14 Colo. 75, 23 Pac. 325.

4. Mistakes by Which Land is Included Which was Intended to be Excluded.—And where, by a mistake of the parties, lands which were not to be included in a conveyance or mortgage are nevertheless included in the instrument, equity will correct the instrument by excluding them from it: *Perry v. Sadler*, 76 Ark. 43, 88 S. W. 832; *Thompson v. Ladd*, 169 Ill. 73, 48 N. E. 174; *Keeley v. Sayles*, 217 Ill. 589, 75 N. E. 567; *Jordan v. Walters* (Iowa), 80 N. W. 530; *Conlin v. Masecar*, 80 Mich. 139, 45 N. W. 67; *Benesh v. Travelers' Ins. Co.*, 14 N. Dak. 39, 103 N. W. 405; *Stites v. Widener*, 35 Ohio St. 555; *American etc. Co. v. Pace*, 23 Tex. Civ. App. 222, 56 S. W. 377; *Baxter v. Tanner*, 35 W. Va. 60, 12 S. E. 1094. And where a release of a mortgage was intended merely to be a partial release, but by a mistake of the scrivener purports to be a full release, equity will reform the instrument: *Kane v. Williams*, 99 Wis. 65, 74 N. W. 570.

k. Mistakes in Regard to the Omission or Inclusion of Easements, Exceptions, Reservations or Conditions in Deeds or Other Contracts, or in Omitting to Place a Seal on the Instrument.—Equity will correct an imperfectly conveyed easement: *State v. Lorenz*, 23 Wash. 289, 60 Pac. 644. Hence it will insert an easement which has been omitted by the mistake of the parties: *Blakeman v. Blakeman*, 39

Conn. 320; Schantz v. Keener, 87 Ind. 258; Howard v. Britton, 67 N. H. 484, 41 Atl. 269. A deed may be reformed so as to include an exception of a certain lease: Arthur D. Jones & Co. v. New England etc. Co., 38 Wash. 637, 80 Pac. 796. And a conveyance may be reformed so as to except from its operation certain short straw timber growing thereon, which had been previously conveyed to a certain lumber company: King v. Hobbs, 139 N. C. 170, 51 S. E. 911. And a clause "reserving to the tenants in possession their legal rights" may be reformed so as to preserve the rights of a tenant claiming under a contract void by the statute of frauds where such was the agreement of the parties: Young v. Miller, 10 Ohio, 85. An omitted reservation of the right to use water from a certain spring may be inserted in the deed by reformation: Brown v. Lamphear, 35 Vt. 252. Omitted reservations, such as of timber (Smith v. Wakeman, 114 Mich. 611, 72 N. W. 599), or of coal (Cook v. Liston, 192 Pa. 19, 43 Atl. 389), or of growing crops (Warrick v. Smith, 137 Ill. 504, 27 N. E. 709; Hendrickson v. Ivins, 1 N. J. Eq. 562), may be corrected by a court of equity. A reservation inserted by mistake may be corrected: Stockbridge v. Hudson Iron Co., 107 Mass. 290. An omitted reservation clause in a right of way conveyance to a railroad company, requiring the railroad company to construct a crossing under its tracks to permit the passage of cattle and loaded wagons, may be inserted by reformation proceedings: Owens v. Carthage etc. Ry. Co., 110 Mo. App. 320, 85 S. W. 987.

The omission of a clause providing for a vendor's lien may be reformed: Worley v. Tuggle, 4 Bush, 168. Likewise an agreed condition in a deed of gift that the grantee should sell to a certain person at a price named may be inserted by way of reformation: Rice v. Hall (Ky.), 42 S. W. 99. And an indorsement of a note may be reformed to show that it is without recourse: Stafford v. Feters, 55 Iowa, 484, 8 N. W. 322. An option to purchase may be inserted in a lease by reformation: Butler v. Threlkeld, 117 Iowa, 116, 90 N. W. 584. Clauses whereby the grantee of a deed assumes a mortgage may be inserted by a court of equity where it was agreed that the mortgage should be assumed or stricken out where it was not so agreed: Williams v. Everham, 90 Iowa, 420, 57 N. W. 901; Jones v. Price (Iowa), 86 N. W. 219; Adams v. Wheeler, 122 Ind. 251, 23 N. E. 760; Stephenson v. Elliott, 53 Kan. 550, 36 Pac. 980. The omission of a clause deducting the amount of a mortgage from the purchase price of the land is reformable: Burns v. Caskey, 100 Mich. 94, 58 N. W. 642.

An omitted seal from a contract required to be under seal may be placed on the instrument by a court of equity if it has been omitted by mistake: Allen v. Elder, 76 Ga. 674, 2 Am. St. Rep. 63; Henkleman v. Peterson, 154 Ill. 419, 40 N. E. 359; Gaylord v. Pel-

land, 169 Mass. 356, 47 N. E. 1019; Lebanon Sav. Bank v. Hollenbeck, 29 Minn. 322, 13 N. W. 145; Conover v. Brown, 49 N. J. Eq. 156, 23 Atl. 507; Chase v. Peck, 21 N. Y. 581; Bullock v. Whipp, 15 R. I. 195, 2 Atl. 309; Probate Court v. May, 52 Vt. 182.

BAUM v. HARTMANN.

[226 Ill. 160, 80 N. E. 711.]

THE RELATION of Guardian and Ward Continues as long as the estate of the latter is in the hands of the former. (p. 249.)

WHERE A PARENT is Guardian of His Child, though the latter has attained the age of majority, any transaction between them whereby the former obtains an advantage at the loss of the latter will be regarded with the highest degree of suspicion. The presumption against the transaction is so strong that it is hardly possible to overcome it. (pp. 249, 250.)

GUARDIAN AND WARD—Constructive Fraud.—From the confidential relations existing between guardian and ward, who are also parent and child, all transactions between them prejudicially affecting the interests of the ward are constructively fraudulent. (p. 250.)

GUARDIAN AND WARD, Dealings Between Shortly After Termination of the Relation.—Where the Guardianship has Ceased by the Majority of the Ward, the courts will not permit transactions between the guardian and the ward to stand, even when they occurred after the minority, if the intermediate period was short, unless the circumstances demonstrate, in the highest sense of the term, the fullest deliberation on the part of the ward and the most abundant good faith on the part of the guardian. (p. 250.)

GUARDIAN AND WARD—Presumption of Undue Influence—Burden of Proof.—Whenever a transaction between guardian and ward, prejudicial to the latter, is brought before a court of equity, there is a strong presumption that the transaction resulted from the undue influence of the former on the latter, and the guardian must assume the burden of proving to the satisfaction of the court that the act proceeded from the independent and uninfluenced will of the ward. (p. 250.)

GUARDIAN AND WARD—Gratuitous Receipt.—Where it appears that a ward a short time after attaining her majority was brought before a probate court by her guardian, who was also her father, and after informing the judge that she had received no part of the estate, executed a receipt stating that she had received the whole thereof, such judge fully advising her of the effect of the receipt, and she, notwithstanding his admonitions, insisting on executing it, and the judge thereupon enters an order of discharge, a presumption arises that her action was the fruit of the undue influence of her father, and his sureties still remain liable on their official bond if they have in no way been misled into changing their position by the alleged statement. (p. 251.)

Miller, Winkelmann & Ogle, for the plaintiff in error.

L. D. Turner and Barthel & Klingel, for the defendants in error.

¹⁶³ VICKERS, J. Maria C. Baum filed a bill in the St. Clair circuit court to set aside an alleged settlement made with her by her father as her guardian, and to vacate and annul the order of the probate court of St. Clair county approving his final report and discharging Simon Baum as guardian. Bernhard Hartmann and Jacob Spies were sureties on the guardian bond of Simon Baum. Hartmann and the administratrix of the estate of Jacob Spies were made parties defendant to the bill, in which was a prayer for an accounting as to the money claimed to be due complainant and that a decree be entered for the complainant for the amount found to be due against the sureties on the guardian bond. Answers were filed by the defendants, and the cause was heard upon the bill, answers, replications and proofs heard in open court and a decree entered dismissing the bill for want of equity, to reverse which a writ of error was sued out from the appellate court for the fourth district. The appellate court affirmed the decree of the circuit court, and the complainant below has sued out this writ of error to bring said decree into review before this court.

The evidence heard shows that at the August term, 1894, of the probate court of St. Clair county, Simon Baum was appointed guardian for his two minor children, Charles W. Baum and Maria C. Baum, and that he executed the usual statutory guardian bond in the penal sum of six thousand eight hundred dollars, with Bernhard Hartmann and Jacob Spies as sureties, and that he received as such guardian, soon after his appointment, the sum of three thousand four hundred dollars which his wards inherited from their mother's father. It is not controverted that Simon Baum invested his wards' money in real estate and took the conveyance to himself, personally. Simon Baum then executed a mortgage upon said real estate to the sureties on his guardian ¹⁶⁴ bond, reciting an indebtedness of three thousand four hundred dollars, but it is admitted that the mortgage was merely an indemnity against possible liability on the guardian's bond. Plaintiff in error attained her majority on the first day of June, 1899. She was then working out in St. Louis. Her father wrote her a letter requesting her to come to Belleville,

which she did on the eighth day of June, and her father met her, and she executed a receipt, in the presence of the deputy probate clerk, in which she recited that she had become eighteen years old on the first day of June, 1899, and that she had made full and final settlement with Simon Baum, as guardian, since she had arrived at said age. She acknowledged the receipt of seventeen hundred dollars in full of all demands against her guardian and entered her appearance in the matter of his application for final discharge. Her father did not pay her on that day, or at any other time, the seventeen hundred dollars, or any part of it. It is not pretended that plaintiff in error received any consideration whatever for the execution of said receipt. After the execution of the receipt plaintiff in error and her father went before the probate judge, and after some conversation between the parties, in which the plaintiff in error told the judge that she had not been paid anything, an order was entered approving the report and discharging the guardian as to plaintiff in error.

The judge of the probate court testified, on behalf of the defendants in error, that plaintiff in error admitted in his presence that she had signed the receipt and that it was his impression that she said she understood it. He testified that he explained to her the nature of the receipt and the entry of appearance. He said that it is his recollection that there was something said about a note, but he does not say that any note was given. In his testimony the judge says that both plaintiff in error and her father became greatly excited and that plaintiff in error insisted on his being discharged, and that plaintiff in error was told by the judge that she was virtually making her father a present of this ¹⁰⁵ money, and she said she understood it; that she knew it, and that she had an agreement with her father and she wanted the discharge entered. This witness stated that a matter of suit on her father's bond and possible criminal prosecution was talked about. That the witness said to the plaintiff in error. "You are the doctor; you understand now what is going on and what is happening; you are entirely releasing all claim you hold and have got," and she said she knew that; that she did not want to make her father any trouble; that she understood it all. Witness then said: "Well, then, I cannot help myself. Then I entered the order of discharge." On cross-examination this witness says that he suggested that a

criminal prosecution of her father might be barred, and also a suit on the bond if he were discharged.

Charles W. Baum testified that he lived with his father until the latter's death, and that plaintiff in error also lived with him; that the money in question came through his mother, and that upon her death it fell to him and his sister; that it was turned over to his father, as guardian; that he heard his father say that he would like to have the money from plaintiff in error; that plaintiff in error had never had any experience in any sort of business; that she was never interested in business of any kind. He says that his father spoke to him frequently about his part of the money, and told him he should do as his sister had done and not make him any trouble and let him have the money until he felt better able to pay it.

It was admitted that at the time this settlement was made with plaintiff in error there were a number of judgments against Simon Baum. Two witnesses testify that the plaintiff in error told them that she had loaned the money to her father as long as he needed it. Plaintiff in error was called as a witness in rebuttal and denied that anyone explained to her the meaning of the receipt before she signed it, and she denies having had any conversation with either ¹⁰⁰ the deputy probate clerk or the probate judge with respect to the paper. She had testified in chief, but since her evidence at that stage of the proceeding was incompetent as to the administratrix of the estate of Jacob Spies, we do not deem it necessary to set out such incompetent testimony, since the case must be determined upon the competent evidence in the record.

The sole question for determination in this case is whether the alleged settlement made by the guardian with plaintiff in error is a bar to her right to recover against the sureties on his bond. While plaintiff in error was a few days past eighteen at the time of the alleged settlement, still the relation of guardian and ward had not been terminated. The rule of law on this subject is, that the relationship continues as long as the estate is in the hands of the guardian: *McParland v. Larkin*, 155 Ill. 84, 39 N. E. 609; *Schouler on Domestic Relations*, sec. 382. There is here also the relation of parent and child. Under such circumstances, where the relation is so intimate, the dependence so complete and the influence so great, any transaction between the plaintiff in

error and her father and guardian whereby he obtains a benefit at the loss of his ward will be regarded with the highest degree of suspicion. The presumption against such a transaction is so strong that it is hardly possible to overcome it: 2 Pomeroy's Equity Jurisprudence, sec. 96; McParland v. Larkin, 155 Ill. 84, 39 N. E. 609. From the confidential relation existing between the parties all transactions between them which prejudicially affect the interest of the ward are constructively fraudulent: Carter v. Tice, 120 Ill. 277, 11 N. E. 529. The doctrine is thus stated in Story's Equity Jurisprudence, volume 1, section 217: "Where the guardianship has, in fact, ceased by the majority of the ward, the courts will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased and the relation become thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate, in the highest ¹⁶⁷ sense of the term, the fullest deliberation on the part of the ward and the most abundant good faith on the part of the guardian, for in all such cases the relation is still considered as having an undue influence upon the mind of the ward and as virtually subsisting, especially if all the duties attached to the situation have not ceased—as, if the accounts between the parties have not been fully settled, or if the estate still remains, in some sort, under the control of the guardian."

Knowing the powerful influence which a guardian has over his ward, especially when the whole estate of the ward is in the hands and control of the guardian, courts of equity have ever regarded with jealous watchfulness all transactions between guardian and ward, and where such position of influence is strengthened by the fact of intimate relationship existing between the parties, greater reason exists for the strict adherence to the rules above announced. Whenever a transaction between guardian and ward which is prejudicial to the interest of the latter is brought under the scrutiny of a court of equity, there is a strong presumption that the transaction has resulted from the undue influence which the guardian is presumed to have over the ward, and the law casts the burden of proof upon the guardian to establish to the satisfaction of the court that the act proceeded from the independent and uninfluenced will of the ward: McParland v. Larkin, 155 Ill. 84, 39 N. E. 609; Thomas v. Whitney, 186

Ill. 225, 57 N. E. 808; Dowie v. Driscoll, 203 Ill. 480, 68 N. E. 56.

In the case at bar the defendants in error rely mainly upon the testimony of the probate judge as being sufficient to meet the requirements of the law in this regard, and as establishing the proposition that plaintiff in error made a free and voluntary settlement and released her guardian from all further liability to her. In our opinion the evidence falls far short of the claim that is here made for it. It is true, the testimony of the probate judge shows that he fully advised plaintiff in error of the effect of the receipt and discharge; that he told her that she was virtually relinquishing¹⁶⁸ all her estate, and that she would receive nothing. The very fact that plaintiff in error persisted in her request for the discharge of her father after the serious and repeated admonitions of the judge convinces us that she was not a free agent and at liberty to accept the wholesome advice given her by the probate judge. It goes a long way toward convincing us that plaintiff in error was under the controlling influence of her father, which had so wrought upon her that the advice and suggestions of the probate judge were put aside without serious consideration and that nothing would satisfy her except the discharge of her father. It will be noted in this connection that the testimony of the probate judge only relates to the occurrences that took place in his presence. There is no evidence offered by defendants in error proving, or tending to prove, the absence of any influence exerted by the father over plaintiff in error before she went into the presence of the judge. It is not enough to relieve this transaction of the fraudulent character which the law imputes to it, to prove that plaintiff in error understood that she was giving away her estate, but the proof must go further, and show that she reached the determination to do so without being influenced by her guardian. It is easy to imagine how a suggestion from her defaulting guardian calling her attention to the serious consequences that threatened him in case she refused to go before the court and request his discharge would bring her to a state of mind which would manifest itself by conduct such as is attributed to plaintiff in error by the testimony of the probate judge. It is true, the evidence in this record does not affirmatively show that the guardian thus sought to alarm his daughter by reminding her of the

danger of his situation; on the contrary, there is no evidence which negatives this supposition, and, as we have seen, the burden of proof upon this question is upon defendants in error. The sureties on the guardian's bond have in no way been misled into changing their position by reason of the alleged settlement. ¹⁶⁹ They still hold the mortgage on the real estate purchased with the trust fund, and whatever rights this mortgage gave them they still have. There is no estoppel in pais and no laches against the plaintiff in error. The guardian has not faithfully discharged his trust and paid over the money required by the bond. The defendants in error are clearly liable on the bond for the amount due the plaintiff in error, with interest from the time it was received by the guardian, and the only impediment in the way of recovery at law is the receipt and the order of the probate court, which it is the province of a court of equity to remove. Equity having obtained jurisdiction for this purpose will retain it to do complete justice.

The judgment of the appellate court and the decree of the circuit court are reversed and the cause remanded to the circuit court, with directions to enter a decree in favor of plaintiff in error for the amount which may be found, upon an accounting, to be due, disregarding the alleged receipt and order of discharge.

The Validity and Effect of Transactions Between Guardian and ward, before or after the termination of the guardianship, are discussed in the note to Schmidt v. Shaver, 89 Am. St. Rep. 302.

FORTUNE v. ENGLISH.

[226 ILL. 262, 80 N. E. 781.]

LIMITATION OF ACTIONS—Concealment, Silence is not.—When the original basis of the action is not fraud, there must be something of an affirmative character designed to prevent, and which does prevent, a discovery of the cause of action. Mere silence by a person liable to an action is not concealment of the cause of action, but such concealment must consist of affirmative acts or representations. (p. 255.)

LIMITATION OF ACTIONS—Pleading Fraud in Concealing Cause of Action.—In a replication to the plea of the statute of limitations, it is necessary that the facts constituting the fraud be clearly stated. The replication must set out facts and circumstances which amount, in law, to a fraudulent concealment by the defendant of the cause of action, and, failing so to do, must be adjudged bad on demurrer. (p. 256.)

LIMITATION OF ACTIONS—Fraud in Concealing Cause of Action, When not Shown.—If in an action against an attorney at law to recover damages resulting from his negligence as such in examining a title and reporting it to be free from encumbrances, whereas it was subject to an encumbrance which has been enforced against the plaintiff by suit, the statute of limitations is pleaded, a replication averring that the plaintiff employed defendant, as attorney at law, to defend such suit, and that he, after such employment, represented to plaintiff, who was unlearned in the law, that defendant, well knowing that he had been guilty of the acts stated in the declaration and to prevent plaintiff from bringing an action against him within five years, represented that the property was free from encumbrances, and advised that such suit could be successfully defended, and plaintiff, relying on such advice, defended such suit, and not until it was decided against him did he become aware of the grievances alleged in his complaint, is not sufficient. It does not show that the defendant misrepresented any matter of fact, nor that he did not believe the advice given by him was incorrect when given. He was not obliged to notify plaintiff of the existence of a cause of action against himself, nor of the acts of negligence giving rise to such cause. (p. 256.)

Alexander Sullivan, Frank L. Kriete, H. T. Gilbert and Carroll C. Boggs, for the appellant.

Kraus, Alschuler & Holden, for the appellee.

²⁶⁵ CARTWRIGHT, J. This is an action on the case brought by appellant in the circuit court of Cook county to recover damages alleged to have resulted from negligence of the appellee in the performance of his duties as attorney at law under an employment ²⁶⁶ as such by the appellant. The declaration alleged, in substance, that the plaintiff having contracted to purchase from Emma A. Leahy certain real

estate in Cook county in fee simple and unencumbered for \$22,000, employed the defendant, as an attorney at law, to examine the title to said real estate, and if it proved to be a good title in fee simple and unencumbered, to cause such title to be conveyed to plaintiff, but the defendant neglected his duty in that behalf, and on December 2, 1889, negligently and wrongfully caused and procured plaintiff to pay the purchase price for said real estate and accept a deed therefor when in fact the real estate was subject to encumbrances, secured by trust deed, amounting to \$12,000; that the holders of the said encumbrances thereafter commenced foreclosure proceedings, and notwithstanding defendant exercised all due care and diligence in the defense thereof, he was compelled to pay the encumbrances, with interest, amounting to \$16,522.70, and costs and expenses amounting to \$5,600. There was much pleading which it is not necessary to state. The declaration finally consisted of original counts 1, 2, 3 and 4, amended additional counts 5, 6, 7 and 8, and additional counts 9 and 10. Demurrers were sustained to the amended additional counts 5, 6, 7 and 8, and plaintiff elected to stand by them. To the other counts pleas were filed of not guilty, the statute of limitations of five years and the statute of limitations of ten years. Replications to the pleas of the statute of limitations were filed and demurrers were sustained thereto, whereupon the plaintiff elected to abide by his replications and there was a final judgment for the defendant. Plaintiff appealed to the appellate court for the first district, and the branch of that court affirmed the judgment.

A decision as to the sufficiency of the amended fourth replication of the plaintiff to the second plea of the defendant to counts 1, 2, 3 and 4 of the declaration will be decisive of the case. That replication was intended to set up a fraudulent concealment of the cause of action by the defendant ²⁶⁷ under section 22 of chapter 83 of the Revised Statutes of 1874, concerning limitations, which is as follows: "If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterward." Under that section, if the defendant fraudulently concealed the cause of action alleged in the declaration from the knowledge of the plaintiff, and the plaintiff discovered the same

within five years before the action was commenced, the statute of limitations would not apply. To meet the requirement of the statute in a case like this, where the original basis of the action is not a fraud, there must be something of an affirmative character designed to prevent, and which does prevent, a discovery of the cause of action. Mere silence by a person liable to an action is not concealment of the cause of action, but such concealment must consist of affirmative acts or representations: *Wood v. Williams*, 142 Ill. 269, 34 Am. St. Rep. 79, 31 N. E. 681; *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725; 19 Am. & Eng. Ency. of Law, 2d ed., 253.

The facts averred in the replication under consideration are, that plaintiff was unlearned in the law and unable to determine for himself the matters in the declaration and replication mentioned; that defendant, for hire and reward, was employed by plaintiff to advise and direct him with respect to such matters; that plaintiff was and remained ignorant until December 9, 1899, of the committing by the defendant of the grievances in the declaration mentioned; that on September 11, 1893, within less than five years after the cause of action arose, the holders and owners of the promissory notes in the declaration mentioned instituted in the circuit court of Cook county a suit against the plaintiff and other persons to subject the real estate to sale for the payment of the amount due on said notes; that plaintiff retained and employed the defendant, for hire and reward, to ²⁶⁸ investigate said suit and the questions of law and fact connected therewith and bearing upon the rights and liabilities of the plaintiff with respect to the promissory notes, trust deed and real estate, and to direct plaintiff as to the course to be pursued with respect to the same; that defendant, well knowing that he had been guilty of committing the grievances in the declaration mentioned and that a cause of action had arisen against him on account thereof and that plaintiff was ignorant thereof, and craftily and fraudulently intending to conceal from the plaintiff the committing of said grievances and to prevent plaintiff from bringing suit within five years after the committing of said grievances, falsely and maliciously represented to the plaintiff that the plaintiff was the owner in fee simple of the real estate free from all encumbrances and could successfully defend the suit and defeat the claims of the complainants therein, and that plaintiff, relying

upon the truth of said representations and acting under the direction and advice of the defendant, defended the suit until December 9, 1899, when it was finally decided adversely to him, until which time he was ignorant of the committing of the grievances in the declaration mentioned.

It is a general rule of pleading that the facts upon which the court is required to state the law shall be alleged (Gould's Pleading, c. 3, sec. 120; 1 Shinn's Pleading and Practice, sec. 475); and in a replication to a plea of the statute of limitations it is necessary that the facts constituting the fraud shall be clearly stated: *Beatty v. Nickerson*, 73 Ill. 605; 13 Ency. of Pl. & Pr. 246. The replication must set out facts and circumstances which amount, in law, to a fraudulent concealment by the defendant of the cause of action, and if it fails to set out such facts as in the law constitute such fraud it will be bad on demurrer. This replication contains no averment that the defendant concealed from the plaintiff any fact or did anything to prevent plaintiff from ascertaining any fact upon which the cause of action depended, either by affirmative act or any scheme or device to ²⁰⁹ prevent inquiry. If there was any fraudulent concealment it related to matter of law, and consisted in the representation that the real estate was not subject to the encumbrances and that plaintiff could successfully defend the foreclosure suit. Although all persons are presumed to know the law, it is undoubtedly true that where the relation of attorney and client exists a fraudulent concealment of the cause of action by the attorney may be accomplished by a misrepresentation of the state of law or the legal rules or principles applicable to the facts, knowingly made for the purpose of deceiving the client. While that relation requires a full disclosure by the attorney of all matters within the scope of his employment, it does not require him to volunteer information to his client that his client has a cause of action against him. The pleading is to be construed most strongly against the pleader, and the replication wholly fails to aver that the defendant knew the contrary to his representation to be the law. There is no distinct or clear averment that the opinion rendered by defendant as to the legal rights of the plaintiff was known by defendant to be false, and for aught that appears it may have been an incorrect opinion resulting from want of knowledge. The words "craftily," "fraudulently," "falsely" and "maliciously" are of no avail in the absence of averments of

facts to which they properly apply. The replication fails to show any misrepresentation of any character as to any fact, or any false or fraudulent misrepresentation as to the state of the law or the legal rights of the plaintiff arising out of the facts, and the court was therefore right in sustaining the demurrer.

The judgment of the appellate court is affirmed.

The Statute of Limitations may be prevented from running by a fraudulent concealment of the cause of action: *Eising v. Andrews*, 66 Conn. 58, 50 Am. St. Rep. 75; note to *Snogross v. Branch Bank*, 60 Am. Dec. 511. Compare, however, *Pietsch v. Milbrath*, 123 Wis. 647, 107 Am. St. Rep. 1017. But the mere ignorance of a person of his right to bring an action, or the mere silence of the person liable to the action, does not prevent the running of the statute: *State v. Walters*, 31 Ind. App. 77, 99 Am. St. Rep. 244; *Davis v. Boyett*, 120 Ga. 649, 102 Am. St. Rep. 118; note to *Alabama etc. Ry. Co. v. Jones*, 55 Am. St. Rep. 515.

A Party Relying on Misrepresentation or Concealment to take his case out of the operation of the statute of limitations must aver the facts constituting the fraud and the time of its discovery: *Douglas v. Corry*, 46 Ohio St. 349, 15 Am. St. Rep. 604; *Wood v. Williams*, 142 Ill. 269, 34 Am. St. Rep. 79.

ABBOTT v. BEEBE.

[226 Ill. 417, 80 N. E. 991.]

PARTITION SALE.—*Inadequacy of Price* is not, in itself, sufficient to set aside a partition sale, unless it is so grossly inadequate as to establish fraud. (p. 259.)

PARTITION SALE.—Courts will not refuse to confirm a partition sale, nor will they order a resale, on motion of an interested party, merely to protect him against the result of his own negligence, where he was under no disability to protect his rights at such sale. (p. 259.)

PARTITION SALE.—*Disability of One of Several Cotenants not Available to the Others.*—The fact that one of eighteen cotenants is of unsound mind will not enable the others to obtain an order of resale in partition on account of an advanced bid, where the bidders deposit in court for such insane person his share of the sum which would be realized were the advanced bid accepted. (pp. 259, 260.)

PARTITION SALE.—*Setting Aside for an Advance Bid.*—Though the chancellor has a broad discretion in approving or disapproving sales made by the master, yet his discretion is not an arbitrary one, but must be exercised in accordance with established principles of law. His order setting aside a sale on account of an advance bid may therefore be reversed. (p. 260.)

PARTITION SALE. *Error in Vacating on Account of an Advance Bid.*—Where two parcels of land sold respectively for three thousand five hundred and fifty dollars and five thousand one hundred dollars, an offer to guarantee, on a resale, a bid of four thou-

sand dollars for the former and six thousand dollars for the latter does not justify the court in vacating the sale and directing a resale, there being no reason why the interested parties did not protect their interests by a higher bidding at the original sale. (p. 260.)

Suit for partition between eighteen heirs at law in which a sale was ordered. Thereat the city property appraised at four thousand dollars was bid in by E. C. Hamilton at three thousand five hundred and fifty dollars, and the county property appraised at seven thousand two hundred dollars was bid in at five thousand one hundred dollars. The master's report was excepted to by various heirs, including Jane Smith, an incompetent, and guaranties were presented to the court by certain of the parties to the effect that, on resale, the city property should sell for four thousand dollars and the farm property for six thousand dollars. Before the exceptions were heard, the purchasers tendered in open court, for the benefit of Jane Smith, such sums as would make up to her her share of the difference between the amount of the bids and the amounts guaranteed on a resale. The court ordered the person who guaranteed the advance on the city property to deposit in addition to his guaranty five hundred dollars earnest money, and the person who made the guaranty on the farm property to deposit in addition one thousand dollars earnest money, and thereupon sustained the exceptions, set aside the sale, and ordered a resale. The purchasers appealed.

J. Bert Miller, C. B. Sawyer, Wheeler & Wheeler and Bert L. Cooper, for the appellants.

W. R. Hunter, Savary & Ruel and C. M. Clay Buntain, for the appellee.

419 CARTER, J. No fraud or misconduct on the part of the purchasers or the officer conducting the sale, or any other person connected therewith, is charged in these proceedings, and no contention is made as to the illegality or insufficiency of any of the proceedings prior to the sale, the whole difficulty arising upon the alleged inadequacy of the amounts bid and the fact that a person who is claimed to be of unsound mind has an interest in the property. If Jane O. Smith were of sound mind, the same as the other seventeen heirs who are interested in the lands involved, under the authorities the report of the sale should have been approved. Inadequacy of

price is not, in itself, sufficient to set aside a sale unless it is so ⁴²⁰ grossly inadequate as to establish fraud: *Heberer v. Heberer*, 67 Ill. 253; *Quick v. Collins*, 197 Ill. 391, 64 N. E. 288. These heirs were all duly made parties to the partition proceedings and had ample notice of the sale. Courts will not refuse to confirm a judicial sale or order a resale on the motion of an interested party, merely to protect him against the result of his own negligence, where he is under no disability to protect his own rights at such sale: *Barling v. Peters*, 134 Ill. 606, 25 N. E. 765; *Quigley v. Breckenridge*, 180 Ill. 627, 54 N. E. 580. "Public policy requires stability in all judicial sales and that they should not be disturbed for slight causes. To do so would impair that confidence so essentially necessary to induce persons to become purchasers when real estate is offered for sale under a judgment or decree of a court": *Conover v. Musgrave*, 68 Ill. 58. It is true in this case that the price bid for each piece was considerably less than the value fixed by the appraisers and less than the guaranty made to the court as to the price that would be paid if the lands were resold. Real estate rarely brings "its full value at a forced sale for cash in hand": *Allen v. Shepard*, 87 Ill. 314.

Should these seventeen cotenants who were not under disability be allowed whatever benefit might accrue to them from a resale, to which they would not otherwise be entitled, merely from the fact that they had been joined in a partition proceeding with a person who is alleged to be of unsound mind? It has always been recognized by this court that it is the primary and insistent duty of all courts to guard with great care the interests of minors, insane and distracted persons and others under similar disabilities. Where the interests of such persons have been involved and the refusal to set aside a sale and order another sale would result in substantial and irreparable loss to them, it has been held that it was appropriate to order a resale of land: *Jennings v. Dunphy*, 174 Ill. 86, 50 N. E. 1045; *Kiebel v. Leick*, 216 Ill. 474, 75 N. E. 187; *Compton v. McCaffree*, 220 Ill. 137, 77 N. E. 129. Nothing appears in the record to justify the conclusion that the property would ⁴²¹ sell for more than the amount of the guaranty filed with the trial court. Even if the premises were sold at a greater price than the amount guaranteed, it does not appear that any substantial gain

would result to the alleged incompetent person, in view of the fact that a resale would cause additional costs. The increased amount that the person of unsound mind would derive from a resale at the prices guaranteed was deposited with the court by the first purchasers before the trial judge had set aside the original sale, and therefore in apt time. In *Compton v. McCaffree*, 220 Ill. 137, 77 N. E. 129, we held that the offer to pay the money into court after the sale had been set aside and appeal allowed was too late, but such is not the situation here. The interests of the alleged incompetent person being fully protected, the court was not justified in setting aside the sale and ordering a resale for the benefit of the remaining cotenants, who were under no disability. They were able to bid for themselves or have others do so, and thus protect their rights and obtain the full value of their interests in the premises sold: *Kiebel v. Leick*, 216 Ill. 474, 75 N. E. 187. The chancellor has a broad discretion in approving or disapproving sales made by the master in chancery, yet this discretion is not an arbitrary one, but must be exercised in accordance with established principles of law: *Wilson v. Ford*, 190 Ill. 614, 60 N. E. 876. The rights of the alleged incompetent person having been fully protected, we are of the opinion upon this record that the court below should have allowed the sale to stand.

The decree of the circuit court is therefore reversed and the cause remanded to that court for further proceedings in accordance with the views herein expressed.

An Accepted Bidder at a Judicial Sale acquires no independent rights until the sale is confirmed by the court, and while the court may exercise discretion in confirming or rejecting the sale, yet such discretion must be exercised according to fixed rules and not arbitrarily, and the bidder has the right to insist upon the exercise of such discretion in such proper manner: *George v. Norwood*, 77 Ark. 216, 113 Am. St. Rep. 143; *Roberts v. Robinson*, 49 Neb. 717, 59 Am. St. Rep. 587. A court, in determining whether or not it will confirm a judicial sale, must, under the circumstances of the particular case, exercise a sound legal discretion with a view to fairness, prudence, and a just regard to the rights of all concerned: *Moore v. Triplett*, 96 Va. 603, 70 Am. St. Rep. 882; *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66.

Opening Judicial Sales for Advanced Bids is the subject of a note to *George v. Norwood*, 113 Am. St. Rep. 147.

SCHMIDT v. BROWN.

[226 Ill. 590, 80 N. E. 1071.]

STATUTE OF FRAUDS.—A Parol Agreement for a Private Way is within the statute of frauds, and cannot operate as a grant or conveyance. (p. 263.)

RIGHTS OF WAY by Prescription.—To establish a way by prescription the use must be adverse, uninterrupted, exclusive, continuous, and under a claim of right. (p. 263.)

RIGHT OF WAY, Use of, When Adverse and not Under a Mere License.—If an agreement between land owners, though oral and therefore void under the statute of frauds, purports to give a right of way to one over the lands of the other, and the use of the right of way continues under a claim of right for twenty years, the use is adverse and will ripen into a prescription. (pp. 264, 265.)

PRESCRIPTION.—The Claim of Right Need not be Well Founded to create title by prescription if adverse possession is held under it. Hence the claim may rest on a parol agreement, void under the statute of frauds. (p. 266.)

PRESCRIPTION—Use, When Need not be Exclusive.—It is not fatal to the claim to a right of way by prescription that others as well as the claimant used such way. (p. 266.)

A WAY is an Inheritable Estate if appurtenant, and passes to the heirs and grantees of the land to which it is attached. (p. 269.)

A WAY is Appurtenant to Land if it leads thereto, and is useless except in connection with it, and has been used solely for access to it. (p. 269.)

A WAY is in Gross When there is not a dominant estate to which it is attached. (p. 269.)

SERVITUDE, Purchase of Property Subject to.—A purchaser of a servient estate charged with an easement discoverable on examination takes his title subordinate thereto. (p. 270.)

WAYS, Right to Remove Obstruction.—One having a right of way over the lands of another, who places obstructions therein, may lawfully enter upon the land subject to such way and peaceably remove the obstructions therefrom, because, as to him, they constitute a private nuisance which he has the right to abate. (p. 270.)

Trespass quare clausum fregit. The defendants claimed that the real property upon which the alleged trespass was committed was a part of their private way upon which they entered peacefully and without unnecessary force, and also that it was a public highway and that the acts committed by them were justifiable in removing obstructions wrongfully placed thereon by the plaintiff. The plaintiff and defendants resided on and were in possession of adjacent farms, the defendant's farm being the northerly, and sometimes called the Brown farm, and the plaintiff's being the southerly, also known as the Smith farm. The predecessors in interest of

the plaintiff were in possession of the Smith farm as early as 1851. The predecessors in interest of the defendants were in possession of the Brown farm as early as 1843, at which date the road about which the present litigation arose was already located, and it ran southerly over part of the Brown farm and continued across the Smith farm. Gates were maintained across it at various times, but always by permission and never with a view of obstructing the use of the road.

In 1883, one Kennedy owned land lying south of the Smith farm and over which the owners of both the Smith and Brown farms enjoyed a passway farther south, and Smith was anxious that Kennedy should not close this road, and, being himself unfriendly with Kennedy, called on Dr. Brown to negotiate for and buy a roadway over the Kennedy land. and it was then agreed between Brown and Smith that if the latter would negotiate for and buy the roadway over Kennedy's land, Brown should always have a roadway over the Smith land. Brown, acting on this agreement, negotiated for and secured a roadway from Kennedy, and afterward Brown's children hauled the rails and built the fence along the line thereof. The plaintiff obtained the title to the Smith farm in 1895, and then asked permission of one of the defendants to close the gates while the pasture fence was changed and moved. This permission having been granted, the gates were put up and closed, but not locked. Thereafter the plaintiff refused to open the gates, placed locks thereon, and posted notices forbidding anyone from going through, and also threatening prosecution for trespass. The defendants threatened that they would open the gates unless the plaintiff opened them, and after waiting a day or so for him to do so, lifted the gates from their hinges, turned them around out of the road, and pulled up the post which had been set in the roadway. The plaintiff replaced the gates and the defendants took them down. After this was repeated three times, this suit was brought for the alleged trespass. The trial court found in favor of the defendants and gave judgment against the plaintiff for costs, from which he appealed.

Courtney & Helm, for the appellant.

C. L. V. Mulkey, for the appellees.

595 VICKERS, J. By appellant's second and appellees' fourth propositions of law submitted, the trial court was

asked to declare the legal effect of the contract between Peter Smith and Dr. Brown of 1883, set out in the foregoing statement. Appellant asked the court to hold that the effect of such agreement was merely to give Brown a parol license, which was revocable. The court refused to so hold, but held, as requested by appellees' fourth proposition, that the way in question had been used as a private way for more than twenty years under an agreement with the owner of the land, Peter Smith, made in 1883, by the father of appellees, and that it had been used under a claim of right with the knowledge and acquiescence of Peter Smith and Thomas Smith, his successor in title. These rulings are assigned as error and relied on by appellant to reverse the judgment below.

The alleged agreement, not being in writing, was void under the statute of frauds and could not operate as a grant or a conveyance; but the parties to it treated it as giving Dr. Brown some sort of right to the roadway, and under this supposed agreement he claimed the right to use the road in question, and his claim thereto was known to Peter Smith and his son, both of whom recognized the claim of right in ~~596~~ the Browns to the use of the roadway. Appellant contends that since the alleged agreement between Peter Smith and Dr. Brown was inoperative and void under the statute of frauds, the only effect it could have was merely as a permission from Smith to Brown to use the way, which, having originated in a license, could never ripen into a prescriptive right, however long continued.

There can be no question as to the legal conclusion of appellant if he is right in his contention as to the meaning of the alleged contract. In order to establish a way by prescription, either public or private, the use must be adverse, uninterrupted, exclusive, continuous and under a claim of right: *Town of Brushy Mound v. McClintock*, 150 Ill. 129, 36 N. E. 976; *City of Chicago v. Chicago etc. Ry. Co.*, 152 Ill. 561, 38 N. E. 768; *Township of Madison v. Gallagher*, 159 Ill. 105, 42 N. E. 316; *Illinois Cent. R. R. Co. v. City of Bloomington*, 167 Ill. 9, 47 N. E. 318; *O'Connell v. Chicago Terminal R. R. Co.*, 184 Ill. 308, 56 N. E. 355. When the arrangement was entered into between Peter Smith and Dr. Brown in regard to this road, it is clear, both from the language used and the subsequent conduct of both parties, that it was the understanding that Dr. Brown was to have some-

thing more than he had hitherto enjoyed in the roadway. The evidence showed that the roadway had been open to the free and uninterrupted use of Dr. Brown and his predecessor in title for about forty years prior to 1883. At no time had there been the slightest objection or interference by Smith of such use, but up to 1883 it might be doubted whether the use was under a claim of right. Dr. Brown's desire for further assurances from Smith as to the future use of the road might have proceeded from a want of entire confidence in his right as it then existed, or, on the other hand, it may have arisen from a wise foresight which enabled him to turn to good account the exigencies of the situation and re-enforce his claim against possible future attacks without implying any want of confidence in his right as it then existed. However ⁵⁹⁷ this may have been, it is certain that it was not the intention of the parties that Brown's position was to be made less secure by the agreement that it was before. If appellant's contention is sustained, the result is that the agreement converts a user of about forty years, which might be the basis of a prescriptive right, into one under a license, thereby destroying any existing right acquired by past user and at the same time making it impossible to acquire any prescriptive right in the future. Manifestly, such was not the intention of the parties. Whether the agreement is to operate as a license or as the basis for a claim of right depends primarily upon the language employed by the parties. If the language is such as to create a license only, the enjoyment under it is to be regarded as permissive and not of right, and no title is acquired under it, however long continued. If, on the other hand, the language purports to give a right to the way and the use is continued under such claim of right for twenty years, the use is adverse and will ripen into a prescription: Jones on Easements, sec. 179.

There is a substantial agreement between the witnesses as to the language of this agreement. Thomas Smith says: "I heard my father say this: 'If you will make a road through Kennedy's place then you shall always have a road out to it.'" On cross-examination this witness says: "My father said if they would help him with a road that he would see that he was not shut up—something to that amount. Anyway, it was an agreement between Dr. Brown and my father that the road should be left open. They made the

road themselves to get into the new Vienna road. As long as my father lived that agreement was carried out. My father and Dr. Brown got the road through the Kennedy place." Appellee Gus Brown testifies: "Mr. Smith and my father bought this road in order to get to town, and then my father said to him: 'Mr. Smith, I am willing to help you buy that road, but I am just a half mile from this road, and it may be you or somebody else would want to shut me up, ^{see} and I am willing to help buy that road if you will give me assurance that that will be open.' Smith says: 'You shall always have a road; I will see that you are never shut out.' A day or two later my father went down and bought the road." John Smith, son of Peter Smith, says: "My father told Brown that he would see that he was never shut out. 'You shall never be shut up,' I think are his very words." James Brown gives a similar account of the agreement.

The evidence is clear and satisfactory that Dr. Brown carried out his part of the agreement and that the road over the Kennedy land was opened up and used in accordance with the wishes of Peter Smith. It is also shown, without any contradiction, that Peter Smith and his son, Thomas, always recognized the right of Dr. Brown and his family to use the road at all times. Two years after the death of Dr. Brown, which occurred in 1886, Peter Smith applied to the widow and Gus Brown for permission to put up gates in the road. Instead of the use of Brown being by the mere permission of Smith, the evidence shows that Smith would not place gates in the road without the permission of the Browns. Again, after the death of Peter Smith, when Thomas Smith wanted to straighten the road so as to put his land in more convenient shape for cultivation, he applied to the Browns for permission, and the road was straightened accordingly. Beginning in 1883, under a claim of right the Browns used the roadway continuously until the appellant locked the gates, in 1905—a period of over twenty-two years. Thus, taking the language of the parties into consideration as well as their conduct under the agreement, it is clear that the parties to the contract understood that in consideration of Brown's assistance in procuring the Kennedy road he was acquiring a permanent right to the road through the Smith farm.

We do not want to be understood as holding that this parol agreement was valid and had the effect of transferring

any right or title to Dr. Brown. On the contrary, we hold ⁵⁰⁰ that the contract was utterly void under the statute of frauds. If the contract was valid and passed the title to the easement, we would have no occasion to consider the question of prescription. Even though the contract was void because not executed in conformity to the statute of frauds, yet such contract may serve to show that Brown's user was under a claim of right. The claim of right which enters into every case of adverse enjoyment need not be a well-founded claim—it need only be a claim of right. A user under a contract void under the statute of frauds is a good claim of right: Washburn on Easements, c. 1, sec. 4, par. 28; Jones on Easements, sec. 179; Buswell on Limitations and Adverse Possession, sec. 267; Graham v. Craig, 81 Pa. 459; Outcalt v. Ludlow, 32 N. J. L. 239; McKenzie v. Elliott, 134 Ill. 156, 24 N. E. 965. "A grant, a sale, or gift of lands by parol," says Shaw, C. J., in Summer v. Stevens, 6 Met. 337, "is void by the statute; but when accompanied by actual entry and possession, it manifests the intention of the donee to enter and take as owner, and not as tenant, and it equally proves an admission on the part of the donor that the possession is so taken. Such possession is adverse." Brown's use of this road was adverse, uninterrupted, continuous and exclusive and under a claim of right. The fact that other persons also used the roadway does not prevent Brown's user from being exclusive. "Exclusive use" does not mean that no one used the way except the claimant of the easement. It means no more than that his right to do so does not depend on a like right in others. The use may be exclusive, within the meaning of this rule, even though Smith and others also used the road: Washburn on Easements, p. 164, sec. 44; Jones on Easements, sec. 272; Bennett v. Biddle, 150 Pa. 420, 24 Atl. 738; McKenzie v. Elliott, 134 Ill. 156, 24 N. E. 965.

We are of the opinion that the agreement, and the user under it for more than the requisite period, together with the clear recognition of Brown's rights by the owners of the Smith farm, warranted the court below in refusing appellant's ⁶⁰⁰ second proposition of law, in which the court was requested to hold that such agreement only operated as a license, and that appellees' fourth proposition was a correct legal conclusion under the evidence in the record.

Appellant has cited a number of decisions of this and other courts which hold that where the proprietor of land has a private way through his own land and for his own use, the mere permissive use of it by others for any indefinite time, such as a half a century, would not confer any right to its continued enjoyment. Among the cases in this court where this rule is recognized are *Dexter v. Tree*, 117 Ill. 532, 6 N. E. 506, *City of Chicago v. Chicago etc. Ry. Co.*, 152 Ill. 561, 38 N. E. 768, and *City of Chicago v. Borden*, 190 Ill. 430, 60 N. E. 915. These cases, and others in line with them, are not applicable to the facts here. Where a proprietor sets apart a portion of his land for a private pass-way for his own personal use across his own land to reach a street, a public highway or other point, the bare fact that the public or other persons may also use such private pass-way gives no right by prescription. But that is not this case. Here Peter Smith did not lay out this road as a private way for his own use, nor does it appear that his predecessors in title, if there were any, laid out the road. The road was in existence at least ten years before Smith obtained title, in 1853. The road extended, not from Smith's farm to a highway, but from Brown's place, more than a quarter of a mile north of the Smith house. How, then, can it be said that the road in question was the private way of the proprietor of the Smith farm? True, the road is located upon the Smith farm, and should the way be abandoned the roadway would revert to the owner of the Smith farm; but this same contention could be made with respect to most highways or private ways in the state. The very existence of an easement presupposes that the title to the reversion is in another. No one can have an easement in his own land. If one having an easement acquires the fee in the servient estate the easement ⁶⁰¹ is destroyed: 3 *Greenleaf's Cruise on Real Property*, 225; *Jones on Easements*, sec. 835. Smith had no easement in this roadway. His title to the road was a fee in the land and was not any different from his title to the residue of the farm. That Smith owned the fee is conceded, but that he had any higher or different right to the roadway than to any other part of his farm is denied. He could pass over the roadway; so could he likewise pass over any other portion of his farm. But his title in the roadway was charged with the burden of the easement which appertained to the Brown farm as the dominant estate, which he

could not lawfully interrupt or destroy. Cases may be found where a proprietor has set apart a strip of his estate for his convenience in passing and repassing and which is used by the owner as a passway, wherein such strip may be spoken of as a private way of the owner; but such language should not be understood as describing any different right or title than exists to the whole estate, but only as describing the use to which the owner has elected to put a part of the estate.

Appellant insists that the use of this roadway under the agreement brings this case within the rule laid down in *Forbes v. Balenseifer*, 74 Ill. 183, and *Lambe v. Manning*, 171 Ill. 612, 49 N. E. 509. To this we cannot assent. In the *Forbes* case four adjoining land owners agreed, by parol, to leave one rod outside of their fences for a road north and south, thus making a road two rods wide running across their lands to a highway on the south. The fences were so built and the road opened for the use of the said proprietors. In a short time, less than three years, one of the proprietors sold his land without making any reservation. After the purchaser of one tract became the owner he closed the lane by erecting gates. There was no question of prescriptive right involved, and the court held that the parol agreement merely operated as a license and that no interest in the easement passed. Had the proprietors of the other tracts used this way for twenty years under the agreement as a claim of right and had such ⁶⁰² right been recognized by the purchaser, then there would be some analogy between that case and the case at bar. In the *Lambe* case (171 Ill. 612, 49 N. E. 509), there was a mere license to take gravel from a pit to repair a mill dam. It was held that the death of the licensor or licensee revoked the license, and that a remote grantee of the mill property could not set up a right to use the gravel pit after the licensor's death and after the property had been sold under partition. The easement in the *Lambe* case (171 Ill. 612, 49 N. E. 509), if such it could be called, was in gross, and in no event could the owners of the mill property set up a claim thereto simply because a remote owner of the mill had once enjoyed such an easement. We fail to find anything in either of these cases that militates against the views we have expressed in the case at bar.

Appellant urges upon our attention the suggestion that if any easement existed here it was personal to Dr. Brown, and that appellees, who are his children, cannot set up such

easement as a justification of the alleged trespasses—in other words, it is said the easement, if any existed, was in gross and not appendant to the Brown farm. In the absence of proof to the contrary, it will be presumed that Dr. Brown died intestate, and that appellees, as his heirs, inherited together with his other children, all of his inheritable property: *Lyon v. Kain*, 36 Ill. 362. Being the owners, by descent from their father, as tenants in common, of the Brown farm, appellees might lawfully do what any other tenant in fee could do to enable them to enjoy the estate and its appurtenances. Was the way in question a way in gross or was it appendant to the Brown farm? A way that is appendant is an inheritable estate and passes to the heirs and to all subsequent grantees. If the way leads to the grantee's land and is useless except in connection with it, and was used solely for access to such land, it is appurtenant to it: *Jones on Easements*, sec. 19. A way is in gross when there is not a dominant estate to which it is attached: *Garrison v. Rudd*, 19 Ill. 558; *Koelle v. Knecht*, 99 Ill. 396; *Willoughby v. Lawrence*, 116 Ill. 11, 56 Am. Rep. 758, 4 N. E. 356. In the *Rudd* case (19 Ill. 558), it was said (page 564): "They [private ways] are said to be appendant or appurtenant when they are incident to an estate, one terminus being on the land of the party claiming, must inhere in the land, concern the premises and be essentially necessary to their enjoyment." Again, in the same case, it is further said: "This right is said to be in gross when it is not attached as an incident to an estate, and is conferred by deed or by reservation in a deed, the distinction being quite manifest between a grant of land where a way is appendant which carries the way, and a grant of a way separate from any estate, in gross or specially." In *Koelle v. Knecht*, 99 Ill. 396, it was said (page 403): "It [an easement] is appurtenant or appendant to an estate in fee in lands, or in gross, to the person of the grantor for life or for years. . . . When in gross it is purely personal to the holder. When appurtenant, it is attached to and is an incident to the land and passes with it, whether the land be conveyed for a term of years, for life or in fee. It is an incident to the land, and cannot be separated from or transferred independent of the land to which it inheres: *Washburn on Easements*, p. 10." The way in question has all of the elements of an easement appendant to the Brown farm as the dominant estate,

and hence it passed to appellees as an appurtenance to their father's estate.

Finally, it is contended that appellees had no right to take the law into their own hands and remove the gates from the way, and that even if the right of way existed, it is said appellees did not have the legal right to remove the gates. This is a misapprehension of the rule of law applicable to the facts. We have already sought to show that appellees were entitled to the enjoyment of an easement over the lands of appellant. A purchaser of a servient estate charged with an easement which is discoverable on examination takes his title subject to the easement: *Morrison v. King*, 62 Ill. 30; *Ingals v. Plamondon*, 75 Ill. 118; *Cihak v. Klekr*, 117 Ill. 643, 7 N. E. 111; ⁶⁰⁴ *Edwards v. Haeger*, 180 Ill. 99, 54 N. E. 176. Appellant had no better right to obstruct this road than his grantor. The roadway was open and visible and appellant had occupied the Smith farm for five years before he purchased it, during which time it is fair to assume that he became familiar with the road and the uses which the Brown family made of it. As already pointed out, he asked and obtained permission to put the gates up in the first instance, which indicates that he had full notice of the rights of the Browns in the roadway. After appellant had locked the gates and refused to open them upon notice, appellees clearly had the right to peaceably remove the gates. The right to remove a private nuisance by abatement by the party aggrieved has always been recognized by the common law. In *Cooley on Torts* (third edition, volume 2, page 748), the author says: "As an obstruction or encroachment would constitute a private nuisance, the owner of the easement may, when practicable, under the rules applicable to the abatement of nuisances in general, proceed to abate it." If in so doing the owner exceeds his right, he becomes a trespasser: See, also, *Webb's Pollock on Torts*, p. 515. The rule applicable to the abatement of nuisances by a private individual is thus stated in a note found on page 515 of *Pollock on Torts*: "The true theory of abatement of nuisance is, that an individual citizen may abate a private nuisance injurious to him when he could bring an action, and also when a common nuisance obstructs his individual right he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing."

We conclude that the conduct of appellees was within the protection of the law, and that the court properly held that they were not guilty of the trespass alleged against them. It follows that the judgment of the trial court is free from error and that the same should be affirmed.

The Establishment of Highways by Presumption is the subject of a note to Whitesides v. Green, 57 Am. St. Rep. 744. There is no doubt that a highway may be established by prescription, so that the public shall be entitled to use it: Frankfort v. Coleman, 19 Ind. App. 360, 65 Am. St. Rep. 412; Smith v. Mitchell, 21 Wash. 536, 75 Am. St. Rep. 858; and it seems that when it is established, its width is not necessarily limited to the width of the track made by passing vehicles: Arndt v. Thomas, 93 Minn. 1, 106 Am. St. Rep. 418.

Any Instrument may Constitute Color of Title, within the meaning of the statute of limitations, which purports to convey the land and shows the extent and boundaries of the premises conveyed, although it is void as a muniment of title: See the note to Power v. Kitching, 88 Am. St. Rep. 704; Joplin Brewing Co. v. Payne, 197 Mo. 422, 114 Am. St. Rep. 770.

FIRST NATIONAL BANK v. DREW.

[226 Ill. 622, 80 N. E. 1082.]

USURY, Grantee of Mortgagor, When Estopped to Plead the Defense of.—It is only where the grantee of mortgaged property has purchased it on the basis of a clear title, and agreed, as a part of the consideration, to pay the mortgage debt, that he is estopped from questioning the mortgage for usury. (p. 272.)

USURY, Who may Interpose the Defense of.—A grantee of a mortgagor may interpose the defense of usury where there is no agreement or understanding to the contrary. (pp. 272, 273.)

USURY, Defense of by Person Acquiring Title Under a Voluntary Conveyance.—If the owner of real property which is subject to a usurious mortgage executes a voluntary conveyance thereof to his wife, because he is unable to manage it, and wishes to prevent it from being further frittered away, she is not estopped, as against the mortgage, to show that the mortgage is usurious. (p. 274.)

Suit to foreclose a mortgage. The defense was usury, and the claim of the plaintiff was that, because the defendant had acquired the property from her husband, subject to the mortgage, she was estopped from urging this defense. Judgment for the plaintiff; the defendant appealed.

Eckhart & Moore, for the appellant.

Le Forgee & Vail, for the appellee.

⁶²⁵ **FARMER, J.** The only question raised in this court by appellant is the correctness of the action of the chancellor in allowing the defense of usury. It is not denied that the fifteen hundred and fifty-six dollars and twenty-six cents note transaction was usurious, and that instead of Drew receiving the amount of said note he only received twelve hundred and thirty-six dollars and fifty-six cents. The contention of appellant is, that a debtor may set apart and dedicate a certain fund or property to the payment of a usurious debt, and the person who has received the fund or property to make such payment cannot withhold it on the ground of usury; also, that the conveyance to appellee was for the purpose of vesting title in her subject to the payment of the mortgage indebtedness, and that this conveyance was an affirmance of the usurious contract, and appellee, by accepting title, is estopped from setting up the defense of usury. While there is authority to sustain these propositions, we do not think this case is within the principles announced in such authorities, and they are therefore not applicable, for the reason that the evidence does not show a setting apart by Levi Drew of the lands for the payment of the indebtedness nor the conveyance of them to his wife to be used by her in paying said indebtedness, nor was the conveyance to appellee made for such purpose nor under such circumstances as that she must be held to have assumed ⁶²⁶ the payment of the usurious indebtedness and be thereby precluded from setting up the defense of usury. In *Crawford v. Nimmons*, 180 Ill. 143, 54 N. E. 209, it was held to be only in cases where the grantee of a mortgagor has purchased the property on the basis of a clear title at an agreed price and assumed to pay the mortgage debt as a part of the consideration, or where the amount of the mortgage debt has been deducted from the price of the land on the basis of a clear and complete title, that such grantee cannot question the validity of the mortgage indebtedness. It was also there said that if the usury was a part of the consideration in the agreement between the mortgagee and his grantee it would be an affirmance of the debt by the mortgagor, and in such case, the grantee having contracted with a view to paying the encumbrance, equity requires him to pay the debt or lose the property. That case and the cases therein cited, and *Union Nat. Bank v. International Bank*, 123 Ill. 510, 14 N. E. 859, also lay down the rule that a

person in privity with the mortgagor may interpose the defense of usury, and that where there is no agreement or understanding about it the grantee of the mortgagor will have the right to make such defense.

The proof here shows Levi Drew to have been utterly incapable to intelligently and successfully manage business affairs and property. His own testimony shows him to have been a man of weak character and practically helpless in financial transactions. During the short time he had owned the property received from his father, prior to 1897, he had so managed his affairs as to involve himself largely in debt with no present ability to pay it. When some of his creditors began to press him and threaten to take his property, or a part of it, he applied to the Atwood Bank for a loan to pay some of his indebtedness. The application was made by him and refused by the bank officers, some of whom are officers of the appellant, a number of times before the loan was finally made, and while he was required to give a note for fifteen hundred and fifty-six dollars and twenty-six cents, and secure it by a ⁶²⁷ mortgage, assignment of leases on certain lands and the assignment of a life insurance policy, he was only given twelve hundred and thirty-six dollars and fifty-six cents. He made very little progress in the payment of this indebtedness, but this, we think, could not have been much of a disappointment to the bank officers, for they were well acquainted with him. Not only was he making poor progress in paying the bank, but he also incurred indebtedness to other creditors, who began to take judgments against him and levy upon and sell his interest in some of the land. It must have been apparent to everyone who knew the man and had any knowledge of his affairs that although he had property of considerable value, he had not the capacity to extricate himself from his financial entanglements. Under these circumstances the title was conveyed to his wife. She paid no consideration whatever for the conveyance. The purpose of placing the title in her was to put it out of the power of her husband to dissipate and fritter it away. Notwithstanding Levi Drew testified, in answer to questions asked him by counsel for the appellant, that appellee told him she had money appropriated and borrowed to pay the fifteen hundred and fifty-six dollars and twenty-six cents to the bank and that it was in that way he came to deed her the

land, we cannot accept this as conclusive. In view of the fact that the record shows him to have been incapable of managing his property or business, and the fact that he was in April, 1903, by the county court of the county of Douglas adjudged a spendthrift and a conservator appointed for him, we cannot accept his statement of this matter as correct, when, taking all the evidence together and all the circumstances shown by the testimony, it clearly appears the conveyance to appellee was made for the purpose and reasons we have above indicated. By accepting the title she assumed no burden or obligation for the payment of her husband's debts, especially one that was illegal, nor did she do anything to estop herself from protecting the property against an invalid and unjust claim. No such thought or intention was in her mind at the time ⁶²⁸ she received the title, as a matter of fact, and she neither said nor did anything out of which the law would raise an estoppel against her.

Appellee has assigned certain cross-errors. We have examined them, and are of opinion she was not prejudiced by any of the rulings or holdings of the circuit and appellate courts.

In our opinion the decree of the circuit court was just and is sustained by the law and the evidence. The judgment of the appellate court affirming said decree of the circuit court is therefore affirmed.

Where a Grantee of Land Assumes the Payment of the Mortgage thereon, or takes expressly subject to it, the amount of which is deducted from the purchase price, he cannot claim an abatement of the amount of the debt on the ground that it is usurious, or otherwise set up usury as a defense. But if there is no assumption of the mortgage debt, nor any agreement that it shall be paid out of the land, usury is admissible in favor of the grantee as a defense: See the note to Klapworth v. Dressler, 78 Am. Dec. 87; Hiner v. Whitlow, 66 Ark. 121, 74 Am. St. Rep. 74.

GUMP v. GOWANS.

[226 Ill. 635, 80 N. E. 1086.]

WILLS, Form of.—The law does not prescribe any particular form for a will, except that it must be reduced to writing and signed and attested in the presence of the testator by two or more credible witnesses. (p. 276.)

WILLS Witnessed by Husband or Wife of the Testatrix or Testator.—The incompetency of husband and wife to testify for or against each other applies to the attestation of wills. Neither, therefore, can, as a witness, attest the will of the other. (p. 276.)

WILLS, Deeds, When not Admissible to Probate as.—A conveyance executed by a married woman, intended to be operative after her death and therefore testamentary in character, and never delivered, cannot be admitted to probate as a will, though her husband joined in the execution of the conveyance, and there was attached thereto the certificate of a notary by him signed, certifying to its acknowledgment. The signatures so placed on the deed cannot be considered as the signatures of subscribing witnesses. (p. 277.)

L. D. Turner, for the plaintiff in error.

Freels & Joyce, for the defendants in error.

⁶³⁵ **CARTWRIGHT, J.** On November 11, 1902, Mary A. Gowans made her last will and testament, by which she devised certain tracts of land owned by her, and on the same day she signed and ⁶³⁶ acknowledged five warranty deeds, in which her husband, Walter Gowans, joined, purporting to convey to the grantees named therein other tracts of land not devised by the will, reserving to herself the use, benefit and control of the said lands during her life, and reciting in each a consideration of love and affection and five dollars. The will and deeds were kept by her in a candle-box in her residence and the deeds were never delivered. She died on June 11, 1905, and on June 23, 1905, Walter Gowans filed in the probate court of St. Clair county his petition for the probate of the will. A cross-petition was afterward filed, alleging that the deeds were executed as required by law in case of wills, and praying that they should be admitted to probate. The probate court admitted the will to probate but denied probate of the other instruments, and on appeal to the circuit court a like order was made. A writ of error was sued out of this court to review the order of the circuit court.

The law does not prescribe any particular form for a will, but only requires that it shall be reduced to writing and signed and attested, in the presence of the testator or testatrix, by two or more credible witnesses. If those conditions are complied with and the intention of the maker to dispose of his estate after death is sufficiently manifest, the instrument will be entitled to probate as a will upon the statutory proof being made: *Robinson v. Brewster*, 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 683; *Noble v. Tipton*, 219 Ill. 182, 76 N. E. 151, 3 L. R. A., N. S., 645. The deeds in question were retained by the maker and did not operate as conveyances for want of delivery. The evidence indicates that they were intended to become operative after her death and were therefore testamentary in character. They were not signed by any person with any intention of attesting the signature of the maker, but they were acknowledged before a notary public, who affixed his signature to the certificates of acknowledgment. Perhaps the certificates, which show that the maker acknowledged to the notary that she signed the instruments, would be sufficient to make him a subscribing witness, but there was no other competent witness. An attempt was made to supply the other witness by the signature of the husband, Walter Gowans, who testified that he was present and saw his wife sign the deeds and that she saw him sign them; but he signed as a grantor, and not as a subscribing witness or for the purpose of attesting her signature. If he had signed as an attesting witness the act would have been of no avail. The term "credible," as applied to subscribing witnesses of a will, means competent (*Harp v. Parr*, 168 Ill. 459, 48 N. E. 113), and the competency of a witness is to be tested by his status at the time of the attestation and not at the time when the will is presented for probate: *Fisher v. Spence*, 150 Ill. 253, 41 Am. St. Rep. 360, 37 N. E. 314. The incompetency of husbands and wives to testify as witnesses for or against each other applies to the attestation of wills (30 Am. & Eng. Ency. of Law, 2d ed., 605,) and our statute has not removed the common-law disqualification. Chapter 51 of the Revised Statutes has relaxed the common-law rule to some extent, but section 8 provides that nothing in the act shall affect existing laws concerning the attestation of last wills and testaments.

The evidence did not show that the deeds were tested by two competent witnesses, and the judgment of the court was therefore correct.

The judgment is affirmed.

In Order to Constitute an Instrument a Will, it is not necessary that it should assume any particular form or that it should be expressed in any particular words: Ferris v. Neville, 127 Mich. 444, 89 Am. St. Rep. 480, and note; Kerr v. Girdwood, 138 N. C. 473, 107 Am. St. Rep. 551; Teske v. Dittberner, 65 Neb. 167, 101 Am. St. Rep. 614.

A Wife has been Held Incompetent to Witness her husband's will: Pease v. Allis, 110 Mass. 157, 14 Am. Rep. 591. As to whether the wife of a beneficiary is a competent witness to a will, see *In re Holt's Will*, 56 Minn. 33, 45 Am. St. Rep. 434; Fisher v. Spence, 150 Ill. 253, 41 Am. St. Rep. 360. The wife of the executor is a competent attesting witness: *In re Will of Lyon*, 96 Wis. 339, 65 Am. St. Rep. 52.

The Words "Credible Witnesses" in the statute of wills has been construed to mean competent witnesses: See the note to *Stevens v. Leonard*, 77 Am. St. Rep. 460.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

KAGY v. WESTERN UNION TELEGRAPH COMPANY.

[37 Ind. App. 73, 76 N. E. 792.]

CONTRACTS—Breach—Damages.—If two persons have made a contract which one of them has broken, the damages which the other ought to receive in respect to such breach should be such as may fairly and reasonably be considered either arising naturally from the breach of the contract, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of its breach. (p. 282.)

TELEGRAPH COMPANIES—Damages for Failure to Send Message.—The damages for which a telegraph company is liable for failure to send a message must result from such failure as a proximate cause, and must not be speculative, remote or conjectural. (p. 282.)

TELEGRAPH COMPANIES—Damages for Failure to Send Message.—Only Cost of Message can be recovered for failure to send or to transmit a message properly and correctly, unless the telegrapher had notice from the message itself, or from the information furnished with it, that its nondelivery would probably be attended with other damages. (p. 283.)

TELEGRAPH COMPANIES—Failure to Deliver Message—Anticipation of Injury.—If a telegraph company fails to deliver a message from child to parent, simply stating to the latter "Come at once prepared to stay. We are both sick," the company is not presumed to have known that its failure to deliver the message would, in the natural course of events, cause a severe personal injury to the sender of the message. (p. 283.)

TELEGRAPH COMPANIES—Failure to Deliver Message.—If a telegraph company fails to deliver a message simply informing the sendee that the sender is sick and to come at once, the sender cannot recover on the ground of being deprived of the sendee's nursing, when the company was not informed that the latter was an experienced nurse. (p. 284.)

TELEGRAPH COMPANIES—Damages—Mental Anguish.—Damages cannot be recovered against a telegraph company for mental anguish alone, caused through negligent failure to send and deliver a telegraphic message. (p. 284.)

TELEGRAPH COMPANIES—Damages—Mental Anguish Followed by Physical Injury.—Damages cannot be recovered against a telegraph company for physical injury sustained as a result of mental anguish arising from the negligent failure of the company to send and deliver a telegraphic message. (pp. 284, 285.)

Cox, Reasoner & Ward, for the appellant.

Chambers, Pickens, Moores & Davidson, Mitchell & McClintic and G. H. Fearons, for the appellee.

⁷⁴ BLACK, P. J. The appellee's demurrer for want of sufficient facts to each of the two paragraphs of the appellant's complaint was sustained.

After preliminary matter it was alleged in the first paragraph: That on October 7, 1902, the appellant and his wife were dangerously sick with typhoid fever at their home in Peru, Indiana; that the appellant's father, Leander Kagy, was then living near Bloomville, Ohio, and there existed between the appellant and his father the affection and close relation of father and son, and the appellant became desirous and anxious for the presence of his father, who was an efficient and careful nurse, and had had large experience in nursing the sick, as appellant knew; that nurses competent to treat and wait upon typhoid fever patients were then scarce in Peru and vicinity, and the condition of the appellant and his wife was such that it became necessary to secure a competent nurse and assistant during said sickness; that, for the purpose of securing the immediate presence of the appellant's father, to comfort, nurse and assist the appellant during the sickness, the appellant, on that day, wrote and sent to the appellee's office in Peru, by a special messenger—Sophie M. Kowalk—a dispatch, of which a copy was set out, as follows: "Peru, Indiana. To Leander Kagy, Bloomville, Ohio. Come at once prepared to stay. We are both sick. V. E. Kagy."

It was alleged that the special messenger took this dispatch to appellee's office in Peru, and stated to the agent in charge of the office that she had a message to be sent to Leander Kagy, at Bloomville, Ohio, that Mr. and Mrs. ⁷⁵ Vetus E. Kagy were ill, that appellant's father lived in the country, and she asked the agent what the charges would be, and he informed her that the fee or charge for the transmission of the dispatch to Leander Kagy would be fifty cents, which she, for and on behalf of the appellant, then and there paid, and immediately returned to the appellant and informed him that the message had been delivered as aforesaid; that the appellee thereupon transmitted the dispatch to Bloomville, Ohio; that the agent in the office at Bloomville

did not deliver it to Leander Kagy, but immediately sent to the office of the appellee at Peru a service message, set out, which was addressed, "Peru, Indiana," and stated: "Yours to-day to Kagy sqd. Same will you guarantee \$1 delivery charges? [Signed] Bloomville, Ohio, October 7." It was alleged that the meaning of this message, as known and understood by appellee's agent at Peru, was that the message of the appellant to his father had been received at Bloomville, Ohio, and would be delivered immediately to Leander Kagy at that place, if one dollar charge should be guaranteed by the appellant or some one on his behalf; that the service message was received by appellee's agent at Peru at 5 o'clock, October 7, 1902; that appellant lived at a place described, in Peru, and the appellee's agent had this address, with the copy of the dispatch filed for transmission; that the office was within five squares of the appellant's residence, as appellee's agent knew; that appellant was then ready and willing to pay the one dollar to guarantee delivery; that the message to Leander Kagy could have been delivered in time for him to start for Peru by the night train from Bloomville, if the one dollar for guaranty had been paid; that he was ready and willing to go to assist and nurse the appellant immediately upon the receipt of the telegram; that appellee's agent at Peru negligently received and retained the service message, and negligently failed and refused to notify the appellant that the message ⁷⁶ would not be delivered without the payment of the one dollar guaranty, and negligently failed to notify the appellant that the message to his father had not been delivered; that by reason of the aforesaid negligence of the appellee the appellant believed that the message had been transmitted, and the fee of fifty cents so paid was all and every fee demanded or compensation expected or required by appellee for the transmission and delivery of the message to appellant's father; that appellant, understanding and believing that his father had received the message, expected him to arrive at Peru on October 8th; that as train after train arrived from the east, and his father did not come, appellant hourly became more anxious and nervous, his fever became more violent, and, being without any competent nurse, and being compelled, by the nature of his disease, to get into and out of bed, under the control of his anxiety and the depression and despondency caused by the failure of his father to arrive, and by reason of having to get into and out of his

bed, appellant, on the tenth day of October, suffered a perforation of an intestine, and suffered a collapse, whereby his temperature dropped from 103 to 97, and his death became imminent, but he afterward rallied, and after many weeks he was able to sit up and so far recovered that at the filing of this complaint he was able to attend to his ordinary affairs, but still suffered incurable and permanent injuries resulting directly from the mental anxiety, depression and despondency caused by the failure of his father to come as requested in said dispatch; that the failure of his father to come as requested, and to arrive on October 8, 1902, was caused directly by appellee's agent's failing and neglecting to inform appellant that a guaranty of one dollar would be necessary; that, by reason of said negligence of appellee's said agent, appellant was deprived of the presence, care and nursing of his father from October 8 until October 11, 1902, and appellant's said collapse and permanent injuries " were directly caused by the want of nursing and care and the mental anxiety produced by the failure of his father to arrive, as expected, October 8, 1902; that by reason of said anxiety and despondency, and the permanent physical injuries as hereinbefore set forth, appellant suffered great mental and physical anguish, and his health had been permanently injured, to his damage, etc. Wherefore, etc.

In the second paragraph nothing is said about the service message, but it is alleged that the appellee's agent at Peru, to whom the appellant's dispatch was delivered, failed and neglected to transmit and deliver the dispatch to appellant's father until late on the day of October 10, 1902; that the failure of the appellant's father to come as requested, and to arrive on October 8, 1902, was caused directly by the appellee's agent's failing and neglecting promptly to transmit and deliver the telegram; and that by reason of said negligence of the appellee's said agent appellant was deprived of the presence, care and nursing of his father from October 8, 1902, to October 11, 1902, and his said collapse and permanent physical injuries were directly caused by the mental anxiety produced by the failure of his father to arrive as expected on October 8, 1902.

We will direct our attention to the matter discussed by counsel, the character of the appellant's injury and the cause thereof. There is want of clearness, directness and certainty in the complaint, in the statement of the appellant's in-

juries for which he seeks damages, and the cause or causes thereof. In the first paragraph it is said, however, that the collapse and permanent injuries were directly caused by the want of nursing and care, and by the mental anxiety produced by the failure of the appellant's father to arrive as expected; while in the second paragraph it is said that the collapse and permanent physical injuries were directly caused by the mental anxiety produced by the same failure to arrive.

⁷⁸ The supreme court of this state and this court have approved and followed the rule concerning damages, expressed in *Hadley v. Baxendale*, [1854] 9 Ex. 341, as follows: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."

The general principle here laid down is applicable in such cases as the one before us, whether it appears from the form of the pleading to have been intended to declare upon contract or in tort, and the special circumstances under which the dispatch is sent, which may thus affect the question of damages, may be stated or indicated by the language of the dispatch, or may be imparted to the telegraph company otherwise. The damages recoverable must result from the default of the defendant as the proximate cause thereof. They may not be remote, ⁷⁹ conjectural or speculative: See *Hadley v. Western Union Tel. Co.*, 115 Ind. 191, 15 N. E. 845; *Berkey*

& Gay Furniture Co. v. Hascall, 123 Ind. 502, 24 N. E. 336, 8 L. R. A. 65; Lowe v. Turpie, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233; Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846; Acme Cycle Co. v. Clarke, 157 Ind. 271, 61 N. E. 561; Bierhaus v. Western Union Tel. Co., 8 Ind. App. 246, 34 N. E. 581; Western Union Tel. Co. v. Henley, 23 Ind. App. 14, 54 N. E. 775. In 2 Shearman and Redfield on Negligence, fifth edition, section 754, it is said to be settled in a majority of the courts that only the cost of the message can be recovered for failure to transmit a message properly and correctly, unless the telegrapher had notice, from the message itself or from the information furnished with it, that its nondelivery would probably be attended with other damages: See Western Union Tel. Co. v. Henley, 23 Ind. App. 14, 54 N. E. 775, and cases cited therein.

Assuming, for the purposes of the argument, that it could have been sufficiently established by satisfactory evidence that if the appellant had been informed promptly of the receipt of the service message he would have paid the extra charge, and the appellant's dispatch would then have been delivered promptly to his father, and he could and would have safely reached the appellant on the next day, or before his collapse and the rupture of his intestine, and that such injury resulted wholly or in part from the lack of his father's nursing, yet the rupture of an intestine cannot fairly and reasonably be considered as arising naturally, according to the usual course of things, from the default of the telegraph company in not promptly delivering such a message as was sent, and it does not appear that the appellee had any information concerning the special circumstances, from which it could reasonably be supposed that such physical consequence from such a cause was contemplated, as a result of its default, at the time of the making of the contract or at the time of the default.

⁸⁰ The person who presented the dispatch to the appellee's agent stated to him that she had a message to be sent to Leander Kagy, at Bloomfield, Ohio, and that Mr. and Mrs. Vetis E. Kagy were ill, and that the appellant's father lived in the country. Except that the appellant's father lived in the country, and inferentially that he was the addressee, and that the person sick other than the sender was his wife, no information in addition to that contained in the dispatch was

imparted to the appellee. The information may perhaps be regarded as sufficient to apprise the appellee that failure to perform its duty by promptly sending and delivering the dispatch would probably result in disappointment, anxiety and "mental anguish" to the sender; but it does not appear that the appellee was notified by the dispatch or otherwise that the person to whom the dispatch was addressed was a careful and efficient nurse, or that he had large experience in nursing the sick, or that the appellee knew of such experience, or that nurses competent to treat the appellant's disease were scarce at Peru and in its vicinity, or that the appellant's condition or that of his wife was such that it had become necessary to procure a competent nurse and assistant, or that the appellant wrote and sent the message to the appellee's office for the purpose of procuring the immediate presence of his father to nurse and assist the appellant during his illness, or that default in the sending or delivery of the dispatch would result in any lack of nursing of the appellant. Whatever may be said in a proper case concerning an averment of the lack of a competent nurse as an adequate proximate cause of such a physical result, the matter is not properly involved in the pleading before us: See *Central Union Tel. Co. v. Swoveland*, 14 Ind. App. 341, 42 N. E. 1035.

It is now the rule of law in this state, in harmony with the weight of authority elsewhere, that damages cannot⁸¹ be recovered for mental anguish alone caused through the negligent failure of a telegraph company to deliver a telegraphic message: *Western Union Tel. Co. v. Ferguson*, 26 Ind. App. 213, 59 N. E. 416; *Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846. That this must be regarded as settled is not disputed in this case; but it is insisted on behalf of the appellant that we should hold that damages may be recovered where physical injury is consequent upon mental anxiety or anguish, as stated in this complaint, and the contention of counsel relates chiefly to this question, it being supposed by counsel for the appellant not to be decided or settled in this jurisdiction.

We need not lengthen this opinion by discussion of the various familiar instances in which mental suffering is admitted without question as an element in the assessment of damages. The question here presented in argument is, whether, in a case where the direct effect of the defendant's negligence is mental anxiety and distress, for which alone no

damages are recoverable, however real and manifest the mental disturbance be, there may be recovery for physical consequence of such mental hurt. Every serious mental shock or tension has physical sequences of varying severity and duration, which are immediately connected with and naturally dependent upon the mental disturbance as the cause thereof. If mental injury of such character is so obscure and incapable of satisfactory investigation in a court of justice that it is wise policy not to submit the matter to a jury, the physical depression or irregularity reasonably to be expected therefrom is ordinarily not less difficult of being intelligently apprehended as a measure of damages. In the case before us the alleged consequence was the rupture of an intestine. Even where damages are followed in such cases, as in some jurisdictions, for mere mental suffering, it is said that they "ought not to be enhanced by evidence of any circumstances which ⁸² could not reasonably have been anticipated as probable from the notice received by the telegrapher": 2 Shearman and Redfield on Negligence, 5th ed., sec. 756, and cases cited.

Illness arising from the excitement which defamatory language may produce is not, it was held, that sort of damage which forms a ground of action: *Allsop v. Allsop*, 5 Hurl. & N. 534. The court treated the physical illness as it would the mental distress which caused the illness.

In *Kalen v. Terre Haute etc. R. Co.*, 18 Ind. App. 202, 63 Am. St. Rep. 343, 47 N. E. 694, where it was alleged that the defendant by its servant negligently let down a gate at a railroad crossing, and thereby the horse, drawing a carriage in which the plaintiff was riding, became frightened, etc., whereby the plaintiff received a severe nervous shock, was greatly frightened, and her life was put in great and imminent peril, and she had suffered great mental pain and anxiety, etc., we held that the complaint did not show a ground for the recovery of substantial damages. We said: "It is not shown that any physical ailment or distress followed as a consequence of the shock, which is not described as enduring, if that would make any difference in the case"—thereby confining the decision to the facts of the particular case.

In *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, 56 Am. St. Rep. 604, 45 N. E. 354, 34 L. R. A. 781, it was said: "Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting

therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of the fright, or the extent of the damages.

In *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199, where the wrongful conduct of the defendant occasioned the plaintiff's fright, unaccompanied with physical injury, though a nervous shock and subsequent ⁸³ illness resulted, it was held that there could be no recovery: See, also, *Ewing v. Pittsburgh etc. R. Co.*, 147 Pa. 40, 30 Am. St. Rep. 709, 23 Atl. 340, 14 L. R. A. 666; *Spade v. Lynn etc. R. Co.*, 163 Mass. 285, 60 Am. St. Rep. 393, 47 N. E. 88, 38 L. R. A. 512; *Cleveland etc. R. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. 917, and cases cited therein; *Gaskins v. Runkle*, 25 Ind. App. 584, 58 N. E. 740.

We are unable to find any reason for allowing the recovery of damages for physical injury resulting from mental anxiety and suffering, occasioned by negligence, which would not require us to hold the defendant to liability where the consequence of such negligence is mental suffering alone.

Judgment affirmed.

ELEMENTS OF DAMAGES RECOVERABLE FROM TELEGRAPH COMPANIES FOR FAILURE TO TRANSMIT AND DELIVER MESSAGES.

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I. Liability in General.

Telegraph companies were formerly regarded by the courts as common carriers, and held liable as insurers of the correctness of messages offered for transmission. This view has been universally abandoned, and their liability is now limited to losses caused by their negligence. Hence it may be stated as a general rule that a telegraph company is liable for such damages as naturally and proximately arise from its negligent failure to transmit and deliver a message without unreasonable delay: *Western Union Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579; *Little Rock etc. Tel. Co. v. Davis*, 41 Ark. 79; *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589; *Postal Telegraph Cable Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. 252; *Western Union Tel. Co. v. Hyer*, 22 Fla. 637, 1 Am. St. Rep. 222, 1 South. 129; *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 229, 45 Am. Rep. 480; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Western Union Tel. Co. v. Kemp*, 55 Ill. App. 583; *Western Union Tel. Co. v. Du Bois*, 128 Ill. 248, 15 Am. St. Rep. 109, 21 N. E. 4; *Western Union Tel. Co. v. Buchannan*, 35 Ind. 429, 9 Am. Rep. 744; *Bierhaus v. Western Union Tel. Co.*, 8 Ind. App. 246, 34 N. E. 581; *West v. Western Union Tel. Co.*, 13 Kan. 93, 7 Am. St. Rep. 569, 17 Pac. 807; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437; *Birney v. New York etc. Printing Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485; *Western Union Tel. Co. v. Carew*, 15 Mich. 625; *Leonard v. New York etc. Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *Baldwin v. Western Union Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Green v. Western Union Tel. Co.*, 136 N. C. 489, 103 Am. St. Rep. 955, 49 S. E. 165, 67 L. B. A. 985; *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500; *Wolfe v. Western Union Tel. Co.*, 62 Pa. 83, 1 Am. Rep. 387; *Western Union Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Western Union Tel. Co. v. Jobe*, 6 Tex. Civ. App. 403, 25 S. W. 168, 1036; *Western Union Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715; *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 760.

A few of the older opinions cited above were rendered when telegraph companies were regarded as common carriers, but these earlier cases are fully sustained by the later authorities. The decisions of the present day are based entirely upon the theory of a contractual relation between the sender of the message and the telegraph company, and the liability of the company is founded upon a breach on its part of the contract. In the famous English case of *Hadley v. Baxendale*, 9 Ex. 341, the rule was laid down that "when two parties have made a contract which one of them has broken, the damage which the other party ought to receive in respect of such breach of contract should be either such as may be fairly and substantially considered as arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." The American courts, without exception, have adopted this rule in determining the elements of damages recoverable against telegraph companies, and the rule is now general in this country that the damages must be such as were reasonably in contemplation of the parties or there can be no recovery.

a. **Damages Must be Such as Were in Contemplation of the Parties.** *Western Union Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Manville v. Western Union Tel. Co.*, 37 Iowa, 214, 18 Am. Rep. 8; *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458, 20 Am. Rep. 605. "A party who has failed to fulfill a contract cannot be held liable for remote, contingent, and uncertain consequences, or for speculative or possible results which may have ensued on his breach of duty, although they may be traceable to that cause. The reason is, that damages of such a nature are not the natural or necessary incidents of a contract, and cannot be deemed to have been within the contemplation of the parties when they agreed together. A rule of damages which should embrace within its scope all the consequences which might be shown to have resulted from a failure or omission to perform a stipulated duty or service would be a serious hindrance to the operations of commerce and to the transaction of the common business of life. The effect would often be to impose a liability wholly disproportionate to the nature of the act or service which a party had bound himself to perform, and to compensation paid and received therefor. The practical rule, founded on a wise policy, and at the same time consistent with good sense and sound equity, is, that a party can be held liable for a breach of contract only for such damages as are the natural or necessary, and the immediate and direct result of the breach, such as might properly be deemed to have been in contemplation of the parties when the contract was entered into, and that all remote, speculative and uncertain results, as well as possible profits and advantages and other

like consequences which might have arisen from the fulfillment of the contract, must be excluded, as forming no just or legitimate basis on which to determine the extent of the injury actually caused by a breach": *Squire v. Western Union Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157. The same doctrine is laid down in *Lee v. Western Union Tel. Co.*, 51 Mo. App. 375; *Western Union Tel. Co. v. Mullins*, 44 Neb. 732, 62 N. W. 88; *Baldwin v. Western Union Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *First Nat. Bank v. Western Union Tel. Co.*, 30 Ohio St. 555, 27 Am. Rep. 485; *Smith v. Western Union Tel. Co.*, 150 Pa. 561, 24 Atl. 1049; *Western Union Tel. Co. v. Campbell*, 36 Tex. Civ. App. 276, 81 S. W. 580; *Kopperl v. Western Union Tel. Co. (Tex. Civ. App.)*, 85 S. W. 1018. In this case an attorney in Galveston, Texas, on learning of his wife's illness in Detroit, Michigan, immediately sent her two dispatches asking her if he should come to her. The telegraph company failed to deliver his wife's reply to his message, and he made the trip from Galveston to Detroit, which he would not have done had he received her reply. It was held he could recover from the telegraph company the expenses of the trip, but could not recover for loss of time, or for fees which he would have earned if he had not gone, these being not in contemplation of the parties: See, also, *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. Rep. 577, 31 L. ed. 479.

II. Notice of Knowledge of Circumstances.

a. **Necessity for.**—A telegraph company being liable only for such damages as are fairly in contemplation of the parties, it naturally follows that the question of its knowledge of the nature of the message is of the greatest importance. The notice contemplated by the law may be imparted to the company either by the words of the message itself, or extraneous knowledge may be brought home to the company so as to fix its liability. These two kinds of notices will be discussed under separate heads, but as a general rule it may be stated that in the absence of any notice as to the character of the message which would indicate the necessity for prompt delivery only nominal damages are recoverable. In the absence of notice of special circumstances connected with the sending of a message, a telegraph company is liable only for nominal damages: *Western Union Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; *Western Union Tel. Co. v. Wilson*, 32 Fla. 537, 37 Am. St. Rep. 125, 14 South. 1, 22 L. R. A. 434; *Western Union Tel. Co. v. Martin*, 9 Ill. App. 587; *Hadley v. Western Union Tel. Co.* 115 Ind. 191, 15 N. E. 845; *Merrill v. Western Union Tel. Co.*, 78 Me. 97, 2 Atl. 847; *Western Union Tel. Co. v. Clifton*, 68 Miss. 307, 8 South. 746; *Abeles v. Western Union Tel. Co.*, 37 Mo. App. 554; *Mackay v. Western Union Tel. Co.*, 16 Nev. 222; *Baldwin v. Western Union Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Western Union Tel. Co. v. Lively (Tex.)*, 15 S. W. 197; *Western Union Tel. Co. v. Coffin*, 38 Tex. 94, 30 S. W. 896; *Candee v. Western Union Tel. Co.*,

34 Wis. 471, 17 Am. Rep. 452; *Western Union Tel. Co. v. Coggin*, 63 Fed. 137, 15 C. C. A. 231; *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. Rep. 577, 31 L. ed. 479.

b. **Importance Apparent on Face of the Message.**—Where the contents of a message indicate the necessity of prompt delivery, the telegraph company is liable for all damages naturally and proximately arising from delay in delivery: *Hadley v. Western Union Tel. Co.*, 115 Ind. 191, 15 N. E. 845; *Western Union Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896. But the message need not disclose on its face the nature of the business, so that its meaning as to quantity, quality or value may be disclosed to the operator; if it shows that it relates to a commercial or legal transaction of value it is sufficient: *Postal Tel. Cable Co. v. Lathrop*, 131 Ill. 575, 19 Am. St. Rep. 55, 23 N. E. 583, 7 L. R. A. 474; *Bierhaus v. Western Union Tel. Co.*, 8 Ind. App. 246, 34 N. E. 581; *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 10 Am. St. Rep. 699, 11 S. W. 783, 4 L. R. A. 660. The following instances are given of messages which were held sufficient on their face to charge the telegraph company with liability for special damages caused by unnecessary delay in delivery, though the agents of the company had no knowledge of the circumstances, except as shown on the face of the messages: "Due 1800. Attach if you can find property; will send note by tomorrow's stage": *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 78 Am. Dec. 589. "Have work, come at once." The telegraph company was held liable for damage sustained by the sender in losing an opportunity to secure a position: *Western Union Tel. Co. v. Hines*, 96 Ga. 688, 51 Am. St. Rep. 159, 23 S. E. 845. A message from a jobber to a broker read, "Put stop—order on 5,000 December at 17 cts." This was held to show sufficient notice of importance of its contents to render the telegraph company liable for all direct damages arising from a mistake in transmission whereby the message read, when delivered, "70 cts." instead of "17 cts.": *Postal Tel. Co. v. Lathrop*, 131 Ill. 575, 19 Am. St. Rep. 55, 23 N. E. 583, 7 L. R. A. 474. "Want your cattle in the morning, meet me at pasture." Failure to deliver this message promptly caused a delay of one day in getting the cattle to the pasture, and the telegraph company was held liable for the loss sustained by the shrinkage in the weight of the cattle: *Hadley v. Western Union Tel. Co.*, 115 Ind. 191, 15 N. E. 845. An attorney telegraphed certain wholesale brokers who were his clients, regarding a debtor about to fail, "Have you claim against P. L. Davis? Answer, how much." By reason of delay in delivery of this message, prior attachments were levied by other creditors. The agents of the telegraph company had no notice of the circumstances, other than as disclosed by the message itself, but the company was held liable for special damages: *Bierhaus v. Western Union Tel. Co.*, 8 Ind. App. 246, 34 N. E. 581. "Ship hogs at once": *Manville v. Western Union Tel. Co.*, 37 Iowa, 214, 18 Am. Rep. 8. "Ship cargo at 90 if

you can secure freight at 10": True v. International Tel. Co., 60 Me. 9, 11 Am. Rep. 156. "If we have any old Southern on hand sell same before Board, buy 500 Hudson at Board": Rittenhouse v. Independent Line of Tel. Co., 44 N. Y. 263, 4 Am. Rep. 673. "Will take two cars 16 ship soon as convenient by West Shore." This was sent in reply to the following message: "Pickled ham 16 9½": Mowry v. Telegraph Co., 4 N. Y. Supp. 666. "Buy 50 North Western, 50 Prairie Du Chien Limit 45": United States Tel. Co. v. Wenger, 55 Pa. 262, 93 Am. Dec. 751. "Car cribs 60 c. a. f. prompt in reply, quote cribs loose and strip packed": Pepper v. Western Union Tel. Co., 87 Tenn. 554, 10 Am. St. Rep. 699, 11 S. W. 783, 4 L. R. A. 660. "You had better come and attend to your claim at once": Western Union Tel. Co. v. Sheffield, 71 Tex. 570, 10 Am. St. Rep. 790, 10 S. W. 752. "M. and Co. hold note of W. Will be attached tonight. Your Bank Tel. M. Bros. Bankers to make bond": Martin v. Western Union Tel. Co., 1 Tex. Civ. App. 143, 20 S. W. 860. "How many beeves and bulls have you, don't go away until you get them all. Answer": Western Union Tel. Co. v. Willford, 2 Tex. Civ. App. 574, 22 S. W. 244. "M. will be home in few days, thinks he can trade." The telegraph company was held liable for loss in failure of trade caused by delay in delivery of the message: Western Union Tel. Co. v. Morrison (Tex. Civ. App.), 33 S. W. 1025. "Send bay horse today Mock loads tonight": Thompson v. Western Union Tel. Co., 64 Wis. 531, 54 Am. Rep. 644, 25 N. W. 789.

c. **Extraneous Evidence of Nature of Message.**—If a telegraph company is informed of the nature of the message, it is bound to take notice of whatever the dispatch suggests, and if it does not seek further notice, it is chargeable with all the knowledge that such inquiry could have elicited: Herron v. Western Union Tel. Co., 90 Iowa, 129, 57 N. W. 696; McPeck v. Western Union Tel. Co., 107 Iowa, 356, 70 Am. St. Rep. 205, 78 N. W. 63, 43 L. R. A. 214; Rittenhouse v. Independent Line of Tel., 44 N. Y. 263, 4 Am. Rep. 673; Western Union Tel. Co. v. Edsall, 74 Tex. 329, 15 Am. St. Rep. 835, 12 S. W. 41; Western Union Tel. Co. v. Jobe, 6 Tex. Civ. App. 403, 25 S. W. 168, 1036. But the mere fact that the sender requested the operator to "rush" the message as it was important would not be sufficient to charge the company with knowledge of nature of a cipher message: Houston etc. R. R. Tel. Co. v. Davidson, 15 Tex. Civ. App. 334, 39 S. W. 605.

d. **Cipher Messages.**—It has been held by a number of courts that where a telegraph company receives and agrees to transmit and deliver a cipher message, it is liable for the damages naturally and proximately resulting from its failure to transmit and deliver: American Union Tel. Co. v. Daughtry, 89 Ala. 121, 7 South. 660, affirming Daughtry v. Telegraph Co., 75 Ala. 168; Western Union Tel. Co. v. May, 83 Ala. 542, 4 South. 844; Western Union Tel. Co. v. Hyer Bros.,

22 Fla. 637, 1 Am. St. Rep. 222, 1 South. 129; Western Union Tel. Co. v. Fatman, 73 Ga. 285, 54 Am. Rep. 877; Dodd G. Co. v. Postal Tel. Cable Co., 112 Ga. 685, 37 S. E. 981; Alexander v. Western Union Tel. Co., 66 Miss. 161, 14 Am. St. Rep. 556, 5 South. 397, 3 L. R. A. 71. But the principle above upheld is contrary to the doctrine established in the famous Baxendale case (9 Ex. 341), and is not supported by the weight of authority. The Dodd G. Co. case (112 Ga. 685, 37 S. E. 981) which is the leading case referred to as sustaining this rule, simply followed an old decision of the supreme court of that state in the Fatman case: 73 Ga. 285, 54 Am. Rep. 877. And it is probable that in reaffirming the Fatman case, the court was actuated by a desire to sustain the doctrine of stare decisis, as no argument was presented by the court in the Dodd G. Co. case (112 Ga. 685, 37 S. E. 981) in favor of the rule it reaffirmed. The other leading case cited (Hyer v. Western Union Tel. Co., 22 Fla. 637, 1 Am. St. Rep. 222, 1 South. 129), has been repudiated by the same court in a later case: Western Union Tel. Co. v. Wilson, 32 Fla. 527, 37 Am. St. Rep. 125, 14 South. 1, 22 L. R. A. 434; so that practically the courts of Georgia and Mississippi stand alone in holding telegraph companies liable for negligence in the transmission and delivery of cipher messages.

As it has been the policy of our courts to follow the rule laid down in the Baxendale case (9 Ex. 341) in all of their decisions respecting damage suits against telegraph companies, it will be found that they have made no exception to the rule in reference to cipher messages, and that the overwhelming weight of authority is to the effect that telegraph companies are not liable for losses incurred by delay in the delivery of a cipher message, unless the nature of the message is communicated to the operator: Western Union Tel. Co. v. Wilson, 32 Fla. 537, 37 Am. St. Rep. 125, 14 South. 1, 22 L. R. A. 434; Postal Tel. Co. v. Lathrop, 131 Ill. 575, 19 Am. St. Rep. 55, 7 L. R. A. 474; Western Union Tel. Co. v. Martin, 9 Ill. App. 587; United States Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519. In this case the dispatch read, "Sell 50 Gold." The court said: "While it was proved that the dispatch in question could be understood among brokers to mean fifty thousand in gold, it was not shown nor was it put to the jury to find, that the appellant's agent so understood it at all. 'Sell 50 Gold' may have been understood in its literal import, if it can be properly said to have any, or was as likely to be taken to mean fifty dollars as fifty thousand dollars, by those not initiated, and if the measure of responsibility at all depends upon the knowledge of the special circumstances of the case, it would certainly follow that the nature of the dispatch should have been communicated to the agent at the time it was offered to be transmitted, in order that the appellant might have observed the precaution necessary to guard itself against the risk": Beaupre v. Pacific & A. Tel. Co., 21 Minn. 155; Abeles v. Western Union Tel. Co., 37 Mo. App. 554; Mackay v. Western Union Tel. Co., 26 Nev. 232; Landsberger v. Magnetic Tel. Co., 32 Barb. 530; Cannon

v. Western Union Tel. Co., 100 N. C. 300, 6 Am. St. Rep. 590, 6 S. E. 731. In *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. Rep. 1098, 38 L. ed. 883, this question was directly before the supreme court of the United States, and by that tribunal it has been adjudicated that telegraph companies are not liable in damages for delays in transmission or delivery of cipher messages when their meaning is not explained to the operator. The decisions of the different state courts are here discussed, and the court, after a lengthy review of the whole question, quotes with approval the rule in the *Baxendale* case, and adds: "No such results could be reasonably supposed to have been in contemplation of both parties, for the simple reason that the defendant at least did not know what the contract was about, nor what nor whether any damage would follow the breach of it." This would seem to settle the question in this country at least, in regard to the liability of telegraph companies for messages in cipher.

III. Damages Must not be Remote, Contingent, or Speculative.

The reason for this rule has been shown by the authorities above cited. But the following cases will illustrate the application of the doctrine. Thus in an action against a telegraph company for damages for failure to transmit a message announcing a rise in the price of cotton, whereby plaintiffs sold their cotton for less than they could have obtained, where the sender was under no legal obligation to inform the plaintiff of the price of cotton, and the plaintiff did not rely on such information, it was held that the damages were too remote: *Frazer v. Western Union Tel. Co.*, 84 Ala. 487, 4 South. 831. Where plaintiff telegraphed his agent to attach for debt but by delay in delivery of the message other creditors secured prior attachment, whereby the plaintiff lost his claim, it was held the loss of the debt was not too remote: *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589; *Cothran v. Western Union Tel. Co.*, 83 Ga. 25, 9 S. E. 836.

Damages for failure to obtain modification of a contract, by reason of delay in delivery of a dispatch, was held too remote in *Western Union Tel. Co. v. Watson*, 94 Ga. 202, 47 Am. St. Rep. 151, 21 S. E. 457. In *Western Union Tel. Co. v. Fenton*, 52 Ind. 1, it was held that damages for failure to obtain employment by reason of delay in delivery of a message was too remote.

An action was brought to recover damages for the inaccurate transmission of a letter directing the sender's racehorse to be sent to a certain racetrack. Owing to an error in the message caused in transmission, the horse was sent to another place and the sender lost the opportunity to have his horse entered in the races. It was held he could not recover the loss of such earnings as he might have won if the horse had been present, as such damages were too speculative: *Western Union Tel. Co. v. Crall*, 39 Kan. 580, 18 Pac. 719.

Plaintiff's brokers in New York sent to him at his home in Kentucky a telegram, stating that they had bought for him certain stock.

The message was never delivered, and plaintiff of course knew nothing of the purchase. On the day the stocks were bought they began to decline, and this decline continued for several days. Plaintiff could have sold the day after the purchase at only a small loss, but on the fourth day the market had so far declined that the value of the stock, together with plaintiff's deposit with his brokers, did not equal the price paid for the stock, and it was sold by the brokers, and plaintiff was left in their debt. The stock soon rose, and ten days after plaintiff's purchase was selling at more than he had paid for it. He brought an action against the telegraph company, alleging that had the telegram been delivered he would have kept his margin good, and prevented the sale of the stocks on a falling market. It was held that only nominal damages could be recovered, because the consequences resulting from the failure in delivery could not possibly have been in contemplation of the parties at the time of the contract, and was therefore too remote: *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126. In *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 66 Am. St. Rep. 361, 38 S. W. 1068, 36 L. R. A. 711, there was delay in delivering a telegram ordering a carload of mules shipped on a certain day. The mules would have been shipped on that day if the message had been delivered within a reasonable time, after it reached the place of destination. It was held that the addressee could recover damages for the loss sustained on account of the mules not being shipped on that day. By reason of failure of a telegraph company to deliver a telegram to plaintiff's husband, notifying him to meet her on the arrival of a certain train, plaintiff was compelled to walk a long distance in the rain to a hotel, and sleep in wet clothes, thereby contracting a severe cold, from which she was confined to a room for some time, causing her great mental pain and anguish, but the court held that the mental anguish resulting from the failure to deliver the message could not have been reasonably anticipated and was too remote: *Western Union Tel. Co. v. Campbell*, 36 Tex. Civ. App. 276, 81 S. W. 580. Plaintiff, anticipating a decline in the market price of certain corporate stock, desired to speculate by selling on the exchange before it declined. He offered for transmission a message to his brokers, in New York City, instructing them to sell a certain number of shares; the message was not delivered for several days, and until after decline in the stock. Plaintiff had no stock, but kept securities with his brokers, and they would have sold and bought again on plaintiff's order if the telegram had been delivered. It was held that the difference in the price of the stock at the time the message should have been delivered, and when it actually was delivered, could not be recovered, the same being too remote, uncertain and speculative: *Cahn v. Western Union Tel. Co.*, 48 Fed. 810, 1 C. C. A. 107. "Only nominal damages can be recovered for failure to deliver a message, where the only loss is the opportunity to make a speculative

bargain": *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. Rep. 577, 31 L. ed. 479.

IV. Injury to Credit.

In *Western Union Tel. Co. v. Brown*, 58 Tex. 170, 44 Am. Rep. 610, it was held that where a telegraph company failed to deliver a message from plaintiff's banking-house to another banking-house to protect plaintiff's note, and by reason of such failure the note was protested, that all actual damages, including injury to plaintiff's credit, could be recovered. But in *Smith v. Western Union Tel. Co.*, 150 Pa. 561, 21 Atl. 1049, it was held that delay by a telegraph company in delivering money transmitted by telegraph, whereby the payee's note was protested, did not render the company liable in damages for his loss of credit caused by the protest.

V. Loss of Expected Profits.

a. *In General*.—In order to recover damages for delay in the transmission or delivery of a telegram, which causes defendant to sustain loss of expected profits, the loss must be actual, and substantial, and this must be proved: *Pennington v. Western Union Tel. Co.*, 67 Iowa, 631, 56 Am. Rep. 367, 24 N. W. 45, 25 N. W. 838; *Mickelwait v. Western Union Tel. Co.*, 113 Iowa, 177, 84 N. W. 1038; *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Alexander v. Western Union Tel. Co.*, 67 Miss. 386, 7 South. 280. Where a dispatch to plaintiff's broker as delivered authorized him to pay a higher price for certain cotton than the market price at the time, it was held there could be no recovery for delay in delivery, in the absence of evidence that the cotton could have been bought at a lower price, or that it was not worth what the plaintiff paid for it: *Western Union Tel. Co. v. Bell*, 24 Tex. Civ. App. 572, 59 S. W. 918; *Cahn v. Western Union Tel. Co.*, 48 Fed. 810, 1 C. C. A. 107; *Telegraph Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. Rep. 577, 31 L. ed. 479.

b. *Messages to Agents to Sell*.—Where the sender of a message to his agent to sell sustains loss by reason of error in transmission, the company is liable for the actual damages sustained. Thus in *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480, it was held that where a message as sent read, "Cover 200 Sept. 100 Aug.," but as delivered read, "Cover 200 Sept. 200 Aug.," the expressions being understood by the cotton trade, that the company was liable for the full amount of the damage: *Postal Tel. Cable Co. v. Lathrop*, 131 Ill. 575, 19 Am. St. Rep. 55, 23 N. E. 583, 7 L. R. A. 474. But this doctrine seems to be limited to errors in transmission only, for in the following cases it is held that negligent delay in delivery of such messages gives no right of recovery, because the damages are too remote and speculative: *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Western Union Tel. Co. v. Bell*, 24 Tex. Civ. App. 572,

59 S. W. 918; *Cahn v. Western Union Tel. Co.*, 48 Fed. 810, 1 C. C. A. 107; *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. Rep. 577, 31 L. ed. 479.

VI. Loss of Employment.

An undertaker, to whom a telegraphic message was sent directing him to meet the sender on the arrival of a certain train, cannot recover for the delay in the delivery of the message, whereby he missed the amount of profit he would have made in conducting the funeral of the sender's relative: *Clay v. Western Union Tel. Co.*, 81 Ga. 285, 12 Am. St. Rep. 316, 6 S. E. 813. Where plaintiff had a definite offer of employment, and lost the position by reason of negligent delay in the delivery of the telegram, he could recover actual damages, including salary for the fixed period of his employment. If the employment was from month to month, he would be entitled to recover for the first month's salary: *Baldwin v. Western Union Tel. Co.*, 93 Ga. 692, 44 Am. St. Rep. 194, 21 S. E. 212; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Kemp v. Western Union Tel. Co.*, 28 Neb. 661, 26 Am. St. Rep. 363, 44 N. W. 1064.

VII. Loss of Professional Fees.

An attorney can recover damages because of negligent delay in delivery of a telegram employing him in a case: *Western Union Tel. Co. v. McLaurin*, 70 Miss. 26, 13 South. 36. In *Fairly v. Western Union Tel. Co.*, 73 Miss. 6, 18 South. 796, a judgment in favor of a physician for a fee he lost because of negligent delay in delivering a telegram calling him to a sick patient was upheld. From failure to deliver a telegram plaintiff, a physician was prevented from responding to a call to perform an operation, and it was held that he could recover what would have been a reasonable fee for performing the operation, less what he would have earned at home during his absence: *Western Union Tel. Co. v. Longwill*, 5 N. Mex. 308, 21 Pac. 339. In *Mood v. Western Union Tel. Co.*, 40 S. C. 524, 19 S. E. 67, it was held that damages to a physician for loss of a fee, caused by delay in delivery of a telegram was too remote. (This case was decided, however, on the ground that no special damages were alleged in the complaint, and that no general or exemplary damages were recoverable under the pleadings. Hence it cannot be considered as establishing a doctrine different than the other cases cited on this question.)

VIII. Loss of Services.

A father can recover from a telegraph company loss of the services of his minor daughter until she reaches the age of eighteen years, where the company fails to deliver a telegram sent by him to prevent her marriage, the marriage having occurred by reason of the failure to deliver the telegram: *Western Union Tel. Co. v. Procter*, 6 Tex. Civ. App. 300, 25 S. W. 811.

IX. Losses Which could have been Prevented.

a. **In General.**—When a party sustains loss by delay or by error in the transmission and delivery of a telegram which could and would have been prevented had the company discharged its duty with reference to the message, the company is responsible for the loss: *Western Union Tel. Co. v. McCormick* (Miss.), 27 South. 606. Plaintiff telegraphed an attorney in Buffalo saying, "Hold my case till Tuesday or Thursday, please reply." The telegraph company failed to deliver the message, and plaintiff supposing the case could not be continued, went to Buffalo, but found the case had been continued, and consequently had to make another trip. It was held that he could recover the expenses of himself and of his attorney in the first trip, and also the fee he had to pay his attorney for making that trip: *Sprague v. Western Union Tel. Co.*, 6 Daly, 200, 67 N. Y. 590. See, also, *Wolfa-Kehl v. Western Union Tel. Co.*, 46 Hun, 542; *Wallingford v. Western Union Tel. Co.*, 60 S. C. 201, 38 S. E. 443, 629; *Western Union Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429, 21 S. W. 109. Delivery of a message directing a shipment of cattle was negligently delayed, and the agent in charge of them released the herd. The telegraph company was held liable for the cost of regathering them, for those lost in regathering, and the depreciation in value due to the regathering: *Western Union Tel. Co. v. Pruett* (Tex. Civ. App.), 35 S. W. 78; *Bodkin v. Western Union Tel. Co.*, 31 Fed. 134. This was an action to recover for the loss of certain barrel staves destroyed by a flood. Because of delay in delivering a telegram announcing the arrival of a barge upon which the staves were to have been placed for shipment, it was held the plaintiff could recover for the loss of the use of the barge in its ordinary and usual uses, but not for the loss of the staves which might have been saved, because the damage would have been too remote.

b. **Messages to Creditors Regarding Failing Debtors.**—Where a creditor loses his claim through negligent delay of a telegraph company by failure to deliver a message directing the levy of an attachment, the company is liable in special damages: *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589; *Bierhaus v. Western Union Tel. Co.*, 8 Ind. App. 246, 34 N. E. 581. An attorney telegraphed a client asking if he desired an attachment levied on the property of one of his debtors who was failing, and requested a quick answer. Delivery of the message was delayed, and other creditors procured the levy of attachment prior to the attachment levied by the creditor to whom the message was sent. The telegraph company was held not liable because the proof showed that the property attached was reasonably worth the full amount of all claims against the debtor, and would have brought at public sale enough to pay all the attaching creditors, but was sold at private sale by consent of the creditors, to which agreement the telegraph company was not a party, for much less than its value: *Manier v. Western Union Tel. Co.*, 94 Tenn. 442, 29 S. W. 732.

A failing debtor telegraphed one of his creditors, advising him to come at once. By reason of delay in delivery of this message other creditors procured prior attachments on the debtor's property, although the creditor to whom the message was sent could have attached before the others if the dispatch had been properly delivered. In the absence of proof that the creditor would have followed the advice in the message and gone at once, or that the sender of the message would have voluntarily given him security for his claim, it was held that there would be no recovery, the damages being too remote: *Hartstein v. Western Union Tel. Co.*, 89 Wis. 531, 62 N. W. 412. A creditor who was injured by delay in delivery of a telegram ordering the levy of an attachment is not bound to test the validity of prior attachments obtained by other creditors, because of the delay before he can institute an action against the telegraph company for his damages: *Pacific Postal Tel. Cable Co. v. Fleischner*, 66 Fed. 899, 14 C. C. A. 166.

X. Failure to Transmit Money.

The general rule is that failure of a telegraph company to transmit money with reasonable dispatch renders it liable only for the interest on the money from the time it should have been delivered and the cost of the message: *Robinson v. Western Union Tel. Co.* (Ky.), 68 S. W. 656; *Smith v. Western Union Tel. Co.*, 150 Pa. 561, 24 Atl. 1049; *Western Union Tel. Co. v. Burgess* (Tex. Civ. App.), 60 S. W. 1023; *Stansell v. Western Union Tel. Co.*, 107 Fed. 668. But this rule does not apply in actions for damages for mental suffering: *Western Union Tel. Co. v. Wells*, 50 Fla. 474, 111 Am. St. Rep. 129, 39 South. 838, 2 L. R. A., N. S., 1072; *Western Union Tel. Co. v. Tyner*, 74 Ill. 168, 24 Am. Rep. 279.

XI. Mistakes or Errors in Transmission.

As the value of a telegraphic message depends upon its correctness, a telegraph company is liable in damages for error in transmission of a message caused by its negligence. Thus plaintiff was in Philadelphia with his wife and two children without money; the telegraph company failed to pay to him promptly certain money sent to him by his broker by telegraph. The payee's name in the message as offered by the broker for transmission read "G. Wake Wells," but when received at Philadelphia it read "G. Wake Fells." The company's agent at Philadelphia expressed himself as satisfied with plaintiff's identity, and that the mistake had occurred in transmission, but declined to pay plaintiff the money till the error could be corrected. This would entail a delay of several hours. Plaintiff had purchased a railroad ticket and sleeping-car accommodations to Jacksonville, Florida, on a train that would leave before the mistake could be corrected. He explained fully all of these circumstances to the company's agent, advising him of the long journey he would have to take with his wife and children, without food,

or the other incidents for lack of funds while traveling with a wife and children. The company was held liable in substantial damages for the mental suffering caused to the plaintiff because of the error in the message, due to the company's negligence in transmission and consequent failure to pay the money: *Wells v. Western Union Tel. Co.*, 50 Fla. 474, 111 Am. St. Rep. 129, 39 South. 838, 2 L. R. A., N. S., 1072; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *Western Union Tel. Co. v. Shotter*, 71 Ga. 760. A message directed the sale of one hundred shares of stock, but by error in transmission one hundred was changed to one thousand; it was held that the error was prima facie evidence of the company's negligence, and plaintiff could recover the amount he paid by reason of advance in the price of stock to replace the excess of nine hundred shares, sold in obedience to the erroneous order, and the fact that it was sent on a printed blank limiting the company's liability for unrepeatd messages did not relieve the company from liability: *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Postal Telegraph Cable Co. v. Lathrop*, 131 Ill. 575, 19 Am. St. Rep. 55, 23 N. E. 583, 7 L. R. A. 474; *Western Union Tel. Co. v. Meek*, 49 Ind. 53. A message delivered for transmission read, "Will arrive eight tonight." As delivered it read, "Will arrive ten tonight." By reason of the change in the hour, caused by error in transmission, the sender lost employment, and it was held he could recover from the telegraph company for loss of time and the expenses of the trip: *Remp v. Western Union Tel. Co.*, 28 Neb. 661, 26 Am. St. Rep. 363, 44 N. W. 1064; *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 263, 4 Am. Rep. 673; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 16 Am. Rep. 165; *Lowery v. Western Union Tel. Co.*, 60 N. Y. 198, 19 Am. Rep. 154. The supreme court of North Carolina in a recent case (1904) held that the plaintiff was entitled to recover damages against the telegraph company, where he had offered for transmission a message to "Mrs. John V. Lee, 2010 Main Street," but by error in transmission when received it read "Mrs. Knoblee, 2010 Main St.," and the agents of the telegraph company, knowing that no such persons lived at that address, failed to make inquiry there and deliver the message until the next day: *Green v. Western Union Tel. Co.*, 136 N. C. 489, 103 Am. St. Rep. 955, 49 S. E. 165, 67 L. R. A. 985. A telegram as received for transmission read, "Meet me immediately with two horses at B. Bring Shep." As delivered it read, "Meet me immediately with two horses at B. Bring sheep." The sender owned and had on his ranch two thousand five hundred head of sheep, and had just purchased a flock of thirteen hundred more in another county. The message was directed to his servant who had charge of the sheep on his ranch. Shep was the name of a dog, in charge of the servant, trained in the management of sheep. The purpose of the message was to have the servant meet the sender on the way

to the ranch with the dog, and assist in driving the thirteen hundred head of sheep he had bought. On account of the erroneous telegram, the servant drove the two thousand five hundred head of sheep to B. Many of the sheep were lost or perished on the journey. The operator was told by the sender when he offered the message for transmission that his purpose was to have his servant and dog meet him. It was held that the telegraph company was liable for the damages sustained: *Western Union Tel. Co. v. Edsall*, 74 Tex. 329, 15 Am. St. Rep. 835, 12 S. W. 41.

XII. Particular Kinds of Messages.

a. **Messages Relating to Gambling Transactions.**—A telegraph company is liable in nominal damages only, not exceeding the price of transmission for its negligence in the transmission or delivery of messages relating to gambling transactions: *Clay v. Western Union Tel. Co.*, 81 Ga. 285, 12 Am. St. Rep. 316, 6 S. E. 813; *Smith v. Western Union Tel. Co.*, 84 Ky. 664, 2 S. W. 483; *Morris v. Western Union Tel. Co.*, 94 Me. 423, 47 Atl. 926; *Western Union Tel. Co. v. Littlejohn*, 72 Miss. 1025, 18 South. 418; *Western Union Tel. Co. v. Harper*, 15 Tex. Civ. App. 37, 39 S. W. 599; *Cahn v. Western Union Tel. Co.*, 46 Fed. 40, 1 C. C. A. 107, 48 Fed. 810; *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. Rep. 577, 31 L. ed. 479.

b. **Forged or Fraudulent Messages.**—When a telegraph company receives and transmits a forged or fraudulent message, it is liable to the addressee for such damages as he sustains in consequence of the forgery or fraud, provided the company's agents could have by ordinary care, detected and prevented the fraud: *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 140; *Lowery v. Western Union Tel. Co.*, 60 N. Y. 198, 19 Am. Rep. 104, Fed. Cas. No. 13,531; *Strauss v. Western Union Tel. Co.*, 8 Biss. (U. S.) 104. In *Lowery v. Western Union Tel. Co.*, 60 N. Y. 198, 19 Am. Rep. 154, the message sent to plaintiff requested that he send five hundred dollars. By error in transmission the message when received by plaintiff read five thousand dollars. Plaintiff sent the five thousand dollars and the payee absconded with it. It was held that the company was not liable, because its negligence was not the proximate cause of the loss.

c. **Immoral or Indecent Messages.**—If a message discloses by its language that it is intended for an immoral or indecent purpose, a telegraph company may refuse to transmit it: *Western Union Tel. Co. v. Ferguson*, 57 Ind. 495; *Commonwealth v. Western Union Tel. Co.*, 112 Ky. 355, 99 Am. St. Rep. 299, 67 S. W. 59, 57 L. R. A. 614.

d. **Libelous Messages.**—Where a telegraph company accepts and transmits a message which indicates its libelous character by the language of the message itself, the company is responsible for the libel. This, where a message to plaintiff read, "Slippery Sam, your

name is pants," signed "Many Republicans," it was held that the message sufficiently indicated its libelous character, and that the plaintiff could recover damages for the libel from the telegraph company: *Peterson v. Western Union Tel. Co.*, 75 Minn. 368, 74 Am. St. Rep. 502, 77 N. W. 985, 43 L. R. A. 581.

XIII. Mental Anguish in General.

In actions concerning property the established rule that the damages claimed must be the natural and proximate consequences of the act complained of necessarily prevents the recovery of damages for mental suffering in such cases. In actions for damages for mental suffering against telegraph companies, arising from failure to transmit or deliver messages, the above rule has also been adopted by all the courts. But in applying the rule in these cases it is held, by some of the courts at least, that when the telegraph company accepts certain messages for transmission, it is put on notice by the very nature of the message that if it is negligent in its duty to transmit and deliver it promptly, that mental anguish may, and probably will, follow its negligence, and hence that in such cases mental suffering is the natural and proximate consequence of the act complained of, and that the company is therefore liable for damages. Other appellate tribunals, notably those of Georgia, Illinois and Mississippi, and nearly all of the federal courts, hold that in actions *ex contractu* it is impossible that mental suffering could have been in contemplation of the parties at the time a contract was made, and that therefore no such injury could be the natural and proximate result of the breach. It appears, therefore, that though the question whether mental anguish should be regarded as an element of damage in cases against telegraph companies for their negligent acts has been a vexed question before the courts for a quarter of a century, and decisions thereon have been rendered by the courts of perhaps four-fifths of the states and many of the federal courts, there is not that harmony of opinion among them which will justify the statement of any general rule on the subject. A distinction has been drawn, however, in cases of this nature, as between mental suffering, incident to messages which relate to the ordinary disappointments, inconveniences, annoyances and anxieties of business or domestic affairs, and such mental suffering as arises from messages relating to sickness, death or burial. It is held by some of the courts that the mental suffering is an element of damages in both cases; by others that it is an element of damages in the latter only, and by some that it is not an element of damage in either. In order to determine what the law really may be in cases of this character, it has been deemed best to divide the subject in two heads—mental suffering in general, and, secondly, mental suffering as arising from messages incident to sickness, death and burial.

In an action of assumpsit against the telegraph company for breach of contract in failing to deliver a message (not relating to sickness), it was held that the breach of contract being shown, damages for mental suffering could be recovered by way of aggravation: *Western Union Tel. Co. v. Manker*, 145 Ala. 418, 41 South. 850. Shock, injury and outrage to the feelings, and sensibilities and suffering great mental distress and anguish are not grounds for damages against a telegraph company for failure to deliver a message, where no corporal or personal injury has been sustained: *Russell v. Western Union Tel. Co.*, 3 Dak. 315, 19 N. W. 408. In *Western Union Tel. Co. v. Wells*, 50 Fla. 474, 111 Am. St. Rep. 129, 39 South. 838, 2 L. R. A., N. S., 1072, it was held that the willful refusal of a telegraph company to pay money in its hands for one entitled thereto on telegraphic order, with knowledge that such person would have to travel a long distance without food, rendered the company liable in damages for mental pain and anguish: *Western Union Tel. Co. v. Halton*, 71 Ill. App. 63, where it is held that mental suffering cannot be considered an element of damage in an action against a telegraph company for failure to transmit or deliver a message.

A telegram was sent to "Mr. H.," which should have been delivered on the evening it was sent but it was delivered the next morning, at which time it was delivered to "Mrs. H.," whose husband had left home several hours before it was delivered, and the wife, being alarmed at the message on account of their daughter who was in L. in delicate health, at once took a train for L., but on arrival found her daughter as well as usual. In an action against the telegraph company by the husband and wife it was held they could recover damages for the personal inconvenience and annoyance resulting from the error: *Western Union Tel. Co. v. Cleaver*, 13 Ky. Law Rep. 301; *Blackburn v. Kentucky Central R. R. Co.*, 15 Ky. Law Rep. 303. Plaintiff, a physician, and his wife had been separated on account of some family trouble, and the wife was residing in Wyoming while the plaintiff resided in Indianapolis. Plaintiff had been endeavoring to effect a reconciliation and a renewal of marital relations with his wife, and had written to her a letter on the subject, requesting her in case a reconciliation was possible to wire him to that effect and to wire him how many physicians there were in the town where she was, with a view of taking up his residence there and practicing his profession. In response to his letter, the wife offered for transmission a message as follows: "Only one here, yes come." The telegraph company failed to deliver the message and plaintiff concluded that all hope of a reconciliation was at an end, and suffered great mental anguish for over three weeks before learning of his wife's reply to his letter. Recovery for his mental suffering was allowed: *Francis v. Western Union Tel. Co.*, 58 Minn. 252, 49 Am. St. Rep. 507, 59 N. W. 1078, 25 L. R. A. 406.

The doctrine allowing mental suffering as an element of damage in actions against telegraph companies for failure to promptly transmit or deliver messages is also upheld in Missouri: *Newman v. Western Union Tel. Co.*, 54 Mo. App. 434. On account of the negligent failure of a telegraph company to promptly deliver money to the payee of a telegraphic order, plaintiff was compelled to walk a distance of several hundred miles on foot to his home, and the company was held liable in damages for his mental suffering in addition to the price of the telegram, and the cost of his meals and lodgings while en route: *Barnes v. Western Union Tel. Co.*, 27 Nev. 438, 103 Am. St. Rep. 776, 76 Pac. 931.

The courts of North Carolina have been more pronounced, perhaps, in upholding the right of recovery for mental suffering, generally, in actions against telegraph companies for negligence in the transmission or delivery of messages than those of any other state: *Green v. Western Union Tel. Co.*, 136 N. C. 489, 103 Am. St. Rep. 955, 49 S. E. 165, 67 L. R. A. 985. In this action a girl of sixteen years was traveling alone; her father had telegraphed a friend of the family to meet his daughter at a certain city, where she would spend the night. The telegram was not delivered, and the girl was not met, but was placed in charge of a colored matron at the station by the conductor, where she remained for some time, waiting for the friend to arrive. After remaining there several hours she procured a hack and was driven to the home of a friend. The only mental anguish she suffered was consequent upon the failure of the friend to meet her, which she would have done had the telegram been delivered. The question was directly before the court, whether mental anguish arising from the disappointment, inconvenience and vexation incident to missing a friend under such circumstances was properly to be considered as an element of damage. It was contended by the defendant company that if mental suffering was to be regarded as an element of damage at all, there should be no recovery except when the mental anguish arises from a message which was incident to sickness, death or burial, when a failure to deliver a message might cause that poignant grief which could arise in being prevented from attending the last illness or the burial of a husband or wife, or of some near and dear relative. After full consideration of all the arguments presented, and a lengthy review of authorities on the subject, it was said by the court: "We are fully aware of the importance of the question thus presented, and have given it the careful consideration which it deserves. We do not desire to impose any additional burdens upon telegraph companies, or require any unnecessary restrictions; but we cannot ignore the essential purposes of their creation. A telegraph company is a quasi public corporation, private in the ownership of its stock, but public in the nature of its duties. It has all the powers of a private corporation, such as a

separate legal existence perpetual succession, and freedom from individual liability; and possesses also, in addition thereto, the extraordinary privileges which under our constitution can be exercised only by such corporations as are organized for a public purpose, and then only when necessary for the proper fulfillment of such purpose. . . . The acceptance of such privileges at once fixes upon the corporation the indelible impress of a public use. A telegraphic company is essentially public in its duties. Without such public duties there would be neither reason for its creation nor excuse for its continued existence . . . Hence it follows, both upon reason and authority, that the failure of a telegraph company to promptly and correctly transmit and deliver a message received by it is a breach of a public duty imposed by operation of law. In the words of a great English judge, 'A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it.' . . . It is, admitted that the message was received by the defendant and not delivered until the following day. This of itself raises the presumption of negligence. It is true no case has been called to our attention in which this court has allowed damages for mental anguish arising from the failure to deliver a telegram except in cases relating to sickness or death. . . . There is a vast difference between sickness and death, and there seems no reason why principles recognized in the former should not apply to kindred cases of equal strength and importance. While we find no direct decision of the question in any of our cases, we think that their line of reasoning tends to recognize the legal existence of mental suffering apart from sickness and death.' In a kindred case to the above, *Green v. Western Union Tel. Co.*, 136 N. C. 506, 49 S. E. 171, which was an action brought by the father of the plaintiff in the last above case to recover damages against the telegraph company for the mental suffering alleged to have been sustained by reason of the nondelivery of his message referred to in the preceding case (136 N. C. 489), it was held that he could recover.

The same doctrine is also upheld in Texas, where it was decided that a father could recover damages against the telegraph company for his mental suffering arising from the failure to deliver a message sent by him to his brother, asking if plaintiff's son was at his house, the father believing that his son had been lost: *Western Union Tel. Co. v. Womack*, 9 Tex. Civ. App. 607, 29 S. W. 932. In a later Texas case, *Western Union Tel. Co. v. Burgess* (Tex. Civ. App.), 56 S. W. 237, the doctrine is again sustained. Here a lady while traveling alone to Beaumont, Texas, lost all of her money in New Orleans while en route, and had no ticket from that point to her place of destination. She telegraphed to a relative informing him of the loss of her money and requesting that he wire the railroad agent at New Orleans to furnish her a ticket to Beaumont. Her relative did as

requested, but by reason of failure to deliver his message, the lady was compelled to remain several days in New Orleans under circumstances of great humiliation and distress of mind, incident to her being penniless in a large city and among total strangers. It was held that the mental anguish she suffered was a proper element of damage.

The federal courts have denied the right of recovery for mental suffering, and actions of this character, except when the negligence of the telegraph company is so gross as to indicate a wanton or malicious purpose in failing to transmit or deliver the message, and unless the mental suffering is an element of physical pain, or the natural and physical result of the physical injury: *Crawson v. Western Union Tel. Co.*, 47 Fed. 544; *Stafford v. Western Union Tel. Co.*, 73 Fed. 273; *Stansell v. Western Union Tel. Co.*, 107 Fed. 668.

XIV. Mental Anguish Incident to Messages Relating to Sickness, Death and Burial.

a. *In General.*—It has been seen that comparatively few of the courts have held that damages for mental suffering alone, unaccompanied by any physical injury, can be recovered where the mental suffering arises from negligence of a telegraph company in the failure to transmit or deliver a message which does not relate to sickness, death or burial. There are many decisions, however, which while denying the right to recover such damages in general, uphold the right of recovery when the mental suffering arises from messages incident to sickness, death or burial, and of course those states where such damages are allowed in general by the courts also sustain mental anguish as an element of damage in cases of sickness, death and burial. There are three or four of the state courts, as will be seen below, that hold that mental anguish can never be considered as an element of damage in any case, where the cause of action is founded on breach of a contract, arguing as they do that no such damage could possibly have been in contemplation of the parties when the contract was made. The federal courts also lean to this view. But though the decisions are not at all uniform, it is safe to say that abundant authority exists to justify the statement that mental suffering can be considered as an element of damage in actions against telegraph companies for negligent delay in the transmission or delivery of messages which relate to sickness, death or burial, and when the damage comes within the rules hereafter to be noticed regarding remoteness, knowledge, relationship, etc.

In all of the cases hereafter cited the messages mentioned related to sickness, death or burial. In *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 7 South. 419, the doctrine is laid down that if the face of the message indicates the necessity for prompt delivery, damages for mental suffering can be recovered. In *Western Union Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579,

a son sent a telegram inquiring as to the condition of his mother, who was ill, requesting a reply at once. By reason of failure to deliver the reply promptly, he was prevented from attending his mother's funeral, and his mental suffering was held to be a proper element of damages. Where failure of prompt delivery of a message from a boy's father to a boy's grandmother prevented the latter from reaching the child's bedside before his death, it was held damages for her mental suffering could be recovered: *Western Union Tel. Co. v. Crocker*, 135 Ala. 492, 33 South. 45, 59 L. R. A. 398. In *Western Union Tel. Co. v. Wilson*, 93 Ala. 32, 30 Am. St. Rep. 23, 9 South. 414, however the right to recover for mental suffering was limited, the court holding that such damages could not be recovered unless there was some other ground for damages, though the same need only be nominal. But in a still more recent case (1903) the supreme court of Alabama held that where a son was prevented from viewing his mother's body before interment, by reason of delay in delivery of a telegram, special damages for his mental suffering could be recovered: *Western Union Tel. Co. v. Crumpton*, 138 Ala. 632, 36 South. 517. It seems, however, that the right to recover such damages in this state may be lost if the complaint is founded in tort rather than in assumpsit, for in a case decided in 1904 (*Western Union Tel. Co. v. Waters*, 139 Ala. 652, 36 South. 773), it was held that such damages could not be recovered, the complaint being predicated not upon breach of contract, but upon the breach of the telegraph company's common-law duty as a public carrier. And it was further held in the case of *Western Union Tel. Co. v. Merrill*, 144 Ala. 618, 113 Am. St. Rep. 66, 39 South. 121, that it was error for the court to affirm plaintiff's right of recovery in such cases as a matter of law, and that the question must be left to the jury to determine whether the negligence of the company was the proximate cause of plaintiff's mental suffering.

In Dakota no such damages can be recovered except in actions for breach of promise of marriage, it being held in this territory that such damages can only enter into and become a part of the recovery in actions for tort where the plaintiff has sustained some corporal or personal injury: *Russell v. Western Tel. Co.*, 3 Dak. 315, 19 N. W. 408.

In *International Ocean Tel. Co. v. Sanders*, 32 Fla. 434, 14 South. 148, 21 L. R. A. 810, it was held that damages for mental suffering alone cannot be recovered.

Chapman v. Western Union Tel. Co., 88 Ga. 763, 30 Am. St. Rep. 183, 15 S. E. 901, 17 L. R. A. 430, is a leading case which has been often quoted as denying the doctrine which allows mental anguish to be considered as an element of damages in actions against telegraph companies for negligence in the performance of their duties. In this case, the question is discussed at length and review made of the different leading cases on the subject, and it was said by the court: "But it is urged that the public occupation of telegraph companies creates be-

tween them and the public a special relation in which their responsibility is greater than that of other persons. So much of their business and profit is derived from the acceptance of messages involving feelings only, that at first view it would seem legitimate and salutary to require them to answer in damages for any dereliction of duty in this important part of their activity. The argument is, that in the exercise of a public employment, they undertake for hire to serve the feelings of their customers, and therefore ought to pay for negligent nonperformance or misperformance of this peculiar function. This reason is unanswerable, in so far as it proves a right of action to arise out of the breach of duty. But how about damages and the measure of damages? It can scarcely be that a new and exceptional principle of damages emerges *ex proprio vigore* from unknown recesses of the law, when occasion seems to require it, or that the court can do more than adapt and apply principles already existing when novel transactions, such as those which make up the business of telegraphy, become the subject of adjudication. Precedents must be followed, else the law will become a wandering, uncertain thing. If our understanding of the law hitherto expounded by its accredited oracles be correct, it would be a judicial innovation to require feelings which had, even under contract or public duty, the right to expect help to be solaced with damages for the disappointment, however severe, at losing the promised benefit." See, also, *Giddens v. Western Union Tel. Co.*, 111 Ga. 824, 35 S. E. 638. The right to recover for mental suffering was also denied in *Western Union Tel. Co. v. Haltom*, 71 Ill. App. 63.

Until recently the right to recover for mental suffering, as an element of damage in actions against telegraph companies for their negligent duty, was strongly upheld by the Indiana courts: *Reese v. Western Union Tel. Co.*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583; *Western Union Tel. Co. v. Stratemeier*, 6 Ind. App. 125, 32 N. E. 871; *Western Union Tel. Co. v. Newhouse*, 6 Ind. App. 422, 33 N. E. 800; *Western Union Tel. Co. v. Cline*, 8 Ind. App. 364, 35 N. E. 564. But in a later case, *Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846, it is held, after an elaborate review in the decisions of other states (but ignoring the previous decisions of its own court), that damages in such cases are not recoverable, and the *Ferguson* case has since been cited and approved in *Western Union Tel. Co. v. Adams*, 28 Ind. App. 420, 63 N. E. 125. So that Indiana can now be classed among the states which repudiate the doctrine that mental suffering can be considered as an element of damages in actions against telegraph companies.

In *Mentzer v. Western Union Tel. Co.*, 93 Iowa, 752, 57 Am. St. Rep. 294, 62 N. W. 1, 28 L. R. A. 72, it was held that damages for mental suffering caused by delay in delivery of a message announcing death and thereby preventing the plaintiff from attending his mother's funeral were recoverable, independent of any physical injury. So, also, in *Cowan v. Western Union Tel. Co.*, 122 Iowa, 379, 101 Am. St. Rep.

268, 98 N. W. 281, 64 L. R. A. 545, it was held that damages for mental suffering for delay in delivery of a telegram announcing death could be recovered, the court saying: "The thought urged upon our attention, that claims of this nature should be disallowed because of the impossibility of providing any exact standard or measure of compensation of injured feelings, and that recognition of such right of recovery will be followed by an enormous increase of litigation, does not impress us as a persuasive consideration. It is no more difficult to fix a compensation for mental anguish in cases like the one at bar than in cases of mental suffering arising from physical injury, and very few persons, we think, will be found ready to say the latter, when wrongfully occasioned, should not afford a ground of recovery."

In *West v. Western Union Tel. Co.*, 39 Kan. 93, 7 Am. St. Rep. 530, 17 Pac. 807, mental suffering alone was denied as an element of damage, and this decision has been reaffirmed in a recent case in that state: *Kansas City etc. R. Co. v. Dalton*, 65 Kan. 661, 70 Pac. 645.

In *Chapman v. Western Union Tel. Co.*, a leading Kentucky case (90 Ky. 265, 13 S. W. 880), the rule that mental anguish is a proper element of damage in cases now under discussion is upheld. In this case, the telegraph company was held liable in damages for mental suffering arising from delay in the delivery of a message announcing the death of plaintiff's father. The court said: "Many of the text-writers say that a person cannot recover damages for mental anguish alone, and that he can recover such damages only where he is entitled to recover some damages upon some other ground. It will generally be found, however, that they are speaking of cases of personal injury. If a telegraph company undertakes to send a message, and it fails to use ordinary diligence in doing so, it is certainly liable for some damage. It has violated its contract; and, whenever a party does so, he is liable at least to some extent. Every infraction of a legal right causes injury, in contemplation of law. The party being entitled, in such a case, to recover something, why should not an injury to the feelings, which is often more injurious than a physical one, enter into the estimate? Why, being entitled to some damage by reason of the other party's wrongful act, should not the complaining party recover all the damage arising from it? It seems to us that no sound reason can be given to the contrary. The business of telegraphing, while yet in its infancy, is already of wonderful extent and importance to the public. It is growing, and the end cannot yet be seen. A telegraph company is a quasi public agent, and as such it should exercise the extraordinary privileges accorded to it with diligence to the public. If, in matters of mere trade, it negligently fails to do its duty, it is responsible for all the natural and proximate damage. Is it to be said or held that, as to matters of far greater interest to a person, it shall not be, because feelings or affections only are involved? If it negligently fails to deliver a message which closes a trade for one hundred dollars, or even less, it is responsible for the damage. It is said, how-

ever, that if it is guilty of like fault, as to a message to the husband that the wife is dying, or the father that his son is dead, and will be buried at a certain time, there is no responsibility save that which is nominal. Such rule, at first blush, merits disapproval. It would sanction the company in wrongdoing. It would hold it responsible in matters of the least importance, and suffer it to violate its contracts with impunity as to the greater. It seems to us that both reason and public policy require that it should answer for all injury resulting from its negligence, whether it be to the feelings or the purse, subject only to the rule that it must be the direct and proximate consequence of the act. The injury to the feelings should be regarded as a part of the actual damage, and the jury be allowed to consider it. If it be said that it does not admit of accurate pecuniary measurement, equally so it may be said of any case where mental anguish enters into the estimate of injury for a wrong, and it furnishes no sufficient reason why an injured party should not be allowed to look to the wrongdoer for reparation. If injury to the feelings be an element of actual damage in slander, libel and breach of promise cases, it seems to us it should equally be considered in cases of this character. If not, then most grievous wrongs may often be inflicted with impunity. Legal insult added to outrage by the party, by offering one cent, or the cost of the telegram, as compensation to the injured party. Whether the injury be to the feelings or pecuniary, the act of a violator of a right secured by contract has caused it. The source is the same, and the violator should answer for all approximate damages." In a more recent case in this state, in an action against a telegraph company for failure to deliver a message whereby a son was prevented from attending his mother's funeral, the company was held liable in damages for mental suffering alone, independent of any other damage, upon the theory, as was said by the court: "It must be supposed that a failure to deliver such a message will cause mental suffering; and this suffering is, therefore, a consequence or result within the contemplation of the parties": *Western Union Tel. Co. v. Cleave*, 107 Ky. 464, 92 Am. St. Rep. 366, 54 S. W. 827. So, also, in a still later case (1905) it was held that a daughter could recover damages for her mental suffering in not being permitted to see her father's remains before burial, through the negligent delay of a telegraph company in not delivering a message announcing his death: *Thomas v. Western Union Tel. Co.*, 120 Ky. 194, 27 Ky. Law Rep. 569, 85 S. W. 760.

In Louisiana mental suffering alone is recoverable in actions against telegraph companies for failure to transmit or deliver messages without unreasonable delay. "Mental pain and suffering, as to their existence, are certainly as actual, clear and positive as are intellectual enjoyment and gratification, and the former are as susceptible of being ascertained and gauged as are the latter. If a contracting party, by reason of a breach of contract, can be made legally responsible for damages on his part for the mortification or the loss of anticipated

pleasure and enjoyment which his default has occasioned, the other contracting party, or if a man who has used harsh and insulting language to another, short of defamation, can be held legally to respond in money for the humiliation which he has caused the latter to suffer, no good reason can be assigned why mental pain and suffering could not, and should not, furnish equally the basis for a judgment for damages. The existence of physical pain as the result of a bodily wound is a fact which everyone knows and recognizes; but the extent of the pain, no one but the sufferer himself can appreciate. The existence of mental suffering by a parent for the loss of a child is a fact so universal and general that it also may be fairly assumed and recognized as existing in any given case, in the absence of facts and circumstances tending to disprove the same. The extent of the distress and sorrow may not be susceptible of direct or exact measurement, but enough certainty and knowledge of the situation can be established through the introduction of testimony to furnish the basis for a verdict or a judgment": *Graham v. Western Union Tel. Co.*, 109 La. 1069, 34 South. 91.

In Mississippi it was held that no damages for mental suffering could be recovered for delay in the delivery of a telegram announcing the death of plaintiff's brother. This is one of the leading cases which establishes this doctrine. "It is immaterial," said the court, "in the determination of the question involved, whether the action be considered as one for the breach of the contract to transmit and deliver the message, or as an action on the case for the tort in failure to perform the duty devolved on the telegraph company under the contract. The substance and nature of the default and the consequent injury are the same in either view, and the absence of circumstances warranting the imposition of punitive damages, the measure of damages must be the same whatever be the form of the action. We have given to the investigation of the question that consideration which its importance demands, and though the right of the plaintiff to recover the damages awarded in this case finds support in the decisions of several of the states, we are unwilling to depart from the long established and almost universal rule of law that no action lies for the recovery of damages for mere mental suffering disconnected from physical injury, and not the result of the willful wrong of the defendant. . . . We are not disposed to depart from what we consider the old and settled principles at law, nor to follow the few courts in which the new rule has been announced. . . . We prefer the safety afforded by the conservatism of the old law as we understand it to be, and are of opinion that no recovery for mental suffering can be had under the circumstances of this case": *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, 24 Am. St. Rep. 300, 9 South. 823, 13 L. R. A. 859.

In *Connell v. Western Union Tel. Co.*, 116 Mo. 34, 38 Am. St. Rep. 575, 22 S. W. 345, 20 L. R. A. 172, it was held that mental

suffering alone is not a proper element of damages in actions against telegraph companies for neglect of duty in the transmission and delivery of telegrams, and to the same effect is the holding in *Western Union Tel. Co. v. Church* (Neb.), 90 N. W. 878, 57 L. R. A. 905.

In North Carolina the right to recover damages for mental suffering arising from the nontransmission or nondelivery of telegraphic messages has been upheld most strongly in many instances. As heretofore seen, the telegraph company's liability is not limited in this state to messages relating to sickness, death or burial, but mental suffering is regarded as an element of damage in all cases where a contract has been breached. In *Young v. Western Union Tel. Co.*, 107 N. C. 370, 22 Am. St. Rep. 883, 11 S. E. 1044, 9 L. R. A. 669, it is held that negligent delay in delivery of a message, "Come in haste, your wife is at the point of death," by which the addressee was prevented from being present at his wife's death or attending her funeral subjected the company to liability for actual damages, including mental suffering and anguish, and this rule has been followed later in *Laudie v. Western Union Tel. Co.*, 126 N. C. 431, 78 Am. St. Rep. 668, 35 S. E. 810; *Bennett v. Western Union Tel. Co.*, 128 N. C. 103, 38 S. E. 294; *Bright v. Western Union Tel. Co.*, 132 N. C. 317, 43 S. E. 841; *Meadows v. Western Union Tel. Co.*, 132 N. C. 40, 43 S. E. 512; *Bryan v. Western Union Tel. Co.*, 133 N. C. 603, 45 S. E. 938; *Dayvis v. Western Union Tel. Co.*, 129 N. C. 79, 51 S. E. 898.

In South Carolina the doctrine allowing mental suffering as an element of damage has been upheld: *Marsh v. Western Union Tel. Co.*, 65 S. C. 430, 43 S. E. 953, where it was held that a son could recover damages for his mental suffering arising from the failure of a telegraph company to promptly deliver a message whereby he was prevented from attending his father's funeral. In *Willis v. Western Union Tel. Co.*, 69 S. C. 531, 104 Am. St. Rep. 828, 48 S. E. 538, it was held that anxiety on account of delay in delivery of a message inquiring as to the condition of one's family could cause mental suffering for which damages could be recoverable, including damages for anxiety and for the negligence which prolonged such anxiety, and for all other kinds of mental suffering. It was held in this case, however, that the actual damages should be confined to such time as elapsed between the time when the message should have been received and the time when the information it imparted was received by the sendee. In a very recent case in this state (1906) it was held that where a party was prevented by nondelivery of a telegram from attending her sister during her last illness and being present at her death and funeral, the telegraph company was liable for such mental anguish as would be suffered by a normal person under such circumstances: *Roberts v. Western Union Tel. Co.*, 73 S. C. 520, 114 Am. St. Rep. 100, 58 S. E. 985.

In Tennessee the doctrine sustaining the right of recovery for mental suffering in actions against telegraph companies was first

announced in *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864, 8 S. W. 574, where damages were allowed a sister, who was prevented by negligent delay in delivery of two messages from attending her dying brother and making preparations for his interment. After citing the general rule laid down by Mr. Cooley, that the "ground of recovery must be something besides an injury to the feelings and affections, . . . that there must be some loss that is capable of being measured by a pecuniary standard," and also the doctrine of *Gray's Communications by Telegraph*, that "neither in an action of tort nor in one of contract could a party recover damages for mental anguish alone, but can recover them only when he is entitled to recover some damage on other grounds," and of *Sutherland on Damages*, "that damages for the breach of a contract, as far as it disappoints in respect to the purpose intended, may give a right to damages appropriate to the objects of the contract," Caldwell, Judge, for the court said: "These are but illustrations and applications of the general rule, which we have already stated, for the estimation of damages in actions for breach of contract. They serve the purpose of showing that in the ordinary contract only pecuniary benefits are contemplated by the contracting parties, and that therefore the damages resulting from the breach of such a contract must be measured by pecuniary standards; and that where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied in the ascertainment of the damages flowing from the breach. The case before us is subject to the same general rule, and the defendant is answerable in damages for the breach according to the nature of the contract, and the character and extent of the injury suffered by reason of its nonperformance. The messages were sent for a particular purpose, which was disclosed upon their faces and of which defendant had full notice. That purpose was not of a pecuniary nature. There was no offer or instruction to buy or sell anything—no proposition or promise with respect to any business transaction. The messages were of far greater importance to the receiver than any of these." This case has been reaffirmed in *Western Union Tel. Co. v. Mellon*, 96 Tenn. 66, 33 S. W. 725. And in *Gray v. Western Union Tel. Co.*, 108 Tenn. 39, 91 Am. St. Rep. 706, 64 S. W. 1063, 56 L. E. A. 301.

That damages for mental suffering alone, unaccompanied by physical injury, can be recovered in actions against telegraph companies has been often upheld by the courts of Texas. The question was first decided in *So Belle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805, where it was held that damages could be recovered by a son for the mental suffering he endured by reason of negligent delay in the delivery of a telegram announcing the death of his mother, where he was prevented from attending her funeral. This being one of the earliest cases decided on this subject, it attracted wide attention, and has been referred to in almost every subsequent decision in all of the states, and became known as the "Texas Doctrine"

by those courts which entertained a contrary view. There have been decisions in Texas since the *So Belle* case which seem to modify to some extent the broad doctrine there announced. Thus in the case of *Gulf etc. Ry. Co. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278, where an action was brought by a father against the telegraph company for failure to deliver a message from his son, announcing the death of the latter's wife and child, it was held there could be no recovery for mental suffering because the telegram sent by the son to his father was for the benefit of the son alone, and that no contractual relation existed between the father and the telegraph company, and therefore there could be no recovery.

The kindred case to the above, namely, *Gulf etc. Ry. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269, was a suit by the son against the railway company, which also operated a telegraph company, to recover damages for his mental suffering arising from the failure of the defendant company to deliver to his father the message alluded to in the previous case (59 Tex. 563, 46 Am. Rep. 278). At the time the message was sent the plaintiff's wife and child had died in a strange city, and the plaintiff, being without funds, was unable to transport their bodies to his home for burial, and had advised his father of their death, in order that the latter might furnish him money with which to bring their bodies home for burial. The telegram not being delivered promptly, and he being unable to have them embalmed, was compelled to bury them among strangers, and to dispose of all of his property to raise the necessary money for this purpose. The telegraph company was held liable in damages for the mental suffering he sustained. It did not appear in the trial that the telegraph company was notified of the necessity of prompt delivery of the message. The court, however, said: "In cases of this character, there is frequently great difficulty in determining whether they are to be limited to such measure of damages as are usually allowed in cases for breach of contract, or whether, in addition to such measure, circumstances of aggravation may be shown, and the larger measure of damages recognized as proper in cases of tort applied; or whether such cases, though to some extent based upon contract, may not be considered as essentially founded on tort. Actions such as this are not based solely upon breach of contract, and hence to be considered in the determination of the measure of damages by the rules applicable to a breach of contract to sell and deliver property, or to do certain acts in reference to property, but the rules applicable to such contracts, in so far as applicable, may be looked to; as where a contract has been made under special circumstances, which are known to the contracting parties, and from which, in the nature of things, special damage will result if the contract is not performed. There the parties are to be presumed to have contracted with reference to such circumstances and the damages which will naturally flow from nonperformance of such contract; and in such case, where the element of wrong,

oppression or willful neglect enters into the breach of the contract, any damage, either actual or exemplary, which the law authorizes to be recovered, ought to be held to have been contemplated by the parties, and therefore recoverable. 'In cases of delay, or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages, on account of the want of street commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings which cannot easily be estimated in money, but for which a jury should be at liberty to award fair damages.' " The distinction made by the court in the two Levy cases above mentioned as between the sender and the sendee of a message has not been followed in the subsequent Texas cases, nor has any such distinction been made by any of the other courts which have adjudicated on this subject. All of the later Texas decisions have followed the rule laid down in the So Belle case without any qualifications: *Stewart v. Western Union Tel. Co.*, 66 Tex. 580, 59 Am. Rep. 623, 18 S. W. 351; *McAllen v. Western Union Tel. Co.*, 70 Tex. 243, 7 S. W. 715; *Loper v. Western Union Tel. Co.*, 70 Tex. 689, 8 S. W. 600; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 10 Am. St. Rep. 772, 9 S. W. 598, 1 L. R. A. 728; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843, 10 S. W. 734; *Western Union Tel. Co. v. Simpson*, 73 Tex. 422, 11 S. W. 385; *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 16 Am. St. Rep. 920, 12 S. W. 857, 6 L. R. A. 844; *Western Union Tel. Co. v. Feegles*, 75 Tex. 537, 12 S. W. 860; *Western Union Tel. Co. v. Moore*, 76 Tex. 67, 18 Am. St. Rep. 25, 12 S. W. 749.

The supreme court of Virginia has adopted the common-law rule that damages for mental suffering are not recoverable, save as incidental to a physical injury, and hold that damages for mental suffering caused by delay in delivery of a telegram, independently of any injuries to the person or estate, are not recoverable: *Connelly v. Western Union Tel. Co.*, 100 Va. 51, 93 Am. St. Rep. 919, 40 S. E. 618, 56 L. R. A. 663.

The rule adopted in Virginia has also been followed by the courts of West Virginia and in *Davis v. Western Union Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026, it was held that a plaintiff, who was prevented by delay in delivery of a telegram from attending his mother's funeral, could not recover damages from the telegraph company for his mental suffering.

The national courts have almost without exception adhered to the common-law rule that mental suffering alone, independent of any physical injury, cannot be regarded as an element of damage. Thus, it is said in *Chase v. Western Union Tel. Co.*, 44 Fed. 554, 10 L. R. A. 464: "The receiver of a telegraphic message, the delivery of which had been negligently delayed, cannot recover for mental suffering

alone, unaccompanied with other injury"; and to the same effect is the case of *Tyler v. Western Union Tel. Co.*, 54 Fed. 634. In *Kester v. Western Union Tel. Co.*, 55 Fed. 603, it was held that no damage could be awarded to a father for mental suffering arising from the fact that he was prevented by the negligent delay in the delivery of a message from attending the funeral of his son: See, also, *Western Union Tel. Co. v. Wood*, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706; *Gahan v. Western Union Tel. Co.*, 59 Fed. 433, and *Western Union Tel. Co. v. Sklar*, 126 Fed. 295, 67 C. C. A. 281.

b. **Relationship of the Parties.**—Damages for mental suffering cannot be recovered against a telegraph company for negligent delay in transmission or delivery of a message-announcing sickness, death or burial unless there exists such close degree of relationship between the plaintiff and the person regarding whom the message is sent, from which natural love and affection are presumed: *Western Union Tel. Co. v. Ayres*, 131 Ala. 391, 90 Am. St. Rep. 92, 31 South. 78. In this case it was held that plaintiff could not recover damages for his mental suffering in being prevented from being present at the death and burial of his brother in law's child, by reason of delay in delivery of the telegram. In *Denham v. Western Union Tel. Co. (Ky.)*, 87 S. W. 788, it was held that an aunt could not recover damages for mental suffering resulting in delay in delivery of a telegram announcing the death of her nephew, the court holding that such damages could only be allowed to those of the first degree of relationship. In North Carolina, however, it was held that a father in law could recover damages for mental suffering because he was prevented from attending his daughter in law's funeral, by reason of delay in delivery of a telegram: *Bennett v. Western Union Tel. Co.*, 128 N. C. 103, 38 S. E. 294. And in *Bright v. Western Union Tel. Co.*, 132 N. C. 817, 43 S. E. 841, a wife was allowed damages for her mental suffering caused by failure to deliver to her husband's uncle a telegram from her to him, announcing her husband's death, but it appeared in this case that the uncle had stood in loco parentis to both the husband and wife. "The law does not regard so much the technical relation between the parties, or their legal status in respect to each other, as it does the actual relation that exists and the state of feeling between them. It does not raise any presumption of mental anguish when there is no relation by blood, but, if mental suffering does actually result from the failure to deliver a message where there is only affinity between the parties, it may be shown and damages recovered." In *Hunter v. Western Union Tel. Co.*, 135 N. C. 458, 47 S. E. 745, damages recovered by a second cousin for mental anguish resulting from failure of a telegraph company to deliver a message informing him of the death of his cousin was upheld. In *Western Union Tel. Co. v. Robinson*, 97 Tenn. 638, 37 S. W. 545, 34 L. R. A. 431, it was held that a father could recover damages for mental suffering resulting from failure to deliver a telegram to a minister, whereby the minister was prevented from arriving

at the bedside of plaintiff's daughter and baptizing her before she died. In Texas it was held that damages for mental suffering arising from failure of a telegraph company to deliver a message whereby the plaintiff was prevented from attending the funeral of his sister's husband were not recoverable: *Western Union Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896; *Western Union Tel. Co. v. Luck*, 91 Tex. 178, 66 Am. St. Rep. 869, 41 S. W. 469. In *Western Union Tel. Co. v. Wilson (Tex.)*, 75 S. W. 482, it was held that the mental anguish of an uncle arising from the nondelivery of a message, whereby he was prevented from being present at the death of his niece and consoling his sister, was not an element of damages. And in *Western Union Tel. Co. v. Arnold*, 96 Tex. 493, 73 S. W. 1043, it was held that a wife could not recover damage for her mental suffering resulting from the nondelivery of a telegram to a minister who had been a lifelong friend of the family, whereby he was prevented from attending and conducting the funeral of her husband. The case of *Western Union Tel. Co. v. Robinson*, 97 Tenn. 638, 37 S. W. 545, 94 L. R. A. 431, was cited and disapproved.

c. **Notice of Knowledge as Affecting Right.**—The same general rule as to the necessity for notice or knowledge of the circumstances in order to render a telegraph company liable in damages for mental suffering for failure to deliver messages applies equally to cases where the messages relate to sickness, death or burial. It has been thought best to give a few instances of messages relating to the latter in which rulings have been made. A husband, whose wife was sick, sent a telegram to the family physician, "Operate tomorrow—tell Scott not home till Thursday," it was held that the message was not sufficient on its face to indicate that the presence of the physician was desired or that the operation would be postponed if he was not present, and that mental suffering would likely ensue: *Western Union Tel. Co. v. Raimes*, 78 Ark. 545, 94 S. W. 700. Mr. H. was engaged to be married to Miss G. on the seventh day of August. A week or two previously he had been taken ill with fever. On August 6th he wrote Miss G. that he would be in her town to consummate the marriage on the 7th if he was able to come, and would wire her in either case, and to look for a telegram. On the 7th he telegraphed Miss G. that he would arrive that day on the evening train, but the message was never delivered. He arrived on the evening of the 7th and they were married. Afterward they brought an action against the telegraph company for the price of the telegram and for damages for the mental suffering on the part of the wife incident to the failure to deliver the telegram. It was held that no damages for mental suffering could be recovered, because the company had no notice of the special circumstances out of which damages for mental suffering could have reasonably be said to have arisen: *Western Union Tel. Co. v. Hogue*, 79 Ark. 33, 94 S. W. 924. A telegram to a physician to "come

at once to ——” was held to charge the telegraph company with knowledge of its urgency, and render it liable in damages for the mental suffering of a woman about to be confined arising from delay in delivery of a message, the telegraph company having knowledge that the addressee was a physician, but having no knowledge of the necessity of his presence: *Western Union Tel. Co. v. Church* (Neb.), 90 N. W. 878, 57 L. R. A. 905. A telegram which read, “Mr. Bright is dead; will bury at Liberty Sunday evening,” signed “Lillian Bright,” was held sufficient to authorize Lillian Bright, who was the wife of deceased, to recover damages from the telegraph company for mental suffering for failure to deliver the message, though her relationship to the deceased was not disclosed: *Bright v. Western Union Tel. Co.*, 132 N. C. 317, 43 S. E. 841. A telegram read, “How is mother today? Let me know at once and I will come at once.” Owing to failure to deliver promptly the reply to this message, it was held the sender could recover the expenses of the journey he made to his mother’s bedside: *Hall v. Western Union Tel. Co.*, 139 N. C. 369, 52 S. E. 50. A wife telegraphed to her husband, “Sick with grippe, not dangerous, want you to come.” Held not to import urgency on its face and no damages for mental suffering for delay in delivery could be recovered: *Gerock v. Western Union Tel. Co.*, 142 N. C. 22, 54 S. E. 782. A telegram reading, “Wire me at Columbia stating mother’s condition,” held sufficient to indicate sickness and to charge the company with liability for mental suffering caused by failure to deliver: *Willis v. Western Union Tel. Co.*, 69 S. C. 531, 104 Am. St. Rep. 828, 48 S. E. 538. A message from a sister to her brother informing him of the condition of another brother read as follows: “Billy is very low; come at once.” Held sufficient to charge the company with notice of relationship: *Western Union Tel. Co. v. Moore*, 76 Tex. 66, 18 Am. St. Rep. 25, 12 S. W. 949. A telegram read, “To W. S. Carter, Taylor, Texas. N. P. Gorsuch is dead; answer.” Signed “F. S. Faust.” The wife of W. S. Carter was the daughter of N. P. Gorsuch. It was held the language of the message was sufficient to charge the telegraph company with notice of the relationship of the parties: *Western Union Tel. Co. v. Carter* (Tex. Civ. App.), 20 S. W. 834. A telegram to H. A. Linn read, “Grace is very low; can you come and bring Maud?” The addressee was a brother in law of Grace. It was held that the language of the message was sufficient to notify the telegraph company that the addressee had a serious interest in the condition of Grace, and that if there was any desire to know more particularly regarding the relationship, it was its duty to make inquiry, and not the duty of the sender to communicate it in the first place: *Western Union Tel. Co. v. Linn*, 87 Tex. 7, 47 Am. St. Rep. 58, 26 S. W. 490. A telegram read, “To Dr. J. C. Jones, Gonzales, Texas. Come at once, if able, to see Dr. Kerr.” Signed “J. M. Henderson.” The sender of the message was acting as the agent of the wife of Dr. Kerr. In an action

by Mrs. Kerr against the telegraph company for damages for her mental suffering, arising from delay in delivery of the message, it was held that no recovery could be had, because the company was not charged with notice that the sender of the message was acting as agent for Mrs. Kerr, and the message itself did not disclose that it was sent for her benefit: *Western Union Tel. Co. v. Kerr*, 4 Tex. Civ. App. 280, 23 S. W. 564. The father in law of Z. sent him a message notifying him of his brother Jerry's illness—"Jerry in hospital, at Sedora, dangerously sick with pneumonia." In an action by Z. to recover damages for mental suffering arising from delay in delivery of the telegram it was held that the language of the message was sufficient to indicate necessity for prompt delivery, and damages were recoverable: *Western Union Tel. Co. v. Zane*, 6 Tex. Civ. App. 585, 25 S. W. 722. Plaintiff's brother telegraphed him, "Father died last night; have you any wishes in regard to his funeral? Answer quick." The message was delayed in delivery and plaintiff brought action for damages for his mental suffering in being thereby prevented from attending his father's funeral. The defendant company claimed that the language of the message gave no knowledge to the company other than to indicate that the sender of the telegram sought only to know from plaintiff if he had any wishes regarding the funeral, and that the damages claimed were not such as were incidental to, or might have been reasonably supposed to have entered into the contemplation of the parties. It was held that the language of the message was sufficient to notify the defendant company that the plaintiff would probably desire to attend his father's funeral: *Western Union Tel. Co. v. Smith* (Tex. Civ. App.), 33 S. W. 742. A telegram read, "Your mother is dying, come at once," signed "Callie." Held that the message on its face gave no notice that the sender had any interest in the subject matter of the message: *Western Union Tel. Co. v. Bell* (Tex. Civ. App.), 90 S. W. 714. One W. R. Watson, who was a brother of plaintiff's wife, Minnie Campbell, sent a message to plaintiff, "W. O. Campbell, Garrison, Texas. Bob fatally shot; want Minnie at once," signed "W. R. Watson." The "Bob" mentioned in the message was the brother of plaintiff's wife, Minnie. By reason of delay in delivery of the message, plaintiff's wife was prevented from reaching the bedside of her wounded brother till after his death. In an action against the telegraph company to recover damages for mental suffering of his wife, it was held that the language of the telegram was sufficient to put the telegraph company on notice of the relationship: *Western Union Tel. Co. v. Campbell* (Tex. Civ. App.), 91 S. W. 312. A late Texas case (1906) has important bearing on this question of notice imparted by the face of the message. A telegram from W. E. Ayres to his mother announcing the death of another son was as follows: "Sour Lake, Texas, Nov. 11th, 1902. Mrs. Annie Ayres, Bay City, Texas. Frank breathed his last at one o'clock." The body of Frank Ayres was taken by his brother, W. E.

Ayres, on the next day to Beaumont, Texas, and buried. By reason of nondelivery of the message, the mother was prevented from attending the burial. The court held that the message on its face gave notice to the company of the relationship of the party and of the mother's probable desire to attend the burial at or in the vicinity of Sour Lake, and would go to Sour Lake for that purpose, and that this was the cause of sending the message. But it also held that the telegraph company was relieved of liability because the damages arising from her inability to attend his burial in Beaumont were not in contemplation of the parties. The evidence in this case showed that had the telegram been delivered promptly, the mother could have reached Sour Lake before the body was removed, or could have met the train carrying the remains at a junction and proceeded with them to Beaumont: *Western Union Tel. Co. v. Ayres* (Tex. Civ. App.), 93 S. W. 199.

d. Messages Summoning a Physician.—Messages of this character differ somewhat from other messages in mental anguish cases. The failure of a telegraph company to properly transmit and deliver such messages may entail physical as well as mental suffering, and both can be considered in estimating the damages: *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 7 South. 149; *Western Union Tel. Co. v. Haley*, 143 Ala. 586, 39 South. 386; *Western Union Tel. Co. v. McCall*, 9 Kan. App. 886, 58 Pac. 797. In *Western Union Tel. Co. v. Church* (Neb.), 90 N. W. 878, 57 L. R. A. 905, the telegram summoned a physician to attend a woman in confinement, and in consequence of delay in delivery of the message, the physician did not arrive until after his services were no longer required, and it was held that substantial damages could be recovered for any increased physical or mental suffering which the mother sustained by reason of the physician's absence. To the same effect: *Cooper v. Western Union Tel. Co.*, 71 Tex. 507, 10 Am. St. Rep. 772, 9 S. W. 598, 1 L. R. A. 728; *Western Union Tel. Co. v. Merrill* (Tex. Civ. App.), 22 S. W. 826; *Western Union Tel. Co. v. Kendzora* (Tex. Civ. App.), 26 S. W. 245. And it has been held that where it appeared that a surgical operation might have been avoided had the physician arrived earlier, it was not error to submit to the jury the question whether or not the delay in the delivery of the message whereby earlier attendance was prevented was the proximate cause of the injury, resulting from such operation: *Western Union Tel. Co. v. Morris*, 83 Fed. 992, 28 C. C. A. 56.

e. Remote, Contingent and Speculative Damages.—The mental suffering of a husband resulting from negligent delay in the delivery of a telegram informing him of the serious illness of his wife was not too remote as an element of damage: *Western Union Tel. Co. v. Merrill*, 144 Ala. 618, 113 Am. St. Rep. 66, 39 South. 121. The mental suffering of a brother caused by failure of a telegraph company to de-

liver a message to the family physician, summoning him to the sickbed of his sister, by reason whereof the physician did not attend, is not too remote to sustain recovery: *Western Union Tel. Co. v. Haley*, 143 Ala. 586, 39 South. 386. In *Taliaferro v. Western Union Tel. Co.*, 27 Ky. Law Rep. 1290, 54 S. W. 825, it was held that failure to deliver a message sent by a brother inquiring after the condition of his sick sister was not the proximate cause of the mental suffering incident to his absence from her funeral, as no answer to the message might have been made, or, if made, might not have been delivered through no negligence of the telegraph company. It has also been held by the court of appeals of Kentucky, in *Western Union Tel. Co. v. Reid*, 120 Ky. 231, 85 S. W. 1171, 70 L. R. A. 289, that the mental suffering of a father in watching the sufferings of his sick child during the period of delay negligently made by a telegraph company in delivering the message summoning a physician was too remote to authorize recovery in an action for damages against the telegraph company for such delay. Where a wife, about to be confined, was deprived of the presence of her husband by reason of negligent delay in delivering a telegram to him, the increased physical pain, mental anguish and anxiety suffered by her on account of his absence was held not too remote as an element of damage: *Thompson v. Western Union Tel. Co.*, 107 N. C. 449, 12 S. E. 427. Where a mother, who was not seriously ill, telegraphed her son, "Come at once," but by negligent delay in delivery of the message the son missed the opportunity to get to his mother promptly, it was held the mental anguish he suffered was not the proximate cause of the telegraph company's negligence, but arose from the son's own misapprehension of the circumstances: *Bowers v. Western Union Tel. Co.*, 135 N. C. 504, 47 S. E. 597. A telegraph company is not liable for mental suffering caused by its failure to deliver an answer to a telegram whereby the plaintiff was left in doubt as to the date of arrival of the sender of the message, and caused to leave the bedside of his dying father, such mental anguish not being the proximate result of the company's negligence: *Arial v. Western Union Tel. Co.*, 70 S. C. 418, 50 S. E. 6. In *Western Union Tel. Co. v. McCaul*, 115 Tenn. 99, 90 S. W. 856, plaintiff, by reason of negligent delay in delivery of a message requesting the transmission of money, was compelled to bury his son in a strange place. It was held that no recovery for mental suffering could be had, but the plaintiff could only recover the cost of exhuming and transporting the corpse from the place where it was buried to the plaintiff's home. Where delay in the delivery of a telegram prevented plaintiff from taking a train to the bedside of her sick father, and she procured a hack and drove to the place where he was sick, it was held that the expense of the hack, which had been sent by other relatives to carry plaintiff to her father, was too remote as an element of damage, not having been in contemplation of the parties: *Western Union Tel. Co. v. Jobe*, 6 Tex. Civ. App. 403, 25 S. W. 168,

1036. Plaintiff's sister telegraphed plaintiff announcing her illness, and requesting plaintiff to come to her, but it appeared that he could not have reached the place where she was before her death occurred. It was held that he could not recover for his mental anguish on the ground that he would have notified his sister that he was coming if the message had been promptly delivered, and that the funeral would have been postponed so that he could have attended, such damages being too remote: *Western Union Tel. Co. v. Linn*, 87 Tex. 7, 47 Am. St. Rep. 58, 26 S. W. 490. See, also, *Western Union Tel. Co. v. Motley* (Tex. Civ. App.), 27 S. W. 52; *Western Union Tel. Co. v. Stone* (Tex. Civ. App.), 27 S. W. 144. Damages for the mental suffering of a mother, resulting from the failure of a telegraph company to transmit a message until after the last train had left on which she could have reached her daughter's bedside before she died, were held not too remote: *Western Union Tel. Co. v. Seffel*, 31 Tex. Civ. App. 134, 71 S. W. 616. A friend telegraphed plaintiff that her daughter had been taken ill in a distant town, and requested plaintiff to telephone. The message was not delivered until it was too late for plaintiff to catch a train to go to her daughter, and she telephoned her daughter to come home alone. Held, that the damages for plaintiff's mental anguish because of her inability to get to her daughter and of accompanying her home were too remote: *Western Union Tel. Co. v. McFadden*, 32 Tex. Civ. App. 582, 75 S. W. 352. The mental anguish suffered by a sister because her brother died without means in a distant place, and consequently was buried at the expense of strangers, is too remote as an element of damage in an action against the telegraph company brought by the sister for failure to deliver a message informing her of her brother's death, and requesting instructions as to the disposition of his body: *Western Union Tel. Co. v. McNairy*, 34 Tex. Civ. App. 389, 78 S. W. 969. In *Western Union Tel. Co. v. Hamilton*, 36 Tex. Civ. App. 300, 81 S. W. 1052, it was held that the damages for mental suffering of a husband resulting from his inability to view the remains of his dead wife because of the decomposition of her body was not too remote, contingent or speculative where delivery of a telegram announcing her illness was delayed until too late for him to get home before she died. Where the only mental anguish plaintiff claimed to have suffered by reason of delay in the delivery of a telegram announcing his sister's death was the necessity to have the funeral postponed to enable plaintiff to be present, it was held there could be no recovery: *Western Union Tel. Co. v. Reed* (Tex. Civ. App.), 84 S. W. 296. In *Western Union Tel. Co. v. Craven* (Tex. Civ. App.), 95 S. W. 633, the plaintiff's wife was about to be confined. Delivery of a message to plaintiff announcing that his wife was sick and requesting him to come at once was delayed, and plaintiff was prevented from being present with his wife, and brought action against the telegraph company for the mental anguish suffered by himself and his wife because he was

prevented from being present at the death and burial of the infant. It was held that although the telegraph company was chargeable with notice of the character of the sickness, it was not chargeable with notice of the infant's death unless the same occurred in the act of parturition. A girl, traveling with her sick mother, telegraphed at a station en route to her brother, stating that the mother was sick, and requesting him to meet them at a certain station. The message was not delivered, and they were compelled to search at night in a strange place for the brother's residence, and were long exposed to the cold and inclement weather, which caused plaintiff serious illness. In an action against the telegraph company by the girl, it was held that the mental suffering she endured was too remote: *Stafford v. Western Union Tel. Co.*, 73 Fed. 273.

1. **Exemplary Damages.**—In an action for damages for mental suffering arising from failure to deliver a telegram announcing death with reasonable dispatch, where plaintiff suffered no physical injury, no exemplary damages can be recovered: *Western Union Tel. Co. v. Cross*, 116 Ky. 5, 74 S. W. 1098 (in this case no gross negligence on the part of the telegraph company was shown). In *West v. Western Union Tel. Co.*, 39 Kan. 93, 7 Am. St. Rep. 530, 17 Pac. 807, plaintiff brought an action against the telegraph company to recover damages for mental suffering arising from delay in the delivery of a death message. It was held that exemplary damages could be recovered for such gross negligence as indicated wantonness or malicious purpose. And in *Western Union Tel. Co. v. Lawson*, 66 Kan. 660, 72 Pac. 283, exemplary damages were allowed the sender of a death message, delivery of which was negligently delayed, because of gross negligence of the agents of the telegraph company. A telegram was sent to a woman announcing the death of her husband, but was not delivered. The evidence showed that her sons had called at the telegraph office both on the day the message was sent and on the succeeding day, inquiring if a message had been received, and were informed that there was none. The telegraph operator admitted that no attempt was made to find the plaintiff after it was ascertained that she lived six or seven miles in the country. It was held that exemplary damages were recoverable: *Western Union Tel. Co. v. Watson*, 82 Miss. 101, 33 South. 76. In *Butler v. Western Union Tel. Co.*, 62 S. C. 222, 89 Am. St. Rep. 893, 40 S. E. 162, it was held that a father could recover exemplary damages in an action against the telegraph company for failure to deliver a message announcing the serious illness of his daughter when such failure to deliver was willful, wanton and gross negligence. Where a telegram announced the death of plaintiff's son and was followed by another to the operator requesting prompt delivery of the first, the company was held liable for exemplary damages when the message was not delivered for four days through the forgetfulness of the operator: *Western Union Tel. Co. v. Frith*, 105 Tenn. 167, 58 S. W. 118. Plaintiff sent a telegram to his father announ-

ing the death of plaintiff's wife and child, the telegraph company sent a messenger boy with the message three times to the place of business of the addressee for delivery but did not send it to his residence, where he was that day and which was in the same town as his place of business and within a quarter of a mile from the telegraph company. Held, no exemplary damages was recoverable: *Gulf etc. R. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269. Where delivery of a telegram giving information of the probable death of plaintiff's wife was reasonably delayed, but the evidence showed that plaintiff could not have caught a train in time to arrive before her death if the message had been promptly delivered, it was held that only actual, and not exemplary, damages could be recovered: *Beasley v. Western Union Tel. Co.*, 39 Fed. 181.

g. **Interstate Messages, What Law Governs.**—The sender of a telegram from one state to a place in another state can recover damages for mental suffering arising from negligence of the company in the transmission or delivery of the message in the latter state, if such recovery is authorized by the laws of that state, even though no such recovery was authorized in the state where the message was offered for transmission: *Gray v. Western Union Tel. Co.*, 108 Tenn. 39, 91 Am. St. Rep. 706, 64 S. W. 1063, 56 L. R. A. 301. But where a telegram is sent from one point in a state to another point in the same state, under the laws of which state no damages for mental suffering can be recovered through negligence on the part of the telegraph company, it was held that mere residence of plaintiff in another state where such damages were recoverable would not authorize the recovery of such damages in the state of his residence, since the law in regard to such damages is governed by the law of the place where the injury occurs, and not by the law of the forum: *Thomas v. Western Union Tel. Co.*, 25 Tex. Civ. App. 398, 61 S. W. 501. A telegram sent from Arkansas to the plaintiff in Texas announced the serious illness of plaintiff's mother. Delivery of the message was negligently delayed, and plaintiff instituted in Texas an action against the telegraph company to recover damages for his mental anguish resulting from such negligent delay. It was held he could recover, although mental anguish was not recognized as an element of damage in Arkansas: *Western Union Tel. Co. v. Blake*, 29 Tex. Civ. App. 224, 68 S. W. 526. It has also been held that though damages for mental suffering were not recoverable in the state where the telegram should have been delivered that such damages can be recovered in the state from which the message was sent if recoverable there by the laws of that state: *Western Union Tel. Co. v. Waller*, 96 Tex. 589, 97 Am. St. Rep. 736, 74 S. W. 751; *Western Union Tel. Co. v. Anderson*, 34 Tex. Civ. App. 14, 78 S. W. 34.

EQUITABLE LIFE INSURANCE COMPANY v. HERBERT.

[37 Ind. App. 373, 76 N. E. 1023.]

INSURANCE, LIFE—Suicide as Defense.—Self-destruction cannot be presumed from the mere death of an insured in an unknown manner, and where death may have resulted from accident or mistake. In such case the presumption is against suicide and if that defense is relied upon, the burden of proving it is upon the insurer. (p. 324.)

INSURANCE, LIFE—Suicide Question for Jury.—Whether or not an insured person committed suicide is to be determined as any other question of fact; and where the evidence is conflicting, such question must be determined by the jury. (p. 326.)

P. B. Colerick, for the appellant.

Breen & Morris, for the appellees.

374 ROBINSON, J. Appellees sued upon a policy of insurance issued upon the life of Oliver J. Hebert, on December 8, 1902. The assured was found dead July 28, 1903. The policy contained a provision "that should the assured within two years from date thereof take his own life, whether sane or insane, any policy issued thereon should become void, and all payments made thereon should be forfeited to said company." The sufficiency of the evidence to sustain the verdict, the excluding of certain testimony offered, and the giving of a certain instruction are the only questions argued by appellant's counsel.

Self-destruction cannot be presumed from the mere fact of death in an unknown manner. The strong instinctive love of life will not permit a presumption of suicide where death may have resulted from accident or mistake. Appellees were entitled to recover unless appellant has by competent evidence overcome this presumption. If the facts are such that death might have resulted from accident, mistake, or suicide, the presumption is against suicide. If the accused committed suicide, the law was against appellees, because the policy by its terms did not cover self-destruction, whether assured at the time was sane or insane. As the defense of suicide was relied upon, the burden of proving it was upon the appellant: See *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. Rep. 1360, 32 L. ed. 308; *Leman v. Manhattan Life Ins. Co.*, 46 La. Ann. 1189, 49 Am. St. Rep. 348, 15

South. 388, 24 L. R. A. 589; *Walcott v. Metropolitan Life Ins. Co.*, 64 Vt. 221, 33 Am. St. Rep. 923, 24 Atl. 992; *Supreme Council etc. v. Brashears*, 89 Md. 624, 73 Am. ³⁷⁵ St. Rep. 244, 13 Atl. 866; *Meadows v. Pacific Mut. Life Ins. Co.*, 129 Mo. 76, 50 Am. St. Rep. 427, 31 S. W. 578; *Streeter v. Western Union etc. Soc.*, 65 Mich. 199, 8 Am. St. Rep. 882, 31 N. W. 779; *Cronkhite v. Travelers' Ins. Co.*, 75 Wis. 116, 17 Am. St. Rep. 184, 43 N. W. 731; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52, 7 Am. Rep. 410; *Hale v. Life Indemnity etc. Co.*, 61 Minn. 516, 52 Am. St. Rep. 616, 63 N. W. 1108.

The defense was that the assured took carbolic acid with suicidal intent. The deceased was found dead on the bank of a railroad right of way, lying on his back at full length, his feet crossed at the ankles, one hand at his side, and the other across his breast; in his vest pocket was a small vial containing carbolic acid, the contents of which were about half gone; and near or under the body was a large bottle containing a solution of carbolic acid and water. The appearance of the face did not indicate that there had been any severe pain preceding death. There was a post-mortem examination held, and the testimony of the physicians was directly contradictory as to the presence of carbolic acid in the stomach, as was also the evidence as to whether the mouth showed the use of carbolic acid. There is evidence that the assured had some pimples on his face, and that his mother had advised him to wash it with a solution of carbolic acid; that on the morning of his death he went to a drug store and purchased ten cents' worth of carbolic acid, secured a large bottle and filled it with a mixture of the acid and water; that the day on which he died was an excessively warm day; that he had received a sunstroke a few weeks before he died, and that his physical condition was such that he might easily have succumbed to the excessive heat.

We have not undertaken to give the substance of all the testimony, but to show that while there are indications that point to suicide, there are other facts and circumstances not consistent with that theory. The evidence relied upon ³⁷⁶ to establish suicide was circumstantial, and in such case it should be sufficient to exclude, with reasonable certainty, any other cause of death. Although the evidence was contradictory as to the presence of carbolic acid in the stomach, and as to whether the mouth indicated the use of the acid,

still, if the evidence had shown, without dispute, that the acid was used, and death resulted, the death might have resulted from accident or mistake, and this would be the presumption as against suicide. "When the dead body of the assured is found under such circumstances and with such injuries that the death may have resulted from negligence, accident, or suicide, the presumption is against suicide, as contrary to the general conduct of mankind, a gross moral turpitude not to be presumed in a sane man; and whether it was from one or the other, if there is any evidence bearing upon the point, is for the jury; as for instance, whether the taking of an overdose of laudanum was intentional or by mistake": May on Insurance, 4th ed., sec. 325.

But, as stated, there was evidence that there was no indication of the presence of the acid in the stomach, nor did the mouth necessarily indicate that it had been used. The credibility of the witnesses was a question for the jury. It cannot be said that there is no evidence to support the conclusion they reached. Whether the assured committed suicide was to be determined as any other question of fact. Upon a careful consideration of the evidence we do not find it such as authorizes us to disturb the verdict: See *Travelers' Ins. Co. v. Nitterhouse*, 11 Ind. App. 155, 38 N. E. 1110; *Phillips v. Louisiana etc. Life Ins. Co.*, 26 La. Ann. 404, 21 Am. Rep. 549; *Hale v. Life Indemnity etc. Co.*, 61 Minn. 516, 52 Am. St. Rep. 616, 63 N. W. 1108; *Leman v. Manhattan Life Ins. Co.*, 46 La. Ann. 1189, 49 Am. St. Rep. 348, 15 South. 388, 24 L. R. A. 589; *Michigan Mut. Life Ins. Co. v. Naugle*, 130 Ind. 79, 29 N. E. 323; *Northwestern etc. Ins. Co. v. Hazelett*, 105 Ind. 212, 55 Am. Rep. 192, 4 N. E. 582; *Supreme Lodge etc. v. Foster*, 26 Ind. App. 333, 59 N. E. 877; *Cochran v. Mutual Life Ins. Co.*, 79 Fed. 46; *Ingersoll v. Knights of Golden Rule*, 47 Fed. 272; *Supreme Lodge etc. v. Beck*, 94 Fed. 751, 36 C. C. A. 467.

The correctness of the tenth instruction is questioned, but what we have already said concerning the presumption that the assured took his own life is applicable to the only question raised as to this instruction. We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

In an Action upon a Life Insurance Policy, the presumption is indulged that the insured did not destroy himself; and if the defense of

suicide is interposed, the burden of proving it is upon the defendant: See the note to Supreme Conclave etc. v. Miles, 84 Am. St. Rep. 539-541, on self-destruction as a defense to an action to recover life insurance.

OVER v. BYRAM FOUNDRY COMPANY.

[37 Ind. App. 452, 77 N. E. 302.]

CONTRACTS OF SALE—Amount of Recovery.—A contract fixing the price and terms of sale of articles specified governs the amount of recovery therefor, in the absence of an exception taking the case out of the general rule to that effect. (p. 329.)

CONTRACTS OF SALE—Manufacture of Goods.—If a contract to sell all of a certain kind of goods to a certain person, which are manufactured during the period of such contract, reserving the "right to discontinue the making thereof" at any time during such period, the exercise of the right of discontinuance is not a breach of the contract. (p. 330.)

CONTRACTS in Restraint of Trade—Monopoly.—A contract to sell all of certain goods made during "the remainder of the year" to a certain person is not monopolistic and void within the meaning of a statute providing that all contracts by persons who "control the output of said article of merchandise" made to prevent competition, "in the importation or sale of articles imported into" the state, shall be void. (p. 330.)

CONTRACTS in Restraint of Trade—Monopoly.—A contract to sell all of certain goods manufactured during "the remainder of the year" to a certain person is not void as creating a monopoly. (p. 331.)

CONTRACTS in Restraint of Trade.—A contract binding a manufacturer to sell exclusively to one person during a limited period is valid, and not in restraint of trade. (p. 332.)

CONTRACTS in Restraint of Trade—Monopolies.—Combinations between individuals or firms for the regulation of prices, and of competition in business, are not monopolies, and are not unlawful as in restraint of trade, so long as they are reasonable, and do not include all of a commodity or trade, or create such restrictions as to materially affect the freedom of commerce. (p. 332.)

N. M. Taylor, for the appellant.

C. E. Averill, for the appellee.

453 **ROBY, C. J.** Action for goods sold and delivered by appellee to appellant, at his special request. A bill of particulars was filed with the complaint. Appellant answered by denial and plea of payment. Appellant filed a counterclaim in four paragraphs, all of which were founded upon an alleged breach of a written contract filed therewith. Demurrers to the counterclaim were overruled, and appellee answered in general denial, and specially in a second paragraph setting

up the invalidity of the contract counted upon as being in restraint of trade. A demurrer to this paragraph of answer was overruled, and a reply in denial filed. The issues were submitted to the court for trial. Finding and judgment for appellee in the sum of one hundred and sixty-eight dollars and seventy-five cents.

The grounds for a new trial stated in appellant's motion are that the decision is not sustained by sufficient evidence, that it is contrary to law, that the court erred in excluding evidence, in support of the complaint, as to the amount of weights made by appellee, and in admitting testimony as to the sale and delivery of weights to appellant, it appearing that such articles were sold in pursuance of the written contract between the parties. The error assigned is in the overruling of the motion for a new trial.

It was developed by interrogatories submitted to appellee, and is established by all the relevant evidence, that the goods, on account of which the appellee sues, were sold and delivered by it to the appellant under and in accordance with a written contract between them of the following tenor:

"Articles of agreement entered into at Indianapolis, Indiana, this 27th day of March, 1901, by and between the Byram Foundry Company and Ewald Over, ⁴⁵⁴ all of the city of Indianapolis, Indiana, witnesseth: Said Byram Foundry Company agrees to, without unnecessary delay, mail a letter or postal withdrawing the price of seventy-five cents per hundred pounds recently made on sash weights to all parties to whom said price was made. Said Byram Foundry Company hereby agrees to make round sash weights during the remainder of this year, not to exceed five hundred tons, which amount of sash weights said Ewald Over agrees to buy of them, delivered either at the depots in this city, or to Ewald Over's place of business, or to his customers in said city; sash weights to be center hung and made in a merchantable manner and full weight as near as practicable. Said Ewald Over hereby agrees to pay said Byram Foundry Company sixteen dollars per ton for said weights, monthly settlements in cash on or before the 10th of the month following invoice. Said Byram Foundry Company reserves the right to fill any and all contracts already made on their own account out of the said five hundred tons. Said Byram Foundry Company also reserves the right to sell sash weights at prices to be

named by said Ewald Over at any time during the term of this agreement, the amount of money obtained in pay for them to be credited to said Ewald Over, and monthly statements of all sales to be made to said Ewald Over, giving names to whom sold, sizes of weights, number of pounds, and the amount of money received in payment. It is understood that the sash weights made under this contract shall be fairly assorted, and delivered in amounts of about fifty to sixty tons per month, and that said Ewald Over may suggest the sizes of such fair assortment. Said Byram Foundry Company also agrees not to make any double ender, round, square or flat weights during the term of this agreement. Said Byram Foundry Company reserves the right to discontinue the making of sash weights at any time during the term of this agreement.

"Witness our hands and seals this 27th day of March, 1901.

"EWALD OVER.

"BYRAM FOUNDRY COMPANY.

"H. G. BYRAM,

"V. P. and Genl. Mgr."

⁴⁵⁵ This contract fixes the price and terms of sale of the articles specified, and in the absence of an exception taking the case out of the general rule it cannot be ignored: *Everett v. Stuck*, 25 Ind. App. 279, 58 N. E. 94; *Baltimore etc. R. Co. v. Ragsdale*, 14 Ind. App. 406, 42 N. E. 1106; *Louisville etc. R. Co. v. Barnes*, 16 Ind. App. 312, 44 N. E. 1113.

Appellee claims that, while a written contract was made, it was not performed by either party, and that a recovery for the reasonable value of the property accepted and used by the appellant may therefore be had. The appellee seems to have carried out the contract up to the date of the following letter:

"Indianapolis, U. S. A., September 4, 1901.

"Ewald Over, City.

"Dear Sir: Owing to the scarcity and consequent high price of scrap, there is no money in sash weights at our contract price, therefore, as we have sufficient work to run our shop without making any weights, we will be unable to make you any further shipments during the month of September, and will have to decline your order of 30th ult.

"Respectfully,

"BYRAM FOUNDRY COMPANY."

The right to discontinue the making of weights at any time during the term of the contract was, by the last item thereof, given to appellee. The exercise of the right thus secured did not amount to breach of contract, but was an act in pursuance thereof, leaving the settlement for goods furnished thereunder to be made as stipulated.

It is assumed that the contract is void as against public policy as in restraint of trade. Section 1 of the act of 1897 (Acts 1897, p. 159; Burns Rev. Stats. 1901, sec. 3312g) declares contracts between persons or corporations who control the output of any article of merchandise ⁴⁵⁶ void when such contracts are made with a view to lessen free competition in the importation or in the sale of imported articles, and also declares contracts between persons or corporations who control the output of "said article of merchandise" which are designed or tend to advance, reduce or control the price or cost to the producer or to the consumer of any such product or article, to be against public policy, unlawful and void.

In order that a contract be within the purview of this act, it must be made between persons or corporations "who control the output." The first two inhibitions apply to contracts made with a view to lessen free competition in the importation of articles of merchandise and in the sale of imported articles. The contract referred to must be made within the state, but the monopoly, in the legislative mind, could not have been limited to the state, since the thing guarded against has relation wholly to goods made without the state. The last two inhibitions within which the present case falls, if it is within the statute at all, are against contracts made between persons "who control the output of said articles of merchandise." The output referred to in the first instance not being restricted to goods made in the state, it is questionable if a narrower meaning should be given the term when used a second time in this section.

The legislature evidently meant to limit the sole power, or power largely in excess of that possessed by others, in dealing in some particular commodity; but, assuming that the last two inhibitions apply to persons controlling the output of articles manufactured in Indiana, there is a total lack of evidence to sustain the judgment. The article is one which may be made of the commonest iron and at any foundry. The parties referred to by the act are not those who control the

output of a single factory or a single town. In these days of quick communication and rapid transportation, such a construction cannot for an instant be entertained. ⁴⁵⁷ The statute was directed against monopoly. The word is defined as, "The abuse of free commerce by which one or more individuals have procured the advantage of selling alone all of a particular kind of merchandise to the detriment of the public." No two establishments can have a monopoly of the business of manufacturing sash weights, so that the first and essential element necessary to the application of the act to the contract in question is wanting. If the act were to be construed as rendering void such a contract as the one under consideration it would be impossible for one person to purchase the most common articles of merchandise from another, since, under the simplest principles of the law of supply and demand, every purchase "tends" to advance the price of the commodity purchased. If so applied, the section would render void a contract tending to make bread cheaper or to reduce the cost to the consumer of any other necessity of life. Such a construction would invalidate the law, and ascribe an intention to the law-making body which it is impossible to believe existed.

Neither is the contract void at common law. By it one party agrees to make for another during "the remainder of the year" round sash weights, not to exceed five hundred tons, which amount the other party agrees to buy at a stipulated price. Each case involving the question of public policy and restraint of trade is decided upon its own facts: *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560, 51 Am. St. Rep. 193, 41 N. E. 1048; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 64, 22 L. ed. 315; *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658, 33 L. ed. 67; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 9 Sup. Ct. Rep. 553, 32 L. ed. 979. The test is whether the contract is inimical to the public interest: *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560, 51 Am. St. Rep. 193, 41 N. E. 1048.

The appellant agreed to buy and pay for all the weights, not exceeding five hundred tons, which the appellee might ⁴⁵⁸ make during the remainder of the year, appellee reserving the right to discontinue making them at any time. The strict rule applicable to contracts, by which persons or corporations holding franchises or rights of a quasi public nature

attempt to evade the corresponding duty, is not applicable to a case involving the manufacturer of cast-iron window weights. The law does not permit any restraint whatever in the former class, but a contract binding the party manufacturing to sell exclusively to one person during a limited period is valid: *Trentman v. Wahrenburg*, 30 Ind. App. 304, 65 N. E. 1057; *Greenhood's Public Policy*, rule DLXI, illustrations; 24 Am. & Eng. Ency. of Law, 2d ed., 854; *Moore & Handley Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 13 Am. St. Rep. 23, 6 South. 41. "Combinations between individuals or firms for the regulation of prices, and of competition in business, are not monopolies, and are not unlawful as in restraint of trade, so long as they are reasonable, and do not include all of the commodity or trade, or create such restrictions as to materially affect the freedom of commerce": *Herriman v. Menzies*, 115 Cal. 16, 56 Am. St. Rep. 81, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318. There is no suggestion that the price fixed was unreasonable. The rights of the parties must, therefore, be determined by reference to the written contract. These considerations lead to a reversal of the judgment.

Other questions discussed in the brief, in view of the conclusions reached, are not relevant.

The judgment is reversed and cause remanded, with instructions to sustain appellant's motion for a new trial and for other consistent proceedings.

Unlawful Monopolies and Restraints of Trade are discussed in the note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235; and in the recent cases of *Dunbar v. American Tel. etc. Co.*, 224 Ill. 9, 115 Am. St. Rep. 132; *White Star Line v. Star Line of Steamers*, 141 Mich. 604, 113 Am. St. Rep. 551, and cases cited in the cross-reference note thereto.

HAMILTON NATIONAL BANK v. NYE.

[37 Ind. App. 464, 77 N. E. 295.]

PLEADING—Answer—Verification.—An answer, in an action by the indorsee of a bank check, that the plaintiff derived title through an unauthorized indorsement by one claiming to be the agent of the payee is sufficient without any verification. (pp. 333, 334.)

PLEADING—Facts—Conclusions of Law.—A pleading setting forth the facts is not bad for surplusage in setting out the legal conclusions from such facts. (p. 334.)

BILLS AND NOTES.—The Unauthorized Indorsement of a check confers no title. (p. 334.)

BILLS AND NOTES—Unauthorized Indorsement—Subsequent Indorsees.—If the first indorsement on a check is unauthorized, subsequent indorsees have no title as against the drawer. (p. 334.)

BILLS AND NOTES—Unauthorized Indorsement.—The delivery of a check with an unauthorized indorsement is in effect its delivery without any indorsement, and in the hands of anyone, other than the payee, it is not negotiable paper. (p. 335.)

BILLS AND NOTES—Authority of Agent to Indorse Principal's Check.—A mere selling agent has no implied authority to indorse checks payable to his principal. (p. 335.)

J. S. Dodge, Jr., and B. Shane, for the appellant.

S. Parker, J. H. Brubaker and W. Brubaker, for the appellee.

⁴⁶⁵ **ROBINSON, J.** Action by appellant upon a bank check. The complaint avers that appellee executed his check upon the Lake City Bank, payable to "Walsh, Boyle & Co., or order," and delivered the check to the payee; that afterward the check, for a valuable consideration, was indorsed by the payee to the Indiana National Bank, which bank, for a valuable consideration, indorsed the check to appellant; that afterward appellant presented the check to the Lake City Bank for payment, which was refused, of which fact appellee had notice; and that the same was duly protested.

Appellee filed a verified answer admitting the execution of the check, but alleges he should not be held liable on the check, for the reason that since this action was commenced he paid the amount of the check to Walsh, Boyle & Co.; that at the time the check was drawn he was indebted to that firm to the amount of the check for goods sold by the firm to him, through their traveling salesman Underhill; that when the check was drawn it was delivered to Under-

hill, who, instead of sending it to the firm, as was his duty, took the same to the Indiana National Bank and wrote the words "Walsh, Boyle & Co." across the back thereof, which bank forwarded the check to appellant, which was its Chicago correspondent; that the check was not indorsed by the firm, but was indorsed with the firm's name by Underhill; that he had no authority or right so to indorse the same; and that the firm did not in any manner ratify the indorsement. It was not necessary to verify the answer. It is not a plea of non est factum. It does not deny the execution or delivery of the check. The effect of the answer is that it denies the appellant's right to sue on the check for the reason that Walsh, Boyle & Co. are the real owners of the check, the title never having passed to appellant. Whether the verification that was attempted was sufficient is not material. ⁴⁶⁶ The facts pleaded in the answer, if true, are a bar to the action: *Bostwick v. Bryant*, 113 Ind. 448, 16 N. E. 378.

It is urged against the answer that it pleads appellee's conclusion as to what he "was bound to do in law." However, this conclusion neither adds anything to, nor takes anything from, the pleading, because the facts from which this conclusion is drawn are pleaded. The facts pleaded speak for themselves, and it was unnecessary for appellee to state what the law upon those facts required or did not require him to do. The conclusion is surplusage.

The maker of the check did not undertake to pay the amount of the check to any person other than Walsh, Boyle & Co., or to some person to whom this firm should order it to be paid. When the check was drawn and delivered to the firm's agent, the title was in the firm, and remained in the firm until by some act of the firm, or its authorized agent, it passed to another. An indorsement by any other person could have no effect on the firm's title. Placing the firm's name on the back of the check and delivering it to a third person would divest the firm's title and vest the title in such third person. If the agent, without the firm's knowledge, had delivered the check without any indorsement to a third person, such delivery could not affect the firm's title, but such an act could have no greater or less effect than the delivery of the check with an unauthorized indorsement.

If appellant has any title to the check, it derived it through the Indiana National Bank. But the unauthorized indorsement and delivery of the check had no effect on the payee's

title and could not therefore convey anything, as against the payee, to that bank. We have nothing to do with the respective rights of the two banks as against each other. "The purchase of the check upon a forged or unauthorized indorsement conferred no title, and in contemplation of law the check remained untransferred": ⁴⁶⁷ Indiana Nat. Bank v. Holtsclaw, 98 Ind. 85. See, also, Graves v. American Exchange Bank, 17 N. Y. 205; Armstrong v. Pomeroy Nat. Bank, 46 Ohio St. 512, 15 Am. St. Rep. 655, 22 N. E. 866, 6 L. R. A. 625; Levy v. Bank of America, 24 La. Ann. 220, 13 Am. Rep. 124; Seventh Nat. Bank v. Cook, 73 Pa. 483, 13 Am. Rep. 751; Welsh v. German American Bank, 73 N. Y. 424, 29 Am. Rep. 175; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 11 Am. St. Rep. 612, note, 20 N. E. 632; Baldwin v. Shuter, 82 Ind. 560; Citizens' State Bank v. Adams, 91 Ind. 280; Adams v. Citizens' State Bank, 70 Ind. 89; Elliott v. Armstrong, 2 Blackf. 198.

It is quite true it is possible that a remote indorsee might acquire a better title to a negotiable instrument, so far as available equities and defenses between the parties are concerned, than some prior indorser through whom the indorsee's title came. But the unauthorized indorsement had no effect on the payee's title to the check. The delivery of the check with the unauthorized indorsement was in effect the delivery of the check without any indorsement, and in the latter case it is clear that the check in the hands of anyone, other than the payee would not be negotiable paper according to the custom of merchants.

The agent Underhill was engaged in selling goods, and was probably authorized as such agent to collect money for goods sold. But he had no implied authority to bind his principal by the separate, original and independent contract of indorsement. In Tiedeman on Commercial Paper, section 77, the author says: "And the execution and negotiation of commercial paper are considered by the commercial world so liable to the infliction of injury on the principals, if this authority is given to agents—the general custom being to reserve this power for personal ⁴⁶⁸ exercise—that the presumption of the law is more strongly opposed to an implied authority to execute and negotiate commercial paper than to do anything else": See Knowlton v. School City of Logansport, 75 Ind. 103; Robinson v. Anderson, 106 Ind. 152, 6 N. E. 12; Runyon v. Snell, 116 Ind. 164; Blackwell

v. Ketcham, 53 Ind. 164, 9 Am. St. Rep. 839, 18 N. E. 522; Indianapolis Mfg. etc. Union v. Cleveland etc. R. Co., 45 Ind. 281; Reitz v. Martin, 12 Ind. 306, 74 Am. Dec. 215; Miller v. Edmonston, 8 Blackf. 291; Smith v. Gibson, 6 Blackf. 369; Kirk v. Hiatt, 2 Ind. 322; Corning v. Strong, 1 Ind. 329; Graham v. United States Sav. Inst., 46 Mo. 186.

It is a general rule, applicable in cases of agency, that where one of two innocent parties must suffer through the fraud of a third party, the loss should fall upon him who put it in the power of such third person to do the wrong. But this rule is not applicable in this case, for the same reason that would prevent its application if the Indiana National Bank had brought this suit, instead of appellant. When the Indiana bank had the check indorsed to it, it was bound to know whether it was properly indorsed, and it is well settled by the above authorities that it acquired no title to the check through the unauthorized indorsement. The wrong against appellant was the statement by the Indiana bank, through its indorsement to appellant, that it was the rightful holder of the check, and that the indorsement to it was a valid indorsement. The complaint shows that the check was indorsed to the Indiana bank, and then indorsed by that bank to appellant. The evidence supports the answer.

Judgment affirmed.

The Bona Fide Ownership of Negotiable Paper is the subject of a note to Bedell v. Herring, 11 Am. St. Rep. 309. The effect of forged indorsements on the rights and liabilities of persons dealing with a negotiable instrument is considered in the notes to First Nat. Bank v. City Nat. Bank, 94 Am. St. Rep. 641; People's Bank v. Franklin Bank, 17 Am. St. Rep. 889; and in the recent cases of Murphy v. Metropolitan Nat. Bank, 191 Mass. 354, 114 Am. St. Rep. 595; Wellington Nat. Bank v. Robbins, 71 Kan. 748, 114 Am. St. Rep. 523.

COLUMBIAN ENAMELING AND STAMPING COMPANY v. BURKE.

[37 Ind. App. 518, 77 N. E. 409.]

MASTER AND SERVANT—Tools and Appliances—Duty of Master.—It is the duty of the master to exercise ordinary care and diligence in providing safe and suitable tools and appliances to servants engaged in his service, and to keep them in a safe condition. The servant has a right to rely upon the master's observance of these requirements and the performance of this duty, and his failure to do so makes him liable to his servant. (p. 339.)

MASTER AND SERVANT—Defective Machinery.—Notice on the part of the master of defects in machinery or appliances, and want of notice on the part of the servant, may be alleged in general terms, and such allegations will include both actual and constructive knowledge. (pp. 339, 340.)

MASTER AND SERVANT—Latent Defects in Appliances.—Reasonable care on the part of the master demands inspection and search for latent defects in his tools and appliances, while reasonable care on the part of the servant requires only attention and observation of open or obvious defects and perils. (p. 340.)

MASTER AND SERVANT—Assumption of Risk—Pleadings.—Special allegations by a servant of injuries caused by the master's negligence will not control general allegations of nonassumption of risk unless it can be held as matter of law that the servant assumed the risk. (p. 340.)

MASTER AND SERVANT—Tools and Appliances—Assumption of Risk.—A servant has the right to rely upon the safety of such implements as are provided by the master for his use in the master's service, unless the defectiveness is open to the observation of an ordinarily prudent man. (p. 340.)

NEGLIGENCE—Conflict of Evidence—Question for Jury.—If a servant sues his master for damages for personal injury alleged to have been caused by the master's negligence, and the facts are controverted and the evidence conflicting, both the question of negligence and of contributory negligence must be submitted to the jury for determination. (p. 342.)

S. M. McGregor and Lamb, Beasley & Sawyer, for the appellant.

A. W. Knight, J. O. Piety and G. A. Knight, for the appellee.

519 WILEY, J. Appellee, who was plaintiff below, recovered a judgment against appellant for personal injuries received while in its employ, alleged to have resulted from its negligence. The complaint was in a single paragraph, to which a demurrer was addressed and overruled. Answer in denial. Trial by jury, resulting in a general verdict for appellee. Appellant's motion for a new trial was overruled.

At the conclusion of the evidence appellant moved that the court instruct the jury to return a verdict in its favor, and this motion was also overruled.

Overruling the demurrer to the complaint and the motion for a new trial are assigned as errors.

The complaint alleges that appellant was in the business of manufacturing enameled ware; that at and prior to June 24, 1903, appellee was in appellant's employ "in and about the manufacture of its goods and wares"; that in the process of such manufacture the appellant immersed its goods in their unfinished state in certain dangerous acids, contained in large tanks; that said tanks were supplied with acids from large bottles; that about the bottles was constructed a framework or crate of wood; that the bottles containing the acid were conveyed to the tanks by means of trucks; that in loading the bottles upon the trucks it was necessary to take hold of the framework about the bottles, and by means thereof tip the bottles to one side, so as to permit the truck to pass under and receive them; that it was one of appellee's duties to aid his fellow-workmen in ⁵²⁰ holding bottles filled with acid in the loading of the bottles upon the trucks preparatory to their being transferred to the tanks; that on the date last named, while appellee was in the performance of his duties, and in the act of tipping one of said bottles filled with acid, so as to permit the truck to pass under and receive it, he had hold of the framework about it, and while so holding to the framework it broke and gave way, causing the bottle to tip backward and to throw out a large amount of acid, which struck appellee in the face and eye, by which he was severely injured; that the framework gave way because it was defective and insecure and insufficient in strength to withstand the handling of the bottles; that the accident was occasioned because of the defective condition of said framework, without any fault on the part of appellee, and while he was exercising due care and caution. It is further alleged that appellee had no knowledge or notice of the insecure condition of the framework about the bottle, and could not have ascertained the same by the exercise of ordinary care; that appellant had notice of the defective condition, or could have had by the exercise of ordinary care; and that appellee's injury was due to appellant's negligence as aforesaid.

The objections urged to the complaint are (1) that it shows that the injury of which appellee complains was the result of a risk assumed by him; (2) that the general allegation in the complaint of want of knowledge on appellee's part of the defective and insecure condition of the crate is overcome by the specific allegations of the complaint showing knowledge on his part, or that he could have known by the exercise of ordinary care.

We do not think that either of these objections is well taken. The law is well settled that it is the duty of a master to exercise ordinary care and diligence in providing safe and suitable tools and appliances to servants who are engaged in his service, which will be safe for the servants to use in the discharge of their ⁵²¹ duties to the master, pursuant to the contract of employment. As was said by this court in the case of *Baltimore etc. R. Co. v. Amos*, 20 Ind. App. 378, 49 N. E. 854: "It is also the master's duty . . . to exercise a reasonable supervision over such tools and exercise ordinary care to keep them in safe condition for the use of the servant. . . . The master is required to take notice not only of the deterioration of tools and appliances by continued use, but also of such deterioration by natural or ordinary decay as may be discovered by reasonable inspection, in any material which may be provided by him as tools or as parts thereof. The servant has a right to rely upon the master's observance of these requirements and performance of these duties": *Island Coal Co. v. Risher*, 12 Ind. App. 98, 40 N. E. 158; *Salem Stone etc. Co. v. Griffin*, 139 Ind. 141, 38 N. E. 411; *Louisville etc. R. Co. v. Hanning*, 131 Ind. 528, 31 Am. St. Rep. 443, 31 N. E. 187.

It has also been held that notice on the part of the master of defects in machinery, or appliances, and want of notice on the part of the servant, may be alleged in general terms, and such allegations will include both actual and constructive knowledge: *Louisville etc. R. Co. v. Miller*, 140 Ind. 685, 40 N. E. 116; *New Kentucky Coal Co. v. Albani*, 12 Ind. App. 497, 40 N. E. 702.

An averment in the complaint that the servant did not know of such defect or danger is sufficient as a matter of pleading to rebut or deny not only actual knowledge, but also implied or constructive knowledge or notice: *Baltimore etc. R. Co. v. Roberts*, 161 Ind. 1, 67 N. E. 530; *Consolidated*

Stone Co. v. Summit, 152 Ind. 297, 53 N. E. 235; Chicago etc. R. Co. v. Richards, 28 Ind. App. 46, 61 N. E. 18.

It has been held that reasonable care on the part of the master demands inspection and search for latent defects, while reasonable care on the part of the servant requires attention and observation of open or obvious defects and perils: Louisville etc. R. Co. v. Quinn, 14 Ind. App. 554, 43 N. E. 240.

⁵²² In the Case of City of Wabash v. Carver, 129 Ind. 552, 29 N. E. 25, 13 L. R. A. 851, it was held that special allegations will not control general allegations of nonassumption of risk unless it can be held as a matter of law that plaintiff assumed the risk: See, also, Cincinnati etc. R. Co. v. Darling, 130 Ind. 376, 30 N. E. 416; Salem Stone etc. Co. v. Griffin, 139 Ind. 141, 38 N. E. 411.

We think it may be stated as a general rule that a servant may rely upon the safety of such implements as are provided by the master for his own use in the master's service, unless their defectiveness is open to the observation of an ordinarily prudent man: Baltimore etc. R. Co. v. Amos, 20 Ind. App. 378, 49 N. E. 854; Arcade File Works v. Juteau, 15 Ind. App. 460, 40 N. E. 818, 44 N. E. 326. A servant engaged in his master's service has a right to presume that his employer has done his duty and furnished appliances which render the work reasonably safe: Indiana etc. R. Co. v. Bundy, 152 Ind. 590, 53 N. E. 175; Brazil Block Coal Co. v. Gibson, 160 Ind. 319, 98 Am. St. Rep. 281, 66 N. E. 882; Pittsburgh etc. R. Co. v. Parrish, 28 Ind. App. 189, 91 Am. St. Rep. 120, 62 N. E. 514; Chicago etc. R. Co. v. Lee, 29 Ind. App. 480, 64 N. E. 675. As a general rule, it may be stated that an employé is not required to make inspection of the tools, appliances, etc., which his master has furnished him. The law does not place upon him that burden or responsibility. The law goes only so far as to lay upon him the duty to observe defects that are open, visible and apparent: Linton Coal etc. Co. v. Persons, 11 Ind. App. 264, 39 N. E. 214; Gould Steel Co. v. Richards, 30 Ind. App. 348, 66 N. E. 68. Applying these settled rules to the facts stated in the complaint, we are clearly of the opinion that the objections urged by appellant's counsel cannot be maintained. There was no error in overruling the demurrer.

Two of the reasons assigned for a new trial are (1) that the verdict was not sustained by sufficient evidence; and

(2) that it was contrary to law. Under the propositions⁵²³ relied upon for a reversal counsel for appellant assert that the evidence fails to establish negligence on the part of appellant, and that there is "no evidence to support the verdict," and hence it is not sustained by sufficient evidence and is contrary to law. In their argument, however, counsel do not discuss these propositions, and say that they do not care to discuss them, and only call our attention to them and the authorities cited under them.

At the conclusion of the evidence appellant moved that the court give a peremptory instruction in its favor. If appellant was entitled to such instruction it was error to refuse it, and in reviewing the question thus raised the sufficiency of the evidence to sustain the verdict may be considered. To determine this question it is important to have before us the facts descriptive of the manner in which appellee was injured. The acid used by appellant was put in tanks or vats from large bottles. These bottles were incased in wooden crates, with cleats attached for handling the same. The crates containing the bottles were conveyed to the vats by means of a truck. Appellee and a coemployé went to get a bottle of acid to put in the vat. Appellee went to where the bottles were, and was moving one of the crates out, and went to tip it up so his coemployé could put the truck under it, and while in the act of tipping it the cleat came off, the bottle fell back to the ground, and the acid flew in his face, etc. The accident occurred between 11 and 12 o'clock at night, and the nearest light was an electric light forty or fifty feet from where he was injured.

As stated by appellee: "I tipped the crate over so the truck could be run under it. The cleat gave way, and the bottle fell back, and the acid flew in my face and eyes, and after that I could not see anything. I never saw the box [crate] again. . . . The cleat appeared to be sound when I took hold of it. I did not know it was unsafe or loose. It appeared to be all right."

⁵²⁴ The coemployé Zollinger, who was assisting appellee, stated in one part of his examination that the cleat broke and came off, and in another that it did not. Appellee's father testified that he was working within forty-five or fifty feet of his son when he was injured, and went to him in three or four minutes. He stated that he saw the bottle and crate the next evening, and examined them; that he

found one cleat off on the ground; that it looked rotten; that nails were sticking in it; some of the nails were in the box, or crate, and some in the cleat; that the cleat was rotten, about two feet long, three or four inches wide, and one inch thick, and lying on the ground beside the bottle. He also testified that he did not see any other box "around there with cleats off." On behalf of appellant witnesses testified that on the following day they found one of the bottles moved out from the others; that the cork was out; that the acid had spilled; that the cleats were on the crate; and they saw no loose or rotten cleats.

This is all the evidence that throws any light upon the manner in which the appellee was injured, and upon this evidence counsel for appellant insist that it was the duty of the court to direct a verdict. We must determine from these facts whether as a matter of law they acquit appellant of actionable negligence. If they do, then it was error to refuse the instruction. But, under the evidence before us, the question of appellant's negligence and appellee's freedom from contributory negligence becomes a mixed question of law and fact. We cannot say that the evidence is without conflict. On the contrary, upon the vital question at issue, there is a sharp conflict. This being true, that question should have been submitted to the jury under proper instructions.

Counsel for appellant make some effort to discredit the evidence of appellee's father, upon the theory that it is not shown that the crate and bottle which he saw the next day, and with the cleat off the crate, were the ones that ⁵²⁵ appellee was handling when he was injured. They urge that this fact is emphasized by the evidence of other witnesses who say that they did not, upon the following day, observe any such conditions. Appellee's father was asked and he answered this question: "If you saw this bottle and crate state that fact to the jury and when you saw them? A. I saw them the next day." Under this evidence it was a question for the jury to determine whether he saw the identical crate and bottle. It was also the province of the jury to determine from the conflicting evidence whether the bottle fell back by reason of the cleat's breaking, and whether it was rotten. Where the facts are controverted, or where negligence may or may not be inferred from facts proved, the question of negligence must be submitted to the

jury: *City of Indianapolis v. Mitchell*, 27 Ind. App. 589, 61 N. E. 947, and authorities cited; *Young v. Citizens' St. R. Co.*, 148 Ind. 54, 44 N. E. 927, 47 N. E. 142, and authorities cited.

There is evidence that the accident was caused by the cleat's coming off the crate, and that the reason it came off was because it was rotten. Appellee testified that it looked all right to him. He was not bound to make an inspection of it, for he was only chargeable with the duty of observing defects that were visible, open and apparent: *Linton Coal etc. Co. v. Persons*, 11 Ind. App. 264, 39 N. E. 214; *Gould Steel Co. v. Richards*, 30 Ind. App. 348, 66 N. E. 68; *Baltimore etc. R. Co. v. Amos*, 20 Ind. App. 378, 49 N. E. 854. If the cleat, or the crate, was defective, by reason of which the former came off, the defect might have been discovered by a reasonable inspection, and, as we have seen, this duty does not rest upon the servant, but upon the master: *Louisville etc. R. Co. v. Quinn*, 14 Ind. App. 554, 43 N. E. 240.

The rule is firmly established in this jurisdiction that where there is a conflict in the evidence, upon a material question at issue, it is an invasion of the province of the jury for the trial court to direct a verdict. This court, in *Hamilton v. Hanneman*, 20 Ind. App. 16, 50 N. E. 43, said: "It is within the power of the trial court to control or direct ⁵²⁶ a verdict by instructions, only where there is a total absence of evidence upon some essential issue, or where there is no conflict, and the evidence is susceptible of but one inference." The evidence before us, as to the essential issues for determination, is conflicting. It was the sole province of the jury to determine its probative force, as well as to determine what facts it established, and what legitimate inferences were deducible therefrom.

There was no error in refusing to give the instruction. The judgment is affirmed.

The Liability of a Master to His Servants for injuries due to defective tools, appliances, and premises is discussed in the notes to *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 289; *Houston etc. Ry. Co. v. DeWalt*, 97 Am. St. Rep. 884. In these notes will be found a discussion of the master's duty of inspection, and also the doctrine of assumption of risks and contributory negligence, as affecting the right of the servant to recover for injuries sustained by him in the service.

McNULTY v. STATE.

[37 Ind. App. 612, 76 N. E. 547.]

OFFICERS DE FACTO—Acts of—Collateral Attack.—If a notary public accepts the office of deputy district attorney, and after the expiration of the latter office swears the prosecuting witness to an affidavit charging a person with the commission of a crime, such official act, whether de jure or de facto, cannot be attacked collaterally. (p. 346.)

ATTORNEY AND CLIENT—Notary Public—Administration of Oath.—Although the notary public who takes the affidavit of the prosecuting witness charging another with a crime is also attorney for the prosecution, this fact does not leave the charge of crime open to a plea in abatement. (pp. 346, 347.)

J. F. Neal and J. F. Beals, for the appellant.

C. W. Miller, attorney general, C. C. Hadley, L. G. Rothchild and W. C. Geake, for the state.

613 **BLACK, P. J.** This was a prosecution upon affidavit and information for selling intoxicating liquor at an unlawful hour, it being charged that the appellant, on or about, etc., at, etc., "did then and there, between the hours of 11 o'clock P. M. of such day, and 5 o'clock A. M. of the succeeding day, unlawfully sell to Frank Burkhart, at and for the sum of thirty-five cents, certain intoxicating liquor in less quantity than a quart at a time, to be then and there drank by said Frank Burkhart as a beverage," etc. The appellant filed his verified plea in abatement, a demurrer to which was sustained.

The appellant denied the jurisdiction of the court over him, for the following reasons: 1. The information was filed upon an affidavit made by Oscar W. Powell, purporting to have been sworn to before Walter L. Carey as notary public. Carey, on May 27, 1901, was duly appointed and commissioned by the governor of the state of Indiana as a notary public, and then as such duly took the oath of office, qualified, gave bond and entered upon the duties of the office, which appointment was the only appointment, power or authority he had from and after that date to act as notary public in this state. After he had so received said commission, and had so qualified and taken upon himself the duties of a notary public, but long before the mak-

ing of such affidavit, Fred E. Hines, the duly ⁶¹⁴ elected, qualified and acting prosecuting attorney for Hamilton county, Indiana, duly and legally appointed Carey as deputy prosecuting attorney within and for that county, he to receive as compensation for his services as such deputy one-half of the fees allowed by law to be taxed, which should be collected, in each case prosecuted by him as such deputy. Carey then duly accepted such appointment, entered upon his duties as deputy, prosecuted a number of the pleas of the state, and collected and received one-half of the fees allowed by law to be taxed in such cases for the prosecuting attorney, all of which prosecutions he conducted as deputy prosecuting attorney by virtue of said appointment by Hines, and said fees were taxed and collected by him by virtue of his appointment as deputy as aforesaid, until a short time prior to the making of said affidavit, when he was discharged from such office by the prosecuting attorney, Hines; and at the time of the making of the affidavit Carey did not hold such office of deputy prosecuting attorney. At no time after he so accepted the office of deputy prosecuting attorney did Carey take or receive any commission or authority to act as notary public within this state, or qualify as such, nor at the time he attempted to swear Powell to the affidavit was Carey a notary public, nor did he then have any power or authority to administer such oath to Powell.

2. It was further averred that Carey had no authority, power or capacity to administer the oath to Powell, because at and before the time of the making of the affidavit Carey had been employed by some association, person or persons, unknown to the affiant, but not the state of Indiana or any of its officers, to procure evidence to sustain this prosecution, and on behalf of said association or persons to act as attorney in the prosecution of this cause for an agreed compensation, and was so acting as such attorney at the time he administered the oath to Powell, who had been and then was employed by said unknown persons or association to ⁶¹⁵ procure evidence upon which to base this prosecution, for which he was to be paid an agreed compensation, all of which Carey at the time well knew; that by reason of the facts aforesaid Carey, at the time he administered the oath to Powell, had an interest in the commencement of this action and the prosecution thereof, and an interest in the

prosecution, by reason whereof he was not disinterested, and had not capacity as notary public to administer such oath.

Assuming that the office of deputy prosecuting attorney is a lucrative office, by the acceptance of which the appointment of Carey as a notary was vacated, under section 8041 of Burns' Revised Statutes of 1901 (Acts 1891, p. 335), yet he had been duly appointed as a notary public, was duly qualified as such, and had entered upon the duties of the office, and the act of administering the oath was an official act which a notary public *de jure* might properly perform; and while at the time of administering the oath to the prosecuting witness Carey had no lawful authority to act as a notary public, yet his administering the oath was the act of an officer *de facto*, and could not be questioned collaterally, as the appellant sought to do by his plea. In administering and in certifying the oath, Carey was performing an act pertaining to the office of notary public under color of an office by virtue of his appointment and qualification as a notary public. Though his right to do so was subject to be questioned, he was not a mere usurper without any color of authority. His official act could not be questioned collaterally because of his having no legal right to continue to act as such officer, as it might if he were not such an officer either *de facto* or *de jure*: *Blackman v. State*, 12 Ind. 556; *Creighton v. Piper*, 14 Ind. 182; *Bansemer v. Mace*, 18 Ind. 27, 81 Am. Dec. 344; *Gumberts v. Adams Express Co.*, 28 Ind. 181; *Case v. State*, 69 Ind. 46; *Leech v. State*, 78 Ind. 570; *Mowbray v. State*, 88 Ind. 324; *Baker v. Wambaugh*, 99 Ind. 312; ⁶¹⁸ *Parker v. State*, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; *Davidson v. State*, 135 Ind. 254, 34 N. E. 972.

Ignoring the conclusions of law stated in the portion of the plea designated therein as the second paragraph, it does not appear therefrom that the notary public who administered the oath in question was interested as a party or could recover any judgment or be subjected to any judgment therein, or could become liable for any of the costs accruing therein. It merely appears that the person who as notary public administered the oath was employed for an agreed compensation, by persons unknown, to procure evidence on which to base the prosecution and to act as an attorney in the prosecution of the cause. The affidavit was the basis

of the information, and, if it would affect the question, it does not appear that he was employed to procure false evidence or a false affidavit. Such matter did not constitute a valid reason why the accused should not be held to answer to the charge of misdemeanor. The administration of the oath was within the statutory authority of the notary public, and we know of no statute forbidding such an officer to act as such under the circumstances as alleged.

In *Yeagley v. Webb*, 86 Ind. 424, it is said: "We know of no law in force in this state which forbids an attorney, who is also a notary public, from administering an oath to his client. The propriety of such an act may possibly be questioned, but the act is not illegal. The oath thus administered is a legal oath, and, if untrue, the affiant, might, doubtless, be convicted of perjury therefor": See, also, *Creighton v. Piper*, 14 Ind. 182.

Some objections are urged to the action of the court in refusing an instruction and in giving instructions, but none of these instructions are set out, nor is the substance of any of them stated in the appellant's brief.

The evidence was such that this court cannot interfere with the result reached thereon in the trial court.

Judgment affirmed.

The Acts of Officers De Facto are, as a rule, valid as to the public and third persons (*Greene v. Village of Rienzie*, 87 Miss. 463, 112 Am. St. Rep. 449, and cases cited in the cross-reference note thereto), and cannot be collaterally assailed: *Hamlin v. Kassafer*, 15 Or. 456, 3 Am. St. Rep. 176; *Jewell v. Gilbert*, 64 N. H. 13, 10 Am. St. Rep. 357. This rule applies to the acts of notaries public: *Davenport v. Davenport*, 116 La. 1009, 114 Am. St. Rep. 575.

Who are De Facto Officers is the subject of a note to *Hildreth v. McIntire*, 19 Am. Dec. 63. A person who, after accepting one office, is appointed to and accepts another and incompatible office, but continues publicly to discharge the duties of the first office, is a de facto officer: *Oliver v. Mayor etc. of Jersey City*, 63 N. J. L. 634, 76 Am. St. Rep. 228. As to what offices are incompatible, see the note to *Attorney General v. Oakman*, 86 Am. St. Rep. 578.

UNGER v. MELLINGER.

[37 Ind. App. 639, 77 N. E. 814.]

APPEAL—Attack on Answer.—An answer cannot be attacked for insufficiency of facts for the first time on appeal. (p. 349.)

PLEADING—Answer—Denial of Part of Complaint.—A single paragraph of an answer may confess certain allegations of a complaint, and avoid the complaint by affirmative facts and deny all others, and such paragraph will be treated as containing but one ground of defense. (p. 350.)

APPEAL—All Questions not Argued in appellant's brief are waived. (pp. 350, 351.)

NEW TRIAL—Weight of Evidence.—A motion for a new trial on the ground of insufficiency of the evidence sufficiently presents the question of the weight of the evidence on appeal. (p. 350.)

HUSBAND AND WIFE—Descent and Distribution.—Husband and wife, by virtue of the marital right, have each a contingent interest in the other's property, which, in the event of death, becomes fixed in the survivors, and which can be abridged or taken away only to the extent stipulated in a marriage settlement. (p. 352.)

HUSBAND AND WIFE—Antenuptial Settlements—Consideration.—Marriage furnishes a consideration for an antenuptial agreement, which will be effective to control the marital right of each in the estate of the other, although the statute may provide a different rule. (p. 352.)

HUSBAND AND WIFE—Postnuptial Settlements—Consideration.—Marriage furnishes no consideration for a postnuptial settlement. (p. 352.)

HUSBAND AND WIFE—Conveyance of Inchoate Rights.—The inchoate interest of husband or wife in the other's property cannot be conveyed without conveyance of the property of the other. (p. 352.)

HUSBAND AND WIFE—Postnuptial Settlements—Consideration.—A postnuptial promise by a husband to release his wife's property from any claim of marital right is no consideration for a promise by his wife to release her marital rights in her husband's property. (p. 353.)

HUSBAND AND WIFE—Postnuptial Settlements.—A postnuptial agreement by a husband to release his claim of marital rights in his wife's property, in consideration that she release her marital rights in his property, is executory and without consideration, and may be disregarded by either. (p. 353.)

J. C. Rogers and W. R. Moore, for the appellant.

Brambaugh & Curtis, for the appellee.

⁶⁴⁰ MYERS, J. By petition filed in the court below appellant sought an order against the executor of the estate of his deceased wife, requiring such executor to distribute to him one-third of the net proceeds of her personal estate.

The petition is in one paragraph, and is upon the theory that, as surviving husband, and having renounced the testamentary disposition of the property made by his wife, he is allowed by law one-third of her personal estate. Appellee answered appellant's petition by confession and avoidance. A demurrer to this answer for want of facts was overruled, and issues thereon formed by reply in general denial. These issues were submitted to the court for trial, finding and judgment. Evidence was introduced and argument of counsel heard, and on November 17, 1904, the cause was submitted to the court for final decision, and the same taken under advisement. On December 5th, and before any decision of the court was had, appellee asked and ⁶⁴¹ obtained leave to file an additional answer to appellant's petition, and to introduce additional testimony, to which action of the court appellant excepted. Appellant's additional answer alleges a postnuptial contract in writing by which appellant and appellee's decedent, Eliza Unger, mutually contracted that neither should inherit from the one dying first; that neither would claim any of the property, real or personal, of the other, which either might own at the time of his or her death; that said agreement has been mislaid, lost or destroyed; that diligent search and inquiry has been made and the same cannot be found; that he is unable more fully to set it out in his answer. Judgment is demanded. The general denial formed the issue on the answer. Appellee introduced evidence in support of this additional paragraph, and the cause was again submitted for final consideration and decision by the court. On December 13th the court made a general finding for appellee, and rendered judgment that appellant take nothing by his petition, and judgment for costs in favor of the estate represented by appellee.

We will consider the errors assigned in the order presented by the record.

1. By appellant's first assignment of error he questions the sufficiency of appellee's additional answer for the first time on appeal. Under our code a complaint for want of facts may be so challenged, but such right does not extend to an answer: *City of Evansville v. Martin*, 103 Ind. 206, 2 N. E. 596; *Deller v. Hofferberth*, 127 Ind. 414, 26 N. E. 889; *Moreland v. Thorn*, 143 Ind. 211, 42 N. E. 639; *Austin v. McMains*, 14 Ind. App. 514, 43 N. E. 141.

2. The second error is based on the overruling of the demurrer to the second paragraph of answer. From the briefs filed in this cause there appears to be some controversy as to whether the pleading filed by appellee, designated as an answer to appellant's ⁶⁴² petition, is to be treated as an answer in one or two paragraphs. It seems that appellant treated such answer as an answer in two paragraphs. The record entries so designate it, but appellee insists that although the answer confesses and avoids part of the allegations of appellant's petition and denies all others, it is nevertheless a single defense and should be treated as a single paragraph. Our code (Burns' Rev. Stats. 1901, sec. 350; Rev. Stats. 1881, sec. 347) provides that where more than one ground of defense is relied on "each shall be distinctly stated in a separate paragraph, and numbered." If the pleading was intended as an answer containing more than one paragraph, it is not in accord with the above provision of the code. The pleading does not contain a general denial to appellant's petition, but the denial is limited to such allegations as are not admitted and sought to be avoided by affirmative facts. It does not admit and deny the same facts so as to constitute a contradiction, and thereby make the pleading bad: *Weser v. Welty*, 18 Ind. App. 664, 47 N. E. 639; *Board v. Woodring*, 12 Ind. App. 173, 40 N. E. 31. A recognized rule of pleading permits a single paragraph of answer to confess certain allegations of a complaint, and avoid the same by affirmative facts and deny all others, and such paragraph will be treated as containing but one ground of defense: *Childers v. First Nat. Bank*, 147 Ind. 430, 46 N. E. 825; *State v. St. Paul etc. Turnpike Co.*, 92 Ind. 42; *Colglazier v. Colglazier*, 117 Ind. 460, 20 N. E. 490.

Considering the allegations of the petition which are denied and those confessed and attempted to be avoided by the answer, we must conclude that it was the purpose of the pleader to set forth but a single defense, and the pleading should be construed as a single paragraph. At the time of filing the demurrer, the overruling of which is the basis of this error, there was no answer on file to which such demurrer was applicable, and for that reason the court did not err in overruling it.

⁶⁴³ 3. The court refused to require appellee to make the second paragraph of answer more specific, and on this ruling

error is assigned. This assignment is not argued, and will be considered as waived. In any event, the conclusion reached on the second error herein is decisive of this question against appellant.

4. Appellant's fourth error asks this court to weigh the evidence. The question sought to be presented by this error is presented by his motion for a new trial: *Parkison v. Thompson* (1905), 164 Ind. 609, 73 N. E. 109.

5. Appellant's motion for a new trial was overruled, and this ruling is assigned as error. In the original motion many causes are noted, but we will consider only those here argued by appellant. Appellant insists that the decision of the court is contrary to the evidence and contrary to law. The evidence in this cause clearly establishes that at the time of the marriage of appellant with appellee's decedent, each had a separate estate, personal and real. The same was kept separate and apart from the other and treated as separate estates during their entire married life. One witness testified that he had known the appellant about fifty years and had been on friendly terms with him during that time, and in a conversation relative to the property of himself and wife, and the right of one to the property of the other, and as to a contract or agreement between himself and wife, appellant said there was both an agreement and contract in black and white, and that both had signed it. He said she should receive nothing and he should receive nothing, he had enough. Another witness testified to having heard the same conversation, and that Mr. Unger said: "That was all fixed in black and white; when she dies I get nothing of her property, and when I die she gets nothing of my property, I have enough." The scrivener who prepared the will of decedent testified that appellant and his wife came to his office, and Mr. Unger told him that his wife wanted to make her will, and "he said, 'I want her ⁶⁴⁴ to make her will,' and we sat down to the table that was there in the office and I took down in pencil memorandum the will, the points as they were given to me there by Mrs. Unger, in the presence of Mr. Unger, and after it was in typewriting I read the will to them, and Mrs. Unger signed it in my office, in the presence of Mr. Unger. . . . He said that he did not want any of her property; that he wanted Aunt Eliza to do with the property as she pleased, and the will

was written that way." The foregoing is a substantial statement of the evidence supporting the contention of appellee.

In this state common-law property rights, as between husband and wife, have been modified, yet by virtue of the marital right the law casts upon each a contingent interest in the other's property, which, in the event of death, becomes fixed in the survivor, and which can be abridged or taken away only to the extent stipulated in a marriage settlement.

Such settlements or contracts, like all other contracts, must be supported by a consideration. Marriage furnishes a consideration for an antenuptial agreement, and such agreement will be effective to control the marital right of each in the estate of the other, although the law may provide a different rule: *McNutt v. McNutt*, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372, and authorities there cited.

In the case at bar appellee rests his defense to the petition upon what is claimed to be a postnuptial contract, whereby each was to hold his or her antenuptial property to his or her separate use, and on the death of one the survivor to have no marital claim on the estate of the other. Unlike antenuptial contracts, marriage furnishes no consideration for a postnuptial agreement. "In the one case it prevents the inchoate right from attaching, while, in the other, it can at the utmost do no more ⁶⁴⁵ than remove it after it has attached": *Bishop's Law of Married Women*, sec. 430.

There is absolutely no evidence of any transfer of property from either of the parties to the other or a release of any present or contingent interest, by any mode known to the law. The inchoate interest of the wife in the lands of her husband is not an estate which can be conveyed without joining with it the interest of the husband: *Davenport v. Gwilliams*, 133 Ind. 142, 31 N. E. 790, 22 L. R. A. 244; *Rupe v. Hadley*, 113 Ind. 416, 16 N. E. 391; *Frain v. Burgett*, 152 Ind. 55, 50 N. E. 873, 52 N. E. 395; *Ohio Farmers' Ins. Co. v. Bevis*, 18 Ind. App. 17, 46 N. E. 928; *Howlett v. Dilts*, 4 Ind. App. 23, 30 N. E. 213. It has also been held that the husband's interest in the wife's land "is precisely of the same character as the wife's inchoate interest in his real estate." This being true, he had no present interest in his wife's real estate which could have been separately conveyed for any purpose: *Huffman v. Copeland*, 139 Ind. 221, 38 N. E. 861.

As we see the evidence in this case, there is a failure of proof to show any consideration to support the agreement to forego the marital right each had in the other's property. But if it could be concluded that the contract was of such a nature that the release of the inchoate interest of the one should be considered as a sufficient consideration for the release of the inchoate right of the other (and there is no evidence of such fact), then the contract would be executory, and of no binding force in case either should choose to disregard it, and claim the provision made by law.

The personal property of each remained in the possession and under the absolute control of its owner, and was subject to the disposition of such owner, without the consent of the other party to the agreement. There was nothing in the contract proved to prohibit such disposition, and, this being true, it follows that either was ⁶⁴⁶ at liberty to revoke such agreement at any time. Appellant disaffirmed the testamentary disposition made by his wife of her property, and is demanding his rights under the law. This, under the facts here appearing, he is at liberty to do. In view of this conclusion, we deem it unnecessary to notice any other questions here presented.

Judgment reversed, with instructions to grant a new trial, and the right to the parties to amend the pleadings if either of them so desires.

Contracts Between Husband and Wife whereby they agree to live apart from each other and to adjust their property rights, are discussed in the note to *Baum v. Baum*, 83 Am. St. Rep. 859. If a husband and wife execute an agreement of separation by which each releases all claim to the property of the other and all right of inheritance thereto, and the agreement is lived up to by both during her lifetime, he will not be heard to say, after her death, that the contract is not fair: *Estate of Edelman*, 148 Cal. 233, 113 Am. St. Rep. 231.

The Assignment or Release of Expectant Estates will be found discussed at length in the note to *McCall v. Hampton*, 56 Am. St. Rep. 339.

Marriage Settlements are discussed in the note to *Merritt v. Scott*, 50 Am. Dec. 371, and in the recent case of *South Carolina Loan etc. Co. v. Lawton*, 69 S. C. 345, 104 Am. St. Rep. 802. The antenuptial agreement of a wife to waive her homestead rights is unenforceable: *Zachmon v. Zachmon*, 201 Ill. 380, 94 Am. St. Rep. 180.

Am. St. Rep., Vol. 117—23

CASES
IN THE
SUPREME COURT
OF
INDIANA.

MCDANIEL v. OSBORN.

[166 Ind. 1, 75 N. E. 647.]

MECHANICS' LIENS—Mortgages—Priority.—A statute making debts due for manual or mechanical labor a preferred claim against the property of the debtor in the hands of an assignee or receiver does not give such debts a preference over a prior mortgage on such property. (pp. 357, 358.)

M. W. Hopkins and R. T. McFall, for the appellants.

R. T. Hollowell and Harding, Hovey & Wiltsie, for the appellees.

¹ MONTGOMERY, J. Appellee Cyrus Osborn brought this suit upon two notes, one for eight hundred and fifty dollars and one for twelve hundred dollars, ² dated January 13, 1898, due in four months and in two years, respectively, after date, and to foreclose two real estate mortgages given to secure the same. Appellants, upon their own application, were made parties to the suit, and filed their intervening petition, setting up their respective claims against the mortgagor, and averring that they were liens upon the mortgaged property superior to the lien of appellee Osborn's said mortgages. Said appellee's demurrer to this petition for want of facts was sustained, and, appellants declining to plead further, judgment was rendered against them for costs. Such further proceedings were had in the case as resulted in a judgment for appellee Osborn upon said notes, and a decree foreclosing said mortgages and ordering the sale of the mortgaged premises.

It is alleged on appeal that the court erred in sustaining the demurrer of appellee Osborn to the intervening petition of appellants.

Appellants averred in their petition that James O. Winsted, the mortgagor, became the owner of the real estate in question on December 19, 1892, and continued as such owner until July 15, 1901, at which time he made a voluntary assignment of all his property to Henry S. Cox, as trustee for the benefit of his creditors, under the laws of this state; that at the time of the execution of said mortgages said Winsted was, and prior thereto had been, and thereafter until the date of assignment continued, in the business of general farm implement merchandizing; that on July 15, 1901, said Henry S. Cox accepted the deed of assignment, caused the same to be duly recorded, qualified as such assignee, and entered upon the duties of his trust; that on October 5, 1901, said Winsted was duly adjudged a bankrupt by the United States district court for the district of Indiana, and on November 25, 1901, James M. Ogden was appointed and qualified as trustee in bankruptcy of all the property of said bankrupt; that in January, 1902, appellee Osborn commenced this suit, and caused William ³ C. Osborn to be appointed by the court as receiver of the mortgaged property, "to take charge of the property, rent the same, and collect the rents and profits and apply them to the payment of the plaintiff's debt, taxes, and the making of necessary repairs of the buildings on said property," and that said receiver qualified and took charge of said property; that the money realized from sales of property coming into the hands of James M. Ogden as trustee in bankruptcy was not more than sufficient to pay the actual costs of the administration of said bankruptcy matter, and that there were no funds and would be none for distribution to any creditor of said Winsted; that within six years next preceding July 15, 1901, appellants each performed "manual and mechanical labor, work and services for said James O. Winsted, at his special instance and request, for which he is indebted" to appellant McDaniel in the sum of one hundred and seven dollars and eighty-five cents, to appellant Sadie Winsted in the sum of one hundred and twelve dollars and seventy-five cents, and to appellant Elmer B. Winsted in the sum of eight hundred dollars and thirty-nine cents, all of which was due; that said James O. Winsted was insolvent, and all his property had passed into the hands of Henry S. Cox, as assignee as aforesaid, since which time he had not had any control of the same; and that the claim and right of appellee in and to said property was inferior to the liens and

claims of appellants. The prayer was that appellants' claims be decreed to be liens upon said real estate, and ordered paid first and in full out of the proceeds arising from the sale of said mortgaged premises. It was also shown by the record that by an order of the federal court the mortgaged property was abandoned by the trustee in bankruptcy, on the ground that there were no equities in the property above the mortgages.

The theory of appellants' petition evidently is that their claims for labor, under the statute, became liens upon the property of their debtor Winsted at the time the title to such property passed to his assignee under the deed of assignment for the benefit of creditors, superior to the liens and claims of all other persons; and that the lien, having once attached, was not divested by the subsequent bankruptcy proceeding in the federal court. If the premises are sound, the conclusion must of necessity follow.

The statute upon which the claims of appellants are based is section 7058 of Burns' Revised Statutes of 1901 (Acts 1885, p. 36, sec. 3), and reads as follows: "All debts due any person for manual or mechanical labor shall be a preferred claim in all cases against any individual, copartnership, corporation or joint stock company where the property thereof shall pass into the hands of an assignee or receiver, and such assignee or receiver in the distribution and payment of the debts shall be required to first pay in full all debts due for manual or mechanical labor before paying any other, except the legitimate costs and expenses." The act is entitled: "An act in regard to the payment of employes of companies, corporations, individuals and associations doing business or employing labor in this state." This statute has not been construed upon the point in question by this or the appellate court, but section 7051 of Burns' Revised Statutes of 1901 (Acts 1885, p. 95), which is similar in principle, has been considered in a number of cases.

Appellants' counsel, in support of their contention, have cited cases in which other statutes upon the subject of liens and preferences have been construed and applied, to which we will briefly refer. *Warren v. Sohn*, 112 Ind. 213, 13 N. E. 863, involved section 7448 of Burns' Revised Statutes of 1901 (Rev. Stats. 1881, sec. 5471), by the terms of which a lien is expressly given to miners and other employes for their labor, prior and paramount to all other liens,

except the lien of the state for taxes, and the decision is clearly right. *Bass v. Doerman*, 112 Ind. 390, 14 N. E. 377, involved section 7051, *supra*, and was correctly decided upon the facts stated. *Watts v. Sweeney*, 127 Ind. 116, 22 Am. St. Rep. 615, 26 N. E. 680, presented the question of priority of the lien of a mortgagee of a locomotive engine and that of a mechanic under section 7268 of Burns' Revised Statutes of 1901 (Rev. Stats. 1881, sec. 5304), for necessary repairs made upon the order of the mortgagor while in possession of the property, and was rightly decided. The case of *Farmers' Loan etc. Co. v. Canada etc. R. Co.*, 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740, correctly declared the priority of the lien of laborers for labor performed in the construction of a railroad, where the lien was acquired upon notice duly given and recorded as provided by sections 7265, 7266 of Burns' Revised Statutes of 1901 (Acts 1889, p. 257, sec. 6; Acts 1883, p. 140, sec. 13). In *Shull v. Fontanet etc. Min. Assn.*, 128 Ind. 331, 26 N. E. 790, it was held that the claim of a laborer rendering services for an assignee while in charge of and operating a coal mine was preferred, and should have been paid as a part of the costs and expenses of the assignee. The case of *Aurora Nat. Bank v. Black*, 129 Ind. 595, 29 N. E. 396, correctly declared the priority of the liens of laborers acquired upon notice given and recorded in accordance with the provisions of sections 7248, 7249 of Burns' Revised Statutes of 1901 (Rev. Stats. 1881, secs. 5286, 5287), by the terms of which such laborers might obtain "a first and prior lien upon the corporate property." *McElwaine v. Hosey*, 135 Ind. 481, 35 N. E. 272, correctly construed section 1 of the mechanic's lien law: Acts 1889, p. 257; Burns' Rev. Stats. 1894, sec. 7255. The case of *Jenckes v. Jenckes*, 145 Ind. 624, 44 N. E. 632, also involved the construction of the mechanic's lien law (Burns' Rev. Stats. 1894, secs. 7255, 7257; Acts 1889, p. 257, secs. 1, 3), but it was expressly overruled in the case of *Sulzer-Vogt Machine Co. v. Rushville Water Co.*, 160 Ind. 202, 65 N. E. 583. The cases of *Small v. Hammes*, 156 Ind. 556, 60 N. E. 342, and *Bell v. Hiner*, 16 Ind. App. 184, 44 N. E. 576, construed section 7051, *supra*, and, so far as they may be deemed authority for the construction of the statute under immediate consideration, are disapproved.

There is no intent manifest in the title, or from any language employed in the body of the statute under considera-

tion, that an employé should have or could acquire a lien upon all the property of his employer on account of general manual or mechanical labor. It is provided, only, that * when the property of the debtor passes into the hands of an assignee or receiver for administration in the interest of creditors, and the estate is reduced to cash and ready for distribution, the laborer shall be so preferred as to receive payment of his claim first in point of time, and to the full amount, as against the claims of general creditors. As a general rule, an assignee or receiver cannot acquire or exercise any greater title or rights in and to the property committed to his control than the insolvent or embarrassed debtor had and could enforce. An assignor cannot transfer to his assignee a greater right than he holds himself; and, as against a bona fide and valid encumbrance upon his property, his assignment passes only his equity of redemption in the property covered by the lien. This equity of redemption is all that the assignee or receiver may ordinarily sell and administer upon, and by the sale of such equity and any other property in his hands, the fund is created for distribution, out of which the assignee or receiver is directed by this statute to pay labor claims first and in full, after the payment of his own legitimate costs and expenses. The assignment statute (Burns' Rev. Stats. 1901, sec. 2911; Rev. Stats. 1881, sec. 2674), expressly declares that "any part of the property assigned on which there are liens or encumbrances may be sold by the trustee, subject to such liens or encumbrances," except when otherwise ordered by the court for cause shown upon special application. There is a very clear and marked distinction between a preferred debt, and a debt secured by a specific lien. A general debt cannot become superior to another secured by a lien, unless expressly made so by a valid law; and, if a statutory lien is to be created, the language employed should be specific in declaring the fact, as well as the nature, character and extent of such lien. The construction contended for by appellants would require the court to infer the lien, and that it attached to this particular property, and superseded a pre-existing valid mortgage. If such a result is within the ⁷ meaning and intent of the statute, then, in case of an employer's insolvency, labor claims in amount unlimited, and bounded in time only by the statute of limitations, may be enforced against his estate to the displacement and exclusion of debts of unquestioned va-

lidity, secured by mortgage liens of many years' standing. We are unable to ascribe such an intent to the legislature, or so to interpret this statute. The obvious purpose of the legislature in this enactment was to give laborers of the class named in the statute preference in the payment of their claims from the estate of the insolvent employer, in the same sense and to the same extent that preference is given in the payment of funeral expenses under the statute for the administration of decedents' estates.

The facts alleged in appellants' intervening petition were not sufficient to show the existence of a lien in their favor upon the mortgaged premises, and the demurrer of appellee Osborn was rightly sustained. The judgment is affirmed.

Hadley, J., did not participate in this decision.

Preferred Claims for Labor against insolvent corporations are discussed in Michigan Trust Co. v. Grand Rapids Democrat, 113 Mich. 615, 67 Am. St. Rep. 486; note to Green v. Coast Line E. E. Co., 54 Am. St. Rep. 418. One who advances money to a going corporation to pay off claims of its laborers is not entitled, upon its subsequent insolvency, to any preference over other creditors, by way of subrogation: Bank of Commerce v. Lawrence County Bank, 80 Ark. 197, ante, p. 85.

McINTYRE v. ORNER.

[166 Ind. 57, 76 N. E. 750.]

AUTOMOBILES—Use of Highways—Negligence.—The employment of the automobile on the public highway as a means of transportation is a lawful use of the road, and if it results in injury to one traveling by another mode, the autoist cannot be held liable unless he was using his machine at a time, or in a manner, or under circumstances inconsistent with a proper regard for the rights of others. (p. 363.)

AUTOMOBILES—Negligence—Care Required.—One using an automobile upon the highway must take notice that the appearance and operation thereof are likely to frighten horses, and must govern himself and his machine accordingly. (p. 364.)

AUTOMOBILES—Negligence—Care Required.—If a person operating an automobile on the highway sees, or by the exercise of ordinary caution could see, that a team of horses in front of him were, under excitement, forcibly crowding off the road, and manifesting unmistakable fright, ordinary care requires him to slow up, stop his machine, or do whatever is reasonably required to relieve persons in the vehicle attached to the horses from their perilous situation, and, failing in this, he is guilty of negligence. (p. 364.)

AUTOMOBILES—Contributory Negligence.—A complaint alleging that defendant drove his automobile past plaintiff's team while going one way, causing the team to become badly frightened to defendant's knowledge, and that he, on the return trip, negligently drove his automobile at a high rate of speed up to within fifteen feet of plaintiff's team, does not show that the latter was guilty of contributory negligence in failing to alight from her carriage when she saw the automobile coming. (p. 365.)

NEGLIGENCE—Invasion of Province of Jury.—In cases involving negligence, where the facts are undisputed and the inferences which may be drawn from them are not equivocal, and can lead to but one conclusion, the court may adjudge as matter of law that there is or is not negligence, and may so instruct the jury. (p. 366.)

AUTOMOBILES—Negligence.—If a person is running an automobile at a high rate of speed, the assertion that the running of the machine required his undivided attention is no justification for his negligence in failing to look ahead and see the perilous situation of the driver of a team which has become frightened at the approach of the automobile. (p. 367.)

AUTOMOBILES—Negligence.—A person using an automobile when he sees that his approach is endangering the safety of the occupants of a vehicle in the highway must stop or check his machine until such danger is over, and on failing to do so is guilty of negligence, regardless of contributory negligence on the part of the occupants of such other vehicle. (p. 368.)

AUTOMOBILES—Negligence—Sudden Peril.—An instruction that if plaintiff, finding herself in sudden peril caused by the negligence of an automobile in approaching at a high rate of speed, in jumping from her carriage acted naturally and as an ordinary person might act under similar circumstances, she would not be guilty of contributory negligence, is proper. (p. 369.)

NEGLIGENCE—Contributory—Sudden Peril.—One who does an act under an impulse, or upon a belief created by a sudden peril attributable to another's negligence, is not to be regarded as guilty of contributory negligence, even though the act would be negligent if performed under circumstances not indicating sudden danger. (p. 369.)

TRIAL—Comment on Interrogatories.—Counsel, in argument, have the right to comment upon the interrogatories to be submitted to the jury. (p. 370.)

J. E. Rose and Marshall, McNagney & Clugston, for the appellant.

C. F. Holler, A. A. Adams and L. H. Wrigley, for the appellee.

59 **HADLEY, J.** Appellee successfully prosecuted this action against appellant to recover damages for injuries claimed to have been received by appellant's negligence in driving an automobile on the public highway.

The action is based upon the following facts disclosed by the jury in answers to interrogatories: The plaintiff, being

fifty-four years of age, and a resident of South Bend, about 3 o'clock P. M. on November 1, 1902, left the city of Auburn with the body of her deceased son to drive across the county to the town of Waterloo, there to take a train for home. The plaintiff and her son occupied the rear seat, and Mr. Ling and Mr. Mayfield, friends of her deceased son, occupied the front seat of a carriage which, with team to draw it, had been procured at a livery-stable for the purpose, but without the knowledge and approval of the plaintiff. One of the horses was to some extent afraid of automobiles and the other was not. Ling, accustomed to driving and managing horses, drove the team without approval, but without any expressed objection from the plaintiff. The road from Auburn to Waterloo runs in a ⁶⁰ northeasterly direction. On the journey the hearse preceded the carriage containing the plaintiff. Later in the same afternoon appellant, with three other gentlemen, left Auburn by the same road for Waterloo in a gasoline automobile belonging to appellant. The machine was two-seated, could speed twenty miles an hour, and exploded its gasoline in a chamber, which to some extent deadened the sound. Appellant drove and managed the machine. On the journey it was necessary for appellant to look ahead to avoid holes and obstructions in the road; but on the occasion of the plaintiff's accident appellant was operating his machine in an unusual and extraordinary manner, by going at a high rate of speed when meeting teams. On the way to Waterloo appellant drove his automobile past the carriage in which the plaintiff was riding, greatly frightened the horses, and caused them to crowd to the side of the road. Both appellee and appellant saw the fright of the horses. Appellant proceeded with his party to Waterloo, remained but a short time, and started to return to Auburn. A short distance from the former town he met the funeral party. The hearse was five hundred feet ahead of the carriage. A short distance before meeting the hearse, appellant drove his automobile to one side of the road and was about to stop when the driver of the hearse signaled him to come on. Appellant proceeded, and, having passed the hearse, he speeded his automobile toward the carriage at more than fifteen miles an hour, the machine puffing and making a great noise, and when it approached within two hundred feet of the carriage, the horses, in apparent fright, began crowding to one side of the road, and when within fifteen or twenty

feet of the plaintiff, whirled back into the road, and, in turning, the carriage cramped and broke a fore wheel, tipping the vehicle, and causing the plaintiff to be thrown out and injured. The driver held the lines firmly and taut, and an ordinarily cautious man could not have driven the team past the automobile, because it was approaching at a ⁶¹ high rate of speed. The driver did not request nor signal appellant to stop the machine; but when the horses whirled around, appellant threw off the power and applied the brake, and stopped the automobile when within fifteen or twenty feet of the plaintiff. The team manifested fright when the automobile was two hundred feet away, seeing which an ordinarily prudent man would have anticipated that the further forward movement of the machine would likely cause injury to the occupants of the carriage. If appellant had run his machine at less speed, it would have made less noise. He operated it in a careless manner, because he speeded it too fast and too close to the team.

There are two paragraphs of complaint, both proceeding upon the theory that the plaintiff was injured by the negligence of appellant in continuing to run his automobile on the highway at an excessive speed, and in failing to stop, or slow up, when, as alleged in one paragraph, "he saw from the frightened condition of plaintiff's horses that to proceed farther would result in injury to the plaintiff," and, in the other, by the exercise of reasonable care he might have known that fact. As relating to the question of negligence the complaint alleges: "That as said defendant approached said carriage with his said automobile, and when he was yet more than three hundred feet distant therefrom, the horses attached to said carriage drawing the plaintiff and her said companions became badly frightened at the approach of said automobile, the loud noise made by the propulsion thereof, and the operation of its said motor, the high and dangerous rate of speed—more than fifteen miles an hour—at which the same was approaching them, and the size and appearance of said vehicle, and plunged, reared, shied and exhibited all of the evidences of fear usually manifested by horses when greatly frightened, . . . and said defendant, well knowing said frightened condition of said horses, well knowing, also, that his said automobile, the approach thereof at said high and dangerous rate of ⁶² speed, and the noise made thereby, were the cause of such fright, and well knowing that the

nearer approach of his said automobile at said speed and under the circumstances aforesaid would greatly increase the fright of said horses, without exercising or using any care whatever, carelessly, recklessly and negligently propelled his said automobile at said high and dangerous rate of speed up to and until the same was within less than fifteen feet of said horses before the same was stopped or the speed thereof checked, . . . causing said horses to whirl around in said highway and run away to the south along the same, breaking one of the wheels of said carriage to which they were attached, and throwing the plaintiff with great violence out of said carriage upon the hard ground, whereby," etc. Is this a sufficient averment of negligence?

The employment of the automobile on the public highways, as a means of transportation, has been recognized in this state as a lawful use of the road (Acts 1905, p. 202; Burns' Rev. Stats. 1905, sec. 8703a et seq.; *Indiana Springs Co. v. Brown*, 165 Ind. 465, 74 N. E. 615, 1 L. R. A., N. S., 238), and if it results in injury to one traveling by another mode, the autoist cannot be held liable for the injury, unless it is made to appear that he used the machine at a time, or in a manner, or under circumstances inconsistent with a proper regard for the rights of others. There is nothing dangerous in the use of an automobile when managed by an intelligent and prudent driver. Its guidance, its speed and its noise are all subject to quick and easy regulation, and under the control of a competent and considerate manager it is as harmless, or may soon become as harmless, on the road, as other vehicles in common use. It is the manner of driving an automobile on the highway, too often indulged in by thoughtless pleasure seekers and for the exploitation of a machine, that constitutes a menace to public safety. While it is the law that the owners of automobiles, subject to ⁶³ statutory restrictions, have equal right with the owners of other vehicles to occupy the highways, it must be borne in mind that this equality of right imposes the reciprocal duty of managing one's vehicle, whatever its character, with care and caution to avoid causing injury to others with equal rights. As we said in *Indiana Springs Co. v. Brown*, 165 Ind. 465, 74 N. E. 615, 1 L. R. A., N. S., 238: "Each is required to regulate his own use by the observance of ordinary care and caution to avoid receiving injury, as well as inflicting injury upon the other." Within these principles it was incumbent upon appellant to

take notice, because it is a matter of common knowledge that motor carriages are, as yet, usually strange objects to horses, and likely to startle them when driven up in front of them at a rapid rate. We assume, therefore, that defendant knew when he met the plaintiff's carriage on his return to Auburn, especially after the fright he observed in the horses as he passed them on the way to Waterloo, that his car, operated in the manner and at the speed described, was highly calculated to frighten the horses, and liable to cause them to injure the occupants of the carriage. With such knowledge it was appellant's duty to keep a lookout ahead, and as he approached the carriage note the effect of his onward movement upon the horses, and when he saw, or could have seen by the exercise of reasonable caution, that the horses were, under excitement, forcibly crowding off of the road, and manifesting unmistakable fright, ordinary care required him to slow up, stop his machine, or do whatever was reasonably required to relieve the persons in the carriage of their perilous situation.

In *Shinkle v. McCullough*, 116 Ky. 960, 105 Am. St. Rep. 249, 77 S. W. 196, it is said: "If . . . appellant knew, or could have known by the exercise of ordinary care, that the machine in his possession and under his control had so far excited appellee's horse as to render him dangerous and unmanageable, it was his duty to stop ⁶⁴ his automobile, and take such other steps for appellee's safety as ordinary prudence might suggest." See, also, to same effect, *Christy v. Elliott*, 216 Ill. 31, 108 Am. St. Rep. 196, 1 L. R. A., N. S., 215, 74 N. E. 1035. This, it is alleged, appellant did not do, but, on the contrary, upon seeing the plaintiff's team rearing and plunging with fright, when three hundred feet away, knowingly drove his machine into their faces at the rate of more than fifteen miles an hour, without stopping, or checking his speed, until within fifteen or twenty feet of the plaintiff. As a charge of negligence this is far within the limits of the rule.

Appellant insists that the complaint shows upon its face that appellee was guilty of contributory negligence. The claim springs from the averments "that the plaintiff was traveling with three other persons in a two-seated covered carriage, drawn by a team of gentle, well-broken horses, which were in charge of, and driven by, a competent and careful driver, who sat upon the front seat of said carriage, while

the plaintiff and her son occupied the rear seat," and "on the road to Waterloo appellant, in his automobile, rapidly and with great noise, passed the carriage in which the plaintiff was riding, whereby the horses attached to said carriage became greatly frightened, and reared, plunged and became almost unmanageable."

It is argued that, since it is shown that appellee occupied the carriage when appellant drove his automobile by it on the road to Waterloo, we must presume, because not denied, that she, as well as appellant, beheld the fright and conduct of the horses; and when appellant was about to meet the carriage on his return from Waterloo and saw, as alleged, the horses plunging and crowding when the automobile was three hundred feet distant, we must also presume that appellee in the carriage saw the automobile coming as far as appellant in the automobile saw the frightened horses plunging, and so seeing and knowing the increasing peril it was negligence on her part to remain in the carriage and make no ⁶⁵ effort to reach a place of safety, or have the horses secured. The specific allegations of the complaint are not sufficient to overcome the presumption of noncontributory negligence created by the statute: *Greenwaldt v. Lake Shore etc. R. Co.*, 165 Ind. 219, 74 N. E. 1081. If we could presume that the plaintiff saw the automobile coming when three hundred feet away, and the team was at the time rearing and plunging, we could not presume that her failure to jump out of the carriage was negligence. It might have been far more dangerous under the circumstances to attempt to alight than to remain seated in the carriage. We think the second paragraph of the complaint is good, and that the demurrer thereto was properly overruled.

Complaint is made of the giving and refusing of certain instructions. In the third instruction given, the court, after directing the jury that if they found from the evidence the existence of certain enumerated facts relating to the conduct of appellant in the operation of his automobile at the time of the plaintiff's accident, continued: "If the facts established by the evidence are as above stated, then you should find for the plaintiff, unless you should also find it established by a fair preponderance of the evidence that there was contributory negligence on the part of, or imputable to, the plaintiff, which precludes a recovery by her." It is objected, first, that the instruction is erroneous, because the

court had no right to declare that any state of facts—if the question of negligence was to go to the jury—constituted negligence; that the most the court could have properly done was to set out a group of facts and authorize the jury to construe them under the law with all the other facts and circumstances in evidence, in determining the question of negligence. We think the rule here contended for by appellant is too narrow. There are frequent cases, no doubt, where certain facts in evidence may be selected, which, if standing alone, would constitute negligence, but which, when considered with other facts and circumstances in evidence of a modifying character, renders the question of negligence equivocal. In such cases it would clearly be error for the court to enumerate only the former class of facts, and direct the jury, if they found them proved, that they should find the existence of negligence; and equally erroneous if the unstated facts would even tend to render the question of negligence doubtful, or such as equally prudent persons would characterize differently.

But the controlling facts of a case may be of a character and so fully stated as to exclude all reasonable and possible modifying inference, and in such cases we see no impropriety in the court's informing the jury whether such facts if established are sufficient in law. In so doing there is no invasion of the province of the jury. The facts are for the jury, and the law for the court. If under the rules of the law a given class of facts, embodying all the controlling facts in evidence and the reasonable inferences arising therefrom constitute negligence, or due care, it is proper for the trial judge to tell the jury so for their guidance in returning their verdict. His primary duty on the bench is to see that the law is properly applied to the facts, and in principle he is doing the same thing whenever he is called upon to consider the correctness of a general verdict in the light of the special facts upon which it is founded as disclosed by answers to interrogatories.

The general rule is thus stated in *Shoner v. Pennsylvania Co.*, 130 Ind. 170, 28 N. E. 616, 29 N. E. 775: "In cases involving questions of negligence, the rule is now settled that, where the facts are undisputed [or found by a jury to exist], and the inferences which may be drawn from them are not equivocal, and can lead to but one conclusion, the court will adjudge as matter of law that there is, or is not, negligence." To the same effect, see *Mann v. Belt R. etc. Co.*, 128 Ind. 138,

26 N. E. 819; Board etc. v. Bonebrake, ⁶⁷ 146 Ind. 311, 45 N. E. 470; Oleson v. Lake Shore etc. R. Co., 143 Ind. 405, 42 N. E. 736, 32 L. R. A. 149.

It is not claimed by appellant that the facts summed up in the instruction were insufficient of themselves to constitute negligence; but he claims that the hypothesis should have embraced an additional fact shown by the evidence which tended to excuse him for not heeding the fright of appellee's horses and stopping his automobile sooner, namely, that he, as manager of the automobile, did not have time and opportunity to look, because it was necessary for him to keep his eyes and attention fixed on the track of the road to enable him to guide the machine safely by the carriage and avoid chuck holes and other obstacles.

We are unwilling to admit that the omitted fact would have furnished appellant with a shadow of justification for continuing to speed his machine at more than fifteen miles an hour to within fifteen or twenty feet of the carriage, and until the horses had whirled around, thrown the appellee out, and ran back onto the road. With the knowledge that the horses hitched to the appellee's carriage were nervous, and that he would soon meet them, it would be a strange rule of law that would permit him willfully to put his automobile into a high rate of speed, and relieve him from the duty of looking ahead and of the consequences of seeing the frightened teams, because the speed of his car required his uninterrupted attention to the road. When, at the distance of two hundred feet, he saw the team trying to break away with fright, it was appellant's duty under the law to stop or check up, and stop or lessen the noise of his motors, as it was shown he could easily have done within a few feet and within a few seconds. Because he did not do it under the circumstances shown and summed up by the court, but one conclusion can be drawn from his conduct.

On this point it is also suggested that a further fact should have been included in the hypothesis, to wit, that as ⁶⁸ the team was successfully controlled when appellant passed on the way to Waterloo, he had a right to believe he could pass them on his return without injury to the occupants of the carriage. Whatever warrant appellant might have had from this incident for such belief, it was completely nullified when, upon his return, approaching the horses, and two hundred feet distant, he beheld the animals

enter into violent efforts to break away. When it became evident to him that his further progress would increase the peril of those in the carriage, his duty was to stop, or at least to check up, without reference to whether the occupants of the carriage were guilty of negligence.

A further objection is made to this instruction because it defines what will constitute negligence, and does not define what will constitute contributory negligence. Appellant has not the slightest ground for complaint on this point. In instruction No. 1, given upon the court's own motion, after enumerating the opportunities and acts of the plaintiff touching her relation to the driver, her knowledge of the habits of the team, her chance to see the automobile coming, her want of effort to seek a place of safety or to request appellant to stop, and other matters illustrative of her conduct precisely as was done in the behalf of the plaintiff in the instruction under consideration, concluded as follows: "Then I charge you as a matter of law that the plaintiff was guilty of such negligence contributing to her own injury as prevents a recovery in this action, and your verdict should be for the defendant." Our conclusion is that there was no error in the giving of the third instruction requested by appellee.

The sixth instruction given upon the request of appellee is also assailed. It is to the effect: It is claimed by the defendant that the plaintiff, when the team attached to the carriage in which she was riding turned around in the highway and just before she was injured, stood up in the carriage and jumped or tried to "jump out of the same; that by so doing she was guilty of negligence which contributed proximately toward producing the injuries of which she complains; that if she had remained seated in the carriage she would not have been injured; and that she is therefore precluded from recovering in this case. Even though the jury may find from the evidence that the plaintiff, when the team turned around and just before she was injured, if she was, did stand up in the carriage, or did endeavor to get out of the same, and that no injury would have occurred to her if she had remained seated, still, "if you further find from the evidence that the plaintiff was in a situation of sudden peril, which was brought about by the defendant's negligence, that in standing up in the carriage and in trying to get out of the same she acted under a sudden fright and impulse created by such peril, that in so doing she acted natur-

ally, and as ordinarily prudent persons might act when in like situation and under the influence of like fright and like impulses," then it will be a question of fact for you to determine from the evidence whether she was guilty of contributory negligence in so standing up in said carriage and in trying to get out of the same. The words quoted furnish the grounds for the criticism. It is insisted that it was erroneous to direct the jury that, if the plaintiff acted as ordinarily prudent persons might act in a like situation and under the influence of like fright and impulse, the jury was at liberty to determine whether she was guilty of contributory negligence, the argument being that prudent men often act imprudently, and that the real test of prudence is what prudent men usually do, and the statement that if plaintiff acted as an ordinarily prudent person might act under like circumstances was an inaccurate statement of the rule. It may also be stated with equal logic that when a prudent person acts imprudently, he is not a prudent person. To say the most, the distinction is refined, and not likely to mislead the jury when modified and explained ⁷⁰ by the context, to wit, that if the jury found that the plaintiff was in a situation of sudden peril which was brought about by the defendant's negligence, and she acted under a sudden fright and impulse created by such peril, and in so doing acted naturally, that is, in a manner expected of ordinarily cautious persons, and as ordinarily prudent persons might act, that is, might be expected to act, or would act, or would likely act, the question of her contributory negligence was for the jury.

The rule quite applicable to the facts in this case was stated by this court in *Clarke v. Pennsylvania Co.*, 132 Ind. 199, 31 N. E. 808, 17 L. R. A. 811, as follows: "One who does an act under an impulse or upon a belief created by a sudden danger attributable to another's negligence is not to be regarded as guilty of contributory fault, even though the act would be regarded as a negligent one if performed under circumstances not indicating sudden peril": See, also, *Indiana R. Co. v. Maurer*, 160 Ind. 25, 66 N. E. 156; *Pennsylvania Co. v. McCaffrey*, 139 Ind. 430, 29 L. R. A. 104. We are of the opinion that the instruction was not prejudicial to appellant.

Some complaint is made of the giving and refusing of a number of other instructions. We have carefully read
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and considered them all in the light of the evidence and accepted rules of the law, and find in them no substantial error, and in view of the final conclusion we have reached in the case, see no important end to be subserved by a prolongation of this opinion.

The court, having indicated his intention to submit to the jury one hundred and forty interrogatories requested by appellant, permitted appellee's counsel, over appellant's objection, to read and comment upon the same to the jury. This was not error: *Chestnut v. Southern Ind. R. Co.*, 157 Ind. 509; 62 N. E. 32; *Southern Ind. R. Co. v. Fine*, 163 Ind. 617, 72 N. E. 589.

We find no available error. Judgment affirmed.

The Law of the Automobile is the subject of a recent note to Christy v. Elliott, 108 Am. St. Rep. 212. The law of the road is discussed generally in the note to Biepe v. Etling, 42 Am. St. Rep. 366.

VANDALIA RAILROAD COMPANY v. STATE.

[166 Ind. 219, 76 N. E. 980.]

MANDAMUS—Contract Duties.—The duties of a corporation arising wholly out of contract obligations, and not imposed by express law, or by the conditions of its charter, cannot be enforced by a writ of mandamus. (pp. 372, 373.)

RAILROADS—Crossings.—A railroad company may be required to make safe and convenient crossings at the intersections of all highways, whether they were established and opened before or after the construction of the railroad. (p. 373.)

MANDAMUS—Railroads—Crossings.—A railroad company whose tracks cross any public streets, avenues, or alleys in any town or city may be required by statute to securely "grade and plank or gravel" such crossings, and mandamus will lie to enforce such duty. (p. 373.)

RAILROADS—Street Crossings—Contractual Duties.—A municipal ordinance granting a railroad company the right to use its streets, but requiring it to grade the crossings and maintain them safe and convenient, if merely declaratory of the statute law, does not make the company's duty therein wholly contractual. (p. 374.)

MUNICIPAL CORPORATIONS—Relinquishing Control of Streets.—Municipal corporations have no power to barter or contract away the present or future control of their streets, alleys or other public places, and they are under a continuing duty to keep them safe. (p. 374.)

MANDAMUS—Penal Ordinances—Railroad Street Crossings.—Although a municipal corporation could have constructed a railroad street crossing and could have brought an action against the company to recover the cost of the crossing and a penalty as provided by an ordinance, yet it has the right to enforce, by mandamus, the construction of such crossing by the company. (pp. 374, 375.)

MANDAMUS—Railroads—Street Crossings.—If a municipal ordinance requires a railroad company to make its street crossings convenient, and a statute requires it to "grade and plank or gravel," such crossings, the court may, under a writ of mandamus, upon the refusal of the company to do either, order the crossings to be planked where so asked in the petition for the writ. (p. 375.)

PLEADINGS, Theory of.—A pleading must be judged from its general tenor and scope, and when it assumes to proceed upon a distinct theory, it cannot be made good on some other by casting into it isolated statements, which, if fully pleaded in separate paragraphs, might constitute a cause of action or of defense. (p. 378.)

PLEADINGS—Answer—Confession and Avoidance.—A single paragraph of an answer cannot perform the double function of denying the cause of action, and of confessing and avoiding it, and its theory, in this respect, must be determined from the general scope of its averments. (pp. 378, 379.)

MUNICIPAL CORPORATIONS—Power to Contract Away Governmental Power.—A municipal corporation has no power, by contract, ordinance or by-law, to cede away, limit, or control its legislative or governmental powers, or to disable itself from performing its public duties. (p. 380.)

MUNICIPAL CORPORATIONS—Contracts—Streets—Railroad Crossings.—A contract between a railroad company and a municipal corporation by which the former agrees to construct a viaduct across its tracks at a street crossing in consideration that the latter will construct the abutments and approaches and keep them and the viaduct in repair for all time, is beyond the power of the city and void. (p. 380.)

S. Parker, J. G. Williams and Anderson, Du Shane & Crabill, for the appellant.

F. H. Dunnahoo and H. B. Wair, for the appellee.

221 MONTGOMERY, J. Appellee brought this action against the Terre Haute and Logansport Railway Company for a writ of mandamus to compel said company to open, plank and make safe and convenient for travel the crossing of Calvert street over its right of way, tracks and yard in the city of South Bend. An alternative writ was issued, whereupon the defendant appeared, waived service, and filed its demurrer for want of facts to the application, the alternative writ and to the petition and writ. This demurrer was overruled, and a return filed to which appellee successfully demurred, and, defendant declining to plead further, judgment was rendered in favor of appellee as prayed.

Appellant alleges that by consolidation it has succeeded to the rights of the Terre Haute and Logansport Railway Company, and by proper assignments of error presents for review the action of the court in overruling the demurrer to the alternative writ, and in sustaining appellee's demurrer to the return.

The alternative writ set forth the following, among other facts: The city of South Bend is a municipal corporation of this state. The Terre Haute and Logansport Railway Company is a railroad corporation operating a line of railway from Bronson street in said city to the south corporation ²²² line. On November 10, 1884, said city by ordinance, a copy of which is filed with the complaint, granted to said railway company a franchise to operate its said road across the streets and alleys of the city. Said railway company accepted said franchise, and ever since has acted under the same. The express condition of said franchise was that wherever a street or alley of said city was crossed by said railroad it should be made to conform with the grade of such street or alley as then fixed or thereafter established, and so maintained by said company as to cause the least obstruction possible to the passage of persons and vehicles. Said railway intersects Calvert street, formerly known as Elmira street, a public highway of said city, and in use as such by the public, at a point particularly described. Said street is sixty feet wide, and the grade thereof has been established for more than four years, but said company has not opened its real property, right of way or tracks at the point of intersection or made the same conform to the grade of said street, but has refused and still refuses so to do. On December 18, 1903, said city notified said railway company to open up said intersection, and to plank the same, but said company refused and neglected so to do.

It was provided by section 4 of the franchise ordinance that if after notice the railway company failed to do the things required of it by the ordinance, the same might be done by the street commissioner of the city, and the cost thereof, with twenty per cent penalty, recovered from the company in any court of competent jurisdiction.

Appellant argues that the passage of the franchise ordinance by the city and its acceptance by the railway company constituted a contract, that this action is founded upon such contract, and that duties of a corporation arising wholly

out of contract relations will not be enforced by writs of mandamus. It is well settled that the use of writs of mandamus is limited to the enforcement of obligations imposed by law; and duties of ²²³ a corporation arising wholly out of contract obligations, and not imposed by express law, or by the conditions of its charter, will not be enforced by such writs: *State v. Trustees etc.*, 114 Ind. 389, 16 N. E. 808; *Indiana etc. R. Co., v. Rinehart*, 14 Ind. App. 588, 43 N. E. 238; 19 *Am. & Eng. Ency. of Law*, 2d ed., 742.

The general railroad act of this state grants to a railroad company power "to construct its road upon or across any . . . highway . . . so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner so as to afford security for life and property; but the corporation shall restore the . . . highway thus intersected to its former state, or in a sufficient manner not to unnecessarily impair its usefulness": *Burns' Rev. Stats.* 1901, cl. 5, sec. 5153; *Rev. Stats.* 1881, sec. 3903. It has been frequently held that under this statute a railroad company is required to make safe and convenient crossings at the intersection of all highways, whether the same were established and opened before or after the construction of the railroad: *Louisville etc. R. Co. v. Smith*, 91 Ind. 119; *Lake Erie etc. R. Co. v. Cluggish*, 143 Ind. 347, 42 N. E. 743; *Evansville etc. R. Co. v. State*, 149 Ind. 276, 49 N. E. 2; *Egbert v. Lake Shore etc. R. Co.*, 6 Ind. App. 350, 33 N. E. 659; *Baltimore etc. R. Co. v. State*, 159 Ind. 510, 65 N. E. 508; *Lake Erie etc. R. Co. v. Shelley*, 163 Ind. 36, 71 N. E. 151; 3 *Elliott on Railroads*, sec. 1102.

Section 5172a of *Burns' Revised Statutes of 1901* (Acts 1895, p. 233, sec. 1) is as follows: "That it shall be the duty of each railroad company whose road or tracks cross, or shall hereafter cross, any street, avenue or alley in any incorporated town or city in the state of Indiana, which said street, avenue or alley has been, or shall hereafter be, by addition, plat or otherwise, dedicated to the public use, to properly grade and plank or gravel its said road and tracks at its intersection with and crossing of said street, avenue ²²⁴ or alley in accordance with the grade of said street or avenue, in such manner as to afford security for life and property at said intersection and crossing." It is thus seen that the duty which appellee seeks to have performed by this proceeding is one specifically enjoined by law and imposed by

appellant's charter. The performance of a similar duty has been enforced in numerous instances by proceedings of this character: Indianapolis etc. R. Co. v. State, 37 Ind. 489; Evansville etc. R. Co. v. State, 149 Ind. 276, 49 N. E. 2; Chicago etc. R. Co. v. State, 158 Ind. 189, 63 N. E. 224; Chicago etc. R. Co. v. State, 159 Ind. 237, 64 N. E. 860; Baltimore etc. R. Co. v. State, 159 Ind. 510, 65 N. E. 508.

The provisions of the franchise ordinance requiring the railway company to make and maintain safe crossings were simply declaratory of the law as it existed independently of the city's enactment, and it cannot be fairly said that the omitted duty complained of was one growing wholly out of contract obligations. In granting a franchise to use its streets, alleys or public places, the city exercises its delegated legislative powers, and for that purpose could not by contract barter away its future legislative control over such highways and places. It is the plain and continuing duty of a city to prevent the unnecessary obstruction of its streets, and to see that the same are kept in good order and safe for use by the public. The railway company, a quasi public corporation, is created to facilitate and not to impede travel, and from its nature as well as charter obligations the duty arises of keeping its intersections with highways in good repair and in condition for safe and convenient use by the public. In the case of Indianapolis etc. R. Co. v. State, 37 Ind. 489, this court disposed of a contention like that now made, in the following language: "But this ordinance is not a contract between the railroad company and the city, but simply a grant of the right of way ²²⁵ upon certain conditions and duties subsequent, to be performed by the company. And the proper means by which a corporation may be compelled to perform a plain duty—and the duty is plain in this case—is by a writ of mandate": Chicago etc. R. Co. v. State, 158 Ind. 189, 63 N. E. 224. See, also, Seymour Water Co. v. City of Seymour, 163 Ind. 120, 70 N. E. 514, and cases cited.

It is next urged that the relator could have constructed the crossing and brought an action for the cost of the same and the penalty as provided in the ordinance, and thereby have secured complete and adequate redress without resort to this extraordinary remedy. It is undeniable that either under the provisions of the ordinance or of sections 5172a-5172e of Burns' Revised Statutes of 1901 (Acts 1895, p.

233), the city might have pursued the course suggested; but the query remains whether such a remedy must be held adequate and exclusive. This question has been answered in the negative in the case of Indianapolis etc. R. Co. v. State, 37 Ind. 489, the court saying: "Can it be said, then, that this would be an adequate remedy? It would seem to us not. Or shall it be said that it is the duty of the city to fill up and grade the streets and alleys so as to make them convenient for passage, etc., at her own expense, in the first instance, and then be compelled to bring an action against the railroad company for reimbursement? If one have a right of action for a grievance against another, either for damages or for the specific performance of an act, it is certainly not an adequate remedy to him, to be compelled in the first instance to lay out one hundred dollars for the use of another, and then to have the right simply to recover back his money so laid out by him, and perhaps to get legal interest on his money."

The fact that, in addition to the cost, a specific penalty may be recovered in lieu of legal interest does not affect the principle. It would further seem to be more expedient and conducive to safety that such work as elevating or lowering ²²⁶ railway tracks and constructing crossings should be done by skilled workmen acting under orders from the company concerned, rather than by the inexperienced employes of the municipality. Our conclusion is that mandamus was an available remedy to enforce performance of this duty, notwithstanding the provisions for a different procedure: State v. New York etc. R. Co., 71 Conn. 43, 40 Atl. 925; State v. Minnesota etc. R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656.

It is further insisted that the choice of materials to be used for making the crossing should have been left to the company, and that the provisions of the mandate requiring the company "to plank the crossing" were not justified by the terms of the ordinance or by the facts stated in the writ. The ordinance does not purport to specify the materials required to make the crossing most convenient for use. The statute requires the railroad "to properly grade and plank or gravel its said road and tracks at its intersections." Conceding that, in the first instance, the company had an option as to materials to be used, providing the crossing was put in such condition "as to afford security to life and prop-

erty," it does not follow that after failure and refusal to construct any crossing, it may justly complain of a choice of materials made by the court. Appellee's petition asked for a plank crossing, the statute authorized the court to prescribe that material, and upon the facts and circumstances shown the court was warranted in requiring the crossing to be planked. The writ was not subject to the criticism of being too specific, but properly directed particularly what should be done in the construction of the crossing: 3 Elliott on Railroads, sec. 1106; Chicago etc. R. Co. v. State, 158 Ind. 189, 63 N. E. 224, and cases cited. The demurrer to the alternative writ was rightly overruled.

The return of the defendant below contained in substance the following averments: That the Terre Haute and Logansport ²²⁷ Railway Company is a corporation owning and operating a line of railroad from Terre Haute to Bronson street in the city of South Bend. On December 1, 1898, the Terre Haute and Logansport Railway Company, to whom the original franchise was granted, ceased to own said railroad. On October 28, 1903, defendant was served with notice from the board of public works of the city of South Bend to open Calvert street, formerly called Elmira street, across its tracks, and to plank the crossing in the usual manner, and that it failed and refused to do said work because of the following facts: At the time of the passage of said franchise ordinance the place where Calvert, or Elmira, street crosses said railroad tracks was outside the corporate limits of said city, and in 1887 was taken into the corporate limits of the town of Myler, and in 1892 said town was annexed and became a part of said city. On August 12, 1891, Frank S. Stover and thirteen others filed with the board of trustees of said town a petition for the establishment of a street, to be known as Elmira street, over the ground where the relator now claims said street is located. The special proceedings had in connection with the establishment of said street are set out in detail, tending to show that the Terre Haute and Logansport Railway Company was not legally notified of such proceedings. It is shown that prior thereto said company had executed an outstanding deed of trust on its property, and that the trustee therein named was not notified of said proceedings; and subsequently said deed of trust was foreclosed, and upon sale

said property was duly transferred to the defendant Terre Haute and Logansport Railway Company.

It is further alleged that in the year 1901 the relator was claiming that by virtue of the proceedings of the board of trustees of the town of Myler, said Calvert, or Elmira, street was located and established across the right of way, land, tracks and yard of the Terre Haute and Logansport Railway Company which, because of the special facts ²²⁸ pleaded, said company in good faith denied; that on January 17, 1902, for the purpose of adjusting and settling said conflicting claims, the relator, acting by its board of public works, entered into a contract whereby said railway company agreed to construct a steel viaduct over its tracks at said alleged street, and the relator agreed to construct the approaches thereto, and each to perform other agreements therein set out, which contract was in writing and was by ordinance duly ratified by the common council of said city. The viaduct agreement and ratifying ordinance are set out in full as part of the return. The agreement provided that in lieu of a grade crossing, the railway company should construct a steel viaduct above and across its tracks at Elmira street, with a paved roadway, thirty feet wide and sidewalks on each side eight feet wide, the bottom of the same to be twenty-two feet above the top of the rail, such work to be done when the city shall have money in hand sufficient to build the approaches to said viaduct, and through its board of public works and common council shall have ordered the approaches built, appropriated the necessary funds, and notified the railway company thereof, in writing; and when completed the city should "maintain and keep in repair said approaches and said viaduct for all time." It is further alleged that the construction of said viaduct would cost thirty thousand dollars, and that the railway company is now and at all times has been able, ready and willing to perform all its agreements in said contract contained, but that the relator has performed none of its agreements and given said company no notice to construct said viaduct, and that the public had acquired no right to use the alleged street across its yard and tracks, except in the manner set out and by the special proceedings of the board of trustees of the town of Myler, which it is charged were wholly insufficient. Wherefore defendant says it should not be com-

pelled to open the alleged street across its track and yard at grade.

²²⁹ Appellant's counsel assert and argue an insufficiency of the notice and return of service in the special proceedings of the board of trustees of the town of Myler for the establishment of Elmira street, a want of notice to the mortgagee of the property to be appropriated, and, in consequence, a taking of property without due process of law in violation of the fourteenth amendment to the constitution of the United States.

Appellee's counsel insist that the only question presented to and considered by the circuit court upon the demurrer to the return was the validity of the agreement therein pleaded.

Appeals are provided primarily to enable parties to secure a review of the decisions made by trial courts, and, generally speaking, upon appeal parties will be held to the position and theory assumed and maintained by them in the court below. In the preparation of issues for trial it is necessary to require parties to adopt and make their pleadings conform to some definite theory. When a pleading has been framed upon a manifestly definite theory, it must be good upon that theory or it will not be good at all. A pleading must be judged from its general tenor and scope, and when it assumes to proceed upon a distinct theory, it cannot be made good on some other by casting into it isolated statements, which if fully pleaded in separate paragraphs might constitute a cause of action or defense: *Western Union Tel. Co. v. Young*, 93 Ind. 118; *Western Union Tel. Co. v. Reed*, 96 Ind. 195; *Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269; 21 *Ency. of Pl. & Pr.* 652.

The manifest theory of the pleader was to show that a reasonable and bona fide controversy existed as to the validity of the proceedings for the establishment of Elmira street by the board of trustees of the town of Myler, as an inducement to and consideration for entering into the compromise agreement pleaded, and that said contract having been legally executed and not rescinded, ²³⁰ the railway company was thereby absolved from the duty declared upon, to construct and maintain a grade crossing at the point in controversy. "A single paragraph of answer cannot perform the double function of denying the cause of action, and of confessing and avoiding it. It must be one thing or the other, but it cannot be both; and its character, in this respect, must be

determined from the general scope of its averments": *Kimble v. Christie*, 55 Ind. 140. The return under consideration was intended to confess and avoid the duty sought to be enforced, and its sufficiency must be determined upon that theory. This conclusion forbids a discussion of the legality of the various steps taken in the proceedings to establish Elmira street, as well as the constitutional question raised.

The only question remaining for decision is the validity of the contract made between the railway company and the city, for the construction and maintenance of a viaduct. The charter of the city of South Bend authorized its board of public works to "design, order, contract for and execute the erection of any culvert, bridge, way, viaduct, tunnel or aqueduct within such city, or to enter into a contract with any company or individual for the joint erection and maintenance of such company or individual and such city of any such structure. . . . Provided, that such contract shall in all cases be submitted by said board to the council of such city and approved by them by ordinance before the same shall take effect": Burns' Rev. Stats. 1901, sec. 4190n8, Acts 1901, p. 198, sec. 72.

It is appropriate to note that the necessity, if any, for the viaduct provided for by the agreement pleaded was created by the existence and operation of the railroad. If the street was lawfully established across the tracks and ground of the railway company, a fact not denied by the return as we construe it, then the duty of making and maintaining a safe and convenient grade crossing devolved upon ²³¹ the company; and in such case the board of works would not be justified either in erecting or maintaining a viaduct solely at the city's expense. The authority, if any existed, for entering into the contract must be found in that part of the statute which empowered the board, with the approval of the council, to make a contract with any company for the joint erection and maintenance of such a structure. The power of the city to make this contract is in nowise affected by the circumstance that the agreement was the result of a compromise and settlement of an existing controversy. It is made to appear that the work contemplated has not been performed, and so far as disclosed no rights have attached by virtue of the agreement. The viaduct as planned was to

be forty-six feet wide, being fourteen feet less than the width of the street, and was to be maintained solely by the city "for all time."

Municipal corporations of this state are given exclusive control over their streets and alleys. This authority is conferred for the benefit of the public, and from it arises a continuing duty on the part of the city to exercise legislative control over its streets and alleys at all times and places when demanded by the public good. A municipal corporation has no power, by contract, ordinance or by-law, to cede away, limit or control its legislative or governmental powers, or to disable itself from performing its public duties: 1 Dillon on Municipal Corporations, 4th ed., sec. 97; Elliott on Roads and Streets, 2d ed., sec. 657; *Schipper v. City of Aurora*, 121 Ind. 154, 22 N. E. 878, 6 L. R. A. 318; *City of Peru v. Gleason*, 91 Ind. 566; *City of Indianapolis v. Indianapolis etc. Coke Co.*, 66 Ind. 396.

If the contract relied upon by appellant is valid its obligations are secure against impairment, not only by the city of South Bend, but also by the legislature itself; and the viaduct, once constructed, must be maintained by the city to the end of time, and the company and its successors be forever relieved of all duties ²³² now owing or hereafter to be imposed on account of the grade crossing. It is not at all improbable that the future policy of the state and the safety and convenience of the people may require the elevation or lowering of railroad tracks through cities and populous districts, and the preservation of ordinary highways upon natural grades free from obstructions. It is impossible to anticipate the changes which in the future may be found expedient, and the police regulations which may become necessary at this particular crossing. The viaduct contract in question provides for single maintenance by the city, instead of joint maintenance by both the parties, and it purports to bind the city and to limit and deny for all time its legislative and police control over this part of the street. That these provisions of the agreement are unauthorized and invalid is not only approved by reason and sound policy, but well supported by authority.

In the case of *State v. Minnesota etc. R. Co.*, 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656, the supreme court of Minnesota, in holding a very similar contract void, said:

"It cannot be that the common council of 1888, by the passage of a resolution providing for the construction of a bridge sixty feet in width in a street one hundred and twenty feet wide, to be perpetually maintained by the city, could limit or control the legislative action of its successors, or could abdicate its right, as future necessity should require, to compel the construction and maintenance of a bridge or viaduct of such dimensions, width, and construction as should, as nearly as may be, restore the street to its former condition of usefulness."

In the case of *Gale v. Village of Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80, in discussing a kindred contract, Cooley, J., said: "What would be thought proper for the village this year might be found worse than useless the next, and no official prescience could determine with absolute or even tolerable certainty what changes a few years might ²³³ work. Indeed, it is impossible to predicate reasonableness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise. Those powers are conferred in order to be exercised again and again, as may be found needful or politic, and those who hold them in trust to-day are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successors": See, also, *New York etc. R. Co. v. Village of New Rochelle*, 29 Misc. Rep. 195, 60 N. Y. Supp. 904; *Brimmer v. City of Boston*, 102 Mass. 19; *Milhau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314; *City of Oakland v. Carpentier*, 13 Cal. 540; *Mott v. Pennsylvania R. Co.*, 30 Pa. 9, 72 Am. Dec. 664; *Mayor etc. v. Bowman*, 39 Miss. 671; *Dingman v. People*, 51 Ill. 277; *Matthews v. City of Alexandria*, 68 Mo. 115, 30 Am. Rep. 776.

The agreement entered into between the relator and the railway company was, on the part of the city, an unwarranted surrender of legislative power and control over the crossing, and an unauthorized assumption of the burdens of another, and is invalid and void. We have already shown that the specific duty of making and maintaining a grade crossing was imposed upon the railway company, and, the agreement relied upon to provide a viaduct in lieu

of the crossing being invalid, it follows that the return was insufficient, and the demurrer thereto rightly sustained.

Finding no reversible error, the judgment is affirmed.

The Duty of Railroad Companies to construct or repair viaducts, which is imposed upon them by a city charter and ordinance, may be enforced by a writ of mandamus, especially where authority to proceed in that manner is conferred by the charter: Chicago etc. R. R. Co. v. State, 47 Neb. 549, 53 Am. St. Rep. 557. And a writ of mandamus will issue in a proper case on relation of a telephone company to compel a street railway company to place guard wires above its trolley wires at crossings of the latter with the telephone wires, as required by the city ordinances: State v. Janesville etc. Ry. Co., 87 Wis. 72, 41 Am. St. Rep. 23.

OHIO FARMERS' INSURANCE COMPANY v. VOGEL.

[166 Ind. 239, 76 N. E. 977.]

INSURANCE—Waiver of Proof of Loss.—Denial of liability by an insurance company within the time fixed for filing proof of loss is a waiver of the right to such proof. (p. 385.)

INSURANCE—Waiver of Proof of Loss—Authority of Adjuster.—When an insurance company has been notified of a loss under a policy issued by it, and sends an adjusting agent to inquire into the loss, and he, while engaged in or at the conclusion of such business, refuses payment and denies all liability of the company under the policy, his action, if within the time stipulated in the policy for the making of formal proofs of loss, is a waiver of such proof by the company. (p. 385.)

CONTRACTS—Execution and Enforcement by Courts.—Courts cannot make contracts for the parties to an action. They can only enforce the contracts as made. (p. 386.)

INSURANCE—Construction of Contracts.—Policies of insurance are to be construed like any other contracts. (p. 386.)

INSURANCE—Forfeiture—Knowledge of Breach.—Courts, in the absence of fraud, will refuse to enforce a condition of forfeiture on an insurance policy in favor of an insurer who has knowledge of such condition broken when he delivers the policy, accepts and retains the premium. (p. 386.)

INSURANCE—Breach of Condition—Election.—The breach of a condition in an insurance policy that it shall be "void if the building insured now is, or shall hereafter be, occupied by a tenant," does not render the policy void in case the premises are so occupied, but voidable merely at the election of the insurer, and when an election has once been exercised, the insurer will be confined to its choice. (p. 386.)

INSURANCE—Breach of Condition—Retention of Premium—Election.—The retention of the premium on a fire insurance policy after knowledge of the breach of a condition involving a right to forfeiture is an election to waive such breach and continue the policy

in force, and the policy should then be construed as though such condition had never existed. (p. 387.)

INSURANCE—Form of Policy—Construction—Conditions.—If a fire insurance policy is intended to cover property occupied by the owner, and provides that it shall become void if such property shall become unoccupied or occupied by a tenant, but is used to insure property exclusively occupied by tenants to the knowledge of the insurer at the time of issuing the policy, such conditions for forfeiture are inapplicable and cannot be enforced. (p. 388.)

INSURANCE—Vacancy Provisions—Construction.—Vacancy provisions in fire insurance policies are to be construed with relation to the character or class of property insured, and should not have the same interpretation when applied to houses to be occupied by the owner, as to houses to be occupied by tenants. (p. 389.)

INSURANCE—Vacancy Provisions.—If a fire insurance policy is taken on tenement property, a provision for forfeiture in case the premises become vacant will operate only after a reasonable time has elapsed in which to obtain other tenants. (p. 389.)

G. A. Deitch and S. A. Barnes, for the appellant.

W. T. Branaman and O. H. Montgomery, for the appellee.

²⁴¹ HADLEY, J. Appellee sued appellant to recover damages for the loss by fire of a dwelling-house, insured by the latter. The policy of insurance contained a condition in these words: "This entire policy, unless otherwise provided by agreement indorsed hereon, or added thereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, . . . or if the buildings insured herein, or any of them, now are, or shall hereafter become, vacant, or unoccupied, or occupied by tenants."

We assume, as stated by appellant in its brief, that the second paragraph of complaint was abandoned and the trial was had upon the first paragraph, to which a demurrer was overruled. There were nine paragraphs of answer, but the controlling issue was formed on the fifth. This answer was in effect that it was provided in said policy of insurance—a copy of which is filed—that the entire policy, unless otherwise agreed to and indorsed thereon, shall be void if the building insured now is, or shall hereafter become vacant or unoccupied. After the issuance of said policy said insured building became vacant and unoccupied, and was vacant and unoccupied at the time it was burned. It is also alleged that the vacancy and unoccupancy was without the knowledge and consent of the defendant and without an agreement indorsed on the ²⁴² policy, and defendant was wholly ignorant of the

fact that said building was vacant and unoccupied at the time of the fire. To this fifth paragraph of answer appellee replied in substance as follows: He admits that there was in the policy a stipulation or condition that the policy should be void if the insured building was then, or should thereafter become, vacant, or unoccupied, or occupied by tenants, and if the hazard be increased by any means within the insured's control, unless otherwise provided by agreement indorsed on the policy. And it is further averred that the house so insured was at the time of the execution of said insurance contract occupied by a tenant, which fact was then and there fully known by defendant, and the same was insured to be occupied by a tenant, and as a tenant house; that a general custom prevailed with the defendant and other insurance companies doing business in the community to grant a permit for insured buildings to be temporarily vacant and unoccupied for a period of thirty days, during changes of tenants; that the contract was entered into with full knowledge and with reference to such custom; that the insured house continued to be occupied by said tenant until 5 o'clock P. M. of the day it was destroyed, with the full knowledge and consent of the defendant, at which time said tenant, without any order or direction from the plaintiff, and without his knowledge or consent, removed therefrom; and four hours thereafter, and before plaintiff had learned of such removal, or had had reasonable time in which to learn of it, and while he was wholly ignorant of the fact, the same was, without plaintiff's fault or knowledge, destroyed by fire, as alleged in the complaint. It is further alleged that the risk was not increased by plaintiff at any time in any manner or by any means. Plaintiff's demurrer to the fifth paragraph of answer was overruled, as was also the defendant's demurrer to the plaintiff's reply. Verdict and judgment for appellee.

²⁴³ Appellant's assignment calls in question the overruling of his demurrers and of his motion for a new trial.

The only objection presented to the complaint is "that there is no sufficient allegation of facts to show a waiver of proofs of loss." Relating to this subject the complaint avers "that within sixty days after said fire plaintiff notified defendant of the same and of his said loss; that defendant's agent and adjuster came and looked at the premises, investigated said loss, and thereupon refused payment of the same, and denied all liability under said policy, and thereby waived

the written notice and sworn proofs of the loss provided for in said policy in case of damage or destruction of property by fire; that the plaintiff has performed on his part all the conditions of said policy of insurance." The principle is old and thoroughly established that when a party repudiates a contract and denies liability under it, the performance of conditions precedent, such as notice, demand, tender and the like, are waived on the ground that the law will not require a thing to be done which the party entitled has excused, or given notice that it will be unavailing. This principle applies to insurance as well as other contracts. Giving effect to this doctrine, it may be considered settled in this state that when an insurance company has been notified of a loss under a policy issued by it, and it sends an adjusting agent to inquire into the loss, and such agent, while engaged in or at the conclusion of such business, refuses payment and denies all liability of the company under the policy, such action by the adjuster, if within the time stipulated in the policy for the making of formal proofs of loss, will be held as a waiver of proof of loss by the company.

It was said by this court in *Aetna Ins. Co. v. Shryer*, 85 Ind. 362: "There is much diversity of opinion as to whether an adjuster has authority to waive preliminary proof. It would seem that the better reason is with the cases which hold that he has; ²⁴⁴ for a company that sends an agent to ascertain the nature, cause and extent of the loss, and employs him in that particular line of duty, may well be deemed to have invested him with a general authority in all such matters": See, also, *Germania Fire Ins. Co. v. Pitcher*, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003; *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400; *Home Ins. Co. v. Sylvester*, 25 Ind. App. 207, 57 N. E. 991; *German Fire Ins. Co. v. Seibert*, 24 Ind. App. 279, 56 N. E. 686; *Ft. Wayne Ins. Co. v. Irwin*, 23 Ind. App. 53, 54 N. E. 817; *Indiana Ins. Co. v. Pringle*, 21 Ind. App. 559, 52 N. E. 821; *Home Ins. Co. v. Boyd*, 19 Ind. App. 173, 49 N. E. 285; *Western Assur. Co. v. McCarty*, 18 Ind. App. 449, 48 N. E. 265. The demurrer to the complaint was properly overruled.

The reply to the fifth paragraph of answer presents a more interesting question. It involves the construction of the vacancy clause in the policy. The contract provides: "This entire policy, unless otherwise provided by agreement indorsed hereon, . . . shall be void, . . . if the buildings insured

herein . . . shall hereafter become vacant, or unoccupied, or occupied by tenants."

The reply avers that at the time of the insurance the house was occupied by a tenant, and that the defendant knew it, and insured the house to be occupied by a tenant and as a tenement. The demurrer admits these averments to be true. Therefore, to overthrow the ruling of the court we must hold that the policy was void from the moment of its execution, and that appellant, having knowingly accepted and retained appellee's money, surrendered under an honest belief that he was getting three years' valid insurance for the sum parted with, nevertheless is entitled to its judgment for cost. This is not in accord with equity and good conscience. It remains to be seen if it is sanctioned by the law.

245 We have this anomaly: On the one hand we have a written instrument of insurance, containing a provision that it shall be void if the house insured shall then or thereafter be occupied by a tenant; on the other, we have one party asserting, and the other admitting, that when the instrument was executed both parties knew the house was then occupied by a tenant, and in the execution of the policy both intended that the house should, during the life of the policy, continue to be occupied by a tenant. It is plain, therefore, that if the policy is enforced according to its terms the court will be found making a contract for the parties very different from the one they made for themselves. This the law never does. Its office is to enforce, not to make, contracts.

There is nothing mysterious or peculiarly venerable about the ordinary insurance policy, with its long list of provisions and conditions of defeasance. All these, and singular, must be construed like similar provisions in other written instruments, upon sound and well-established principles—principles that support the integrity of the contract, and that forbid an insurer from taking the money of another for a policy which he knows at the time of delivery contains a provision which, under the facts, will enable him to avoid it, if a loss occurs. Such provisions in insurance policies have been before the courts a great many times, and, so far as we have observed, courts have everywhere, in the absence of fraud, refused to enforce a condition of forfeiture in favor of an insurer who has knowledge of the condition broken when he delivered the policy. One reason is this: Having accepted a premium to take the risk of indemnifying the insured against loss, it is

incompatible for the insurer to attach to the policy a condition that will from the beginning relieve him of that risk.

Another reason is that, although so expressed in the instrument, a violation of such condition does not in fact ²⁴⁶ make the policy void, but voidable only, at the election of the insurance company (*Excelsior Mut. Aid Assn. v. Riddle*, 91 Ind. 84), and when an election has been once exercised the company will be confined to its choice. Thus, when appellant learned that the house was occupied by a tenant, it was free to choose between a refusal to issue the insurance because of the occupancy, or to waive the character of the occupancy and undertake the risk for the sum proposed. In short it had the right to elect between two inconsistent courses, and, having chosen one, it will be excluded from all rights and benefits of the other. In such case, in the absence of fraud, it will be conclusively presumed that the insurer, while he keeps the premium, waives the inconsistent provision: *Menk v. Home Ins. Co.*, 76 Cal. 50, 9 Am. St. Rep. 158, 14 Pac. 837, 18 Pac. 117; *Caldwell v. Fire Assn.*, 177 Pa. 492, 35 Atl. 612; *German Ins. Co. v. Shader*, 68 Neb. 1, 93 N. W. 972, 60 L. R. A. 918; *Hunt v. State Ins. Co.*, 66 Neb. 121, 92 N. W. 921; *Continental Ins. Co. v. Cummings*, 98 Tex. 115, 81 S. W. 705. To the same effect, see *Farmers' Ins. Assn. v. Reavis*, 163 Ind. 321, 70 N. E. 518, 71 N. E. 905; *Havens v. Home Ins. Co.*, 111 Ind. 90, 60 Am. Rep. 689, 12 N. E. 137; *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 77 Am. St. Rep. 423, 55 N. E. 119; *Hanover Fire Ins. Co. v. Dole*, 20 Ind. App. 333, 50 N. E. 772.

Within these principles and under these authorities appellant's policy in the hands of appellee, which was untainted by the latter's fraud, so far as the record discloses, should be read and enforced precisely as if said condition had never been in it.

This leads us to another consideration. The condition against the occupancy by a tenant is found as one of a class or group of conditions, separated by the word "or," and appears in a policy executed upon a printed form which, manifestly from the very phrase we ²⁴⁷ are considering, was designed for exclusive use in insuring houses to be occupied by the owner, and not designed, or even appropriate, without alteration, for use in insuring houses to be occupied as tenements. It is plain that the group of conditions referred to were suitable and intended to be incorporated in policies is-

sued to occupying owners. It is equally plain that all were not suitable or intended to be incorporated in policies issued for tenement occupancies. The policy in suit is in form of the former class, but the contract the parties made is of the latter class. And how shall we know what conditions, if any, are a part of it? We are certain that one appearing in the policy against occupancy by a tenant is not, and we see no possible ground for presuming that any condition of forfeiture was annexed to the insurance contract, as it was agreed upon. This, perhaps, should end the case as presented by the demurrers, for the answer is wholly based on broken conditions, and if there were no conditions there can be no breaches. Appellant, however, earnestly urges that the condition against vacancy was not waived and was broken. For convenience we repeat the words of the policy that give rise to this controversy: "This entire policy unless otherwise provided by agreement indorsed hereon, . . . shall be void, . . . if the buildings insured herein now are, or shall hereafter become, vacant, or unoccupied, or occupied by tenants."

It may be noted that the prohibitory clauses against vacancy and occupancy by a tenant stand together, separated only by the word "or," in a form of policy that we have seen is suitable and appropriate only for a contract of insurance on a house occupied by the owner. A further reason why both conditions were intended to apply to the same sort of policy is that the occupying owner is in absolute control of the vacancy. If he wants to vacate, it is a matter of convenience that he may arrange with deliberation and in accordance with his best interest, and so may ²⁴⁸ take plenty of time to see the insurance agent and procure his indorsement of a vacancy permit upon the policy. A tenant has always the right to "move out," with or without notice to his landlord, at the middle or end of his term; and it is very apparent that the landlord has not the control or perfect knowledge of the vacancy of his tenement, as he has of his own dwelling. As to the latter he may, because he knows, reasonably and safely contract that he will not, on a penalty, vacate without first obtaining the company's indorsed consent; while in the former case it would be neither reasonable nor safe, for want of notice of removal, to contract that his policy should be void the moment his tenant should vacate.

But conceding that the condition against vacancy should be considered as embraced in the insurance contract, appel-

lant's case would not be improved. We have seen that the agreement between the parties was for the insurance of a house to be occupied by tenants. The term of insurance was three years. The better reason and clear weight of authority hold to the doctrine that a condition against vacancy and unoccupancy, usually found in insurance policies, must be construed with relation to the character or class of property to which it relates; that it should not have the same interpretation when applied to churches and schoolhouses as when applied to stores and dwellings; nor the same when applied to houses to be occupied by the owner and to houses to be occupied by tenants.

Parties, when negotiating insurance on schoolhouses, know, at the time, because common knowledge, that the houses will be vacant, in a general sense, a large part of the year, and the contract is made with that implied understanding; and it is just as well known, when negotiating or writing a three years' term of insurance on a house to be occupied by tenants, that during the term the probabilities are that there will be some change ²⁴⁹ of tenants. When such changes occur, as they are liable to in spite of the efforts of the landlord, the necessary and reasonable time intervening between the outgoing and incoming tenant must be held to have been contemplated by the parties, and not intended to affect the validity of the policy, in the absence of something more specific than the general and usual condition against vacancy and unoccupancy. Upon this point the supreme court of Iowa, in *Worley v. State Ins. Co.*, 91 Iowa, 150, 51 Am. St. Rep. 334, 59 N. W. 16, said: "It must surely have been contemplated by the parties that there would be changes of tenants during the life of the policy, and that some time would intervene between the going out of one and the coming in of another. The condition against the premises becoming vacant must have been made in view of this probability, and it was not intended that the lapse of a reasonable time in changing tenants should render the policy void": See, also, to same effect, *Hotchkiss v. Phoenix Ins. Co.*, 76 Wis. 269, 20 Am. St. Rep. 69, 44 N. W. 1106; *Lockwood v. Middlesex Mut. Ins. Co.*, 47 Conn. 553; *Roe v. Dwelling-house Ins. Co.*, 149 Pa. 94, 34 Am. St. Rep. 595, 23 Atl. 718; *German Ins. Co. v. Davis*, 40 Neb. 700, 59 N. W. 698; *Traders' Ins. Co. v. Race*, 142 Ill. 338, 31 N. E. 392; *Dwelling-house Ins. Co. v. Walsh*, 10 Ky. Law Rep. 282; *Union Ins. Co. v. McCullough*, 2 Neb. (Un-

official) 198, 96 N. W. 79; *Shackelton v. Sun Fire Office*, 55 Mich. 288, 54 Am. Rep. 379, 21 N. W. 343; *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260, 23 Am. Rep. 111.

There was no error in overruling the demurrer to the second paragraph of the reply.

Appellant also complains of the overruling of its motion for a new trial. It is urged that the court erred in giving to the jury instruction eight, requested by the appellee. This instruction was framed upon the theory of the second paragraph ²⁵⁰ of reply, and embodied substantially the same language, and what we have said relative to the demurrer to the reply will sustain this instruction as a correct expression of the law. But appellant further argues that it was erroneously given because there was no evidence in the case to which it was applicable. In this it is mistaken. The testimony of appellant's agent, Day, justified the instruction, and upon the controlling facts there was really no conflict in the evidence.

There was also evidence tending to prove a denial of liability within sixty days from the loss, and the cause cannot be reversed for insufficiency of evidence on this point.

We find no error. Judgment affirmed.

Montgomery, J., did not participate in the decision of this case.

The Denial of Its Liability by an Insurance Company ordinarily amounts to a waiver of proofs of loss; *Security Mut. Ins. Co. v. Woodson*, 79 Ark. 266, 116 Am. St. Rep. 75; *Home Ins. Co. v. Koob*, 113 Ky. 360, 101 Am. St. Rep. 354; *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 99 Am. St. Rep. 295; *Angier v. Western Assur. Co.*, 10 S. Dak. 82, 66 Am. St. Rep. 685; *Wilson v. Commercial etc. Assur. Co.*, 51 S. C. 540, 64 Am. St. Rep. 700.

Conditions in Fire Insurance Policies against the premises becoming vacant or unoccupied are construed strictly and most strongly against the insurer: *Moody v. Insurance Co.*, 52 Ohio St. 12, 49 Am. St. Rep. 699. As to the effect of the knowledge or want of knowledge of the insured of a vacancy, see *Schuermann v. Dwelling-House Ins. Co.*, 161 Ill. 437, 52 Am. St. Rep. 377; *East Texas etc. Ins. Co. v. Kempner*, 87 Tex. 229, 47 Am. St. Rep. 99; *Strunk v. Fireman's Ins. Co.*, 160 Pa. 345, 40 Am. St. Rep. 721; *Moore v. Phoenix Ins. Co.*, 64 N. H. 140, 10 Am. St. Rep. 384.

The Waiver of Conditions and Forfeitures in insurance policies by the agents of the insurer is the subject of a note to *Johnson v. Aetna Ins. Co.*, 107 Am. St. Rep. 99.

CHENEY v. UNROE.

[166 Ind. 550, 77 N. E. 1041.]

CONTRACTS Entered into in Contravention of statute are utterly void. (p. 393.)

OFFICERS—Contracts Against Public Policy.—Any contract by a public officer binding himself to violate his duty to the public, or placing him in a position inconsistent with his duty to the public, and which has a tendency to induce him to violate such duty, is against public policy, and clearly illegal and void. (p. 393.)

OFFICERS—Contracts Against Public Policy.—A contract by a highway superintendent to labor for the contractors engaged to construct a public highway and accept pay therefor is opposed to public policy and void, though no fraud is shown. (p. 394.)

EVIDENCE.—Under a General Denial plaintiff must establish a cause of action upon which he has a right to recover, and any fact which goes to destroy, not to avoid, the plaintiff's cause of action is provable under the general denial. (p. 396.)

E. B. Sellers, for the appellants.

W. Cummings, for the appellee.

551 **HADLEY, J.** This is an action upon an open account for work and labor which appellee claims he performed for appellants in the construction of a certain macadamized road in White county. The road was constructed under the provisions of the free gravel road act of 1901 (Acts 1901, p. 449; Burns' Rev. Stats. 1901, sec. 6899 et seq.). The appellants were the contractors and appellee the superintendent of the road, under appointment and pay of the board of commissioners. The complaint counts on a special contract for work and labor at one dollar and fifty cents per day, but it is not shown that the work was performed on the road of which the plaintiff was the superintendent. The answer was the general denial, and payment. Verdict and judgment for plaintiff for the amount of his claim. The questions presented arise under the overruling of appellants' motion for a new trial.

The plaintiff testified that he was appointed superintendent by the board of commissioners and gave bond for the faithful discharge of his duties, namely, to see that the contractors executed the work of construction strictly in accordance with the terms and specifications of their contract, and his compensation was to be one dollar and fifty cents per day. Under his said appointment he acted as superintendent

two hundred and twenty-four days, for which the county paid him at the contract rate. During the time he was acting as superintendent he also worked for the contractors (appellants) at general and common labor on the road, under a contract that he was to receive for his work the same price paid the other hands on the road. Under this contract he worked for appellants one hundred and sixty-seven days and had received from them fifty-four dollars on account. On cross-examination he testified as follows: "Why did you work for one dollar and fifty cents per day? A. Because I was getting work from both parties. You worked for the county, and for those whom you were employed to watch, and got pay from both? A. Yes, sir; and I earned my money."

Touching the testimony appellants, at the proper time, requested the court to give to the jury the following instruction: ⁵⁵² "If you find from the evidence that the defendants were engaged in the construction of a public macadam road in White county, Indiana, during the year 1900, under contract with the board of commissioners of said county, and that the plaintiff was appointed by said board superintendent of said road, and qualified and gave bond as such superintendent, and entered upon the discharge of his duties as such officer, and so acted upon said road during the progress of the construction of the same, and if you further find that the work and labor sued for was done by plaintiff on said road while he was superintendent thereon and acting as such, and not otherwise, he would not be entitled to recover anything therefor, whether the defendants employed him to do such work or not, and it will be your duty to find for the defendants." The refusal of the court to give this instruction presents the principal question in the case.

There is a class of contracts, entered into by officers and agents of the public, which naturally tends to induce the officer, or agent, to become remiss in his duty to the public, that the courts unhesitatingly pronounce illegal and void as being contrary to public policy.

As indicating the state's disapproval of kindred contracts, the legislature has provided as follows: "Any . . . county commissioner, . . . or their appointees or agents, . . . who shall, during the time he may occupy such office, . . . be interested, directly or indirectly, in any contract for the construction of . . . work of any kind erected or built for the use of the . . . township, . . . shall be fined . . .

and imprisoned in the state prison," etc.: Burns' Rev. Stats. 1901, sec. 2136; Rev. Stats. 1881, sec. 2049. All contracts entered into in contravention of the statute are utterly void: *Wingate v. Harrison School Tp.*, 59 Ind. 520; *Case v. ⁵⁵³ Johnson*, 91 Ind. 477; *Benton v. Hamilton*, 110 Ind. 294, 11 N. E. 238.

It remains to be seen whether the contract sued on falls within the general class referred to above. "It is a well-established and salutary doctrine," says a distinguished author, "that he who is intrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself. This rule does not depend on reasoning technical in its character, and is not local in its application. It is based on principles of reason, of morality, and of public policy. It has its foundation in the very constitution of our nature, for it has authoritatively been declared that a man cannot serve two masters, and is recognized and enforced wherever a well-regulated system of jurisprudence prevails": 1 Dillon on Municipal Corporations, 4th ed., sec. 444. The principle is stated in 1 Clark & Skyles on Agency, section 39(e), as follows: "Any contract of agency by a public officer by which he binds himself to violate his duty to the public, or which places him in a position which is inconsistent with his duty to the public and has a tendency to induce him to violate such duty, is clearly illegal and void." Greenhood on Public Policy, page 337, states the doctrine thus: "Any contract by one acting in a public capacity which restricts the free exercise of discretion vested in him for the public good, is void": See, also, page 337 quoted approvingly in *Brown v. First Nat. Bank*, 137 Ind. 655, 37 N. E. 158, 24 L. R. A. 206.

The appellee was appointed superintendent by the board of commissioners pursuant to the statute: Burns' Rev. Stats. 1901, sec. 6869; Acts 1901, p. 439, sec. 2. He was a public officer: *City of Ft. Wayne v. Rosenthal*, 75 Ind. 156, 39 Am. Rep. 127. The duties of his appointment required him to be personally present on the road during its construction, and for and on behalf of the taxpayers of the township see to it for them that the road ⁵⁵⁴ was constructed in strict accordance with the plans and specifications of the contract. The interests of the taxpayers and contractors were adverse. Otherwise appellee's appointment was a useless expense. The General Assembly, when engaged in framing the statute, evi-

dently deemed it wise to provide for the appointment of some one to guard the interests of those who should be called upon to pay for the improvements, as against the contractor employed to make it. Such provision is in perfect accord with accepted business principles. This conflict of interest is the source whence the rule under consideration acquires its form and force by making the person who has one part intrusted to him incapable of acting or identifying himself with the other side, and by temptation be led away from the duties of his trust.

Influence is a subtle agent. It is often potential when its presence is unsuspected. Appellee testified that when one of the appellants introduced him to the other, the former remarked: "This is to be our superintendent on No. 2, and I think we will find him a reasonable man to deal with; and I think when we get started we will put him to work." This amounted to a declaration of confidence and liberal treatment, and strongly tended to invite return of like sentiment from appellee. The latter's natural desire to please his kind and liberal employers, and to continue to receive his wages, was well calculated to place him in a position where he might be induced by his own feelings and private interests to neglect the interest of the people whose agent and trustee he was. The claim that appellee's acceptance of employment from the contractors while he was acting as superintendent was without fraud and without prejudice to the interests of the taxpayers cannot be allowed. "It is of no consequence," said this court, speaking generally on the subject through Woods, J., in *Waymire v. Powell*, 105 Ind. 328, 332, 4 N. E. 886, "that no injury or that an actual benefit has resulted ~~ess~~ from such employment. The law will not permit public servants to place themselves in a situation where they may be tempted to do wrong, and this it accomplishes by holding all such employment, whether made directly or indirectly, utterly void": See *Lum v. McEwen*, 56 Minn. 278, 57 N. W. 662. A trustee cannot place himself in a position of antagonism to the beneficiaries of his trust. "An agent . . . must not put himself in a position which is adverse to that of his principal. As agent he cannot contract with himself personally. He cannot buy what he is employed to sell. If employed to procure a service to be done, he cannot hire himself to do it. This doctrine is generally applicable to private agents and trustees, but to public officers it applies with

greater force, and sound policy requires that there be no relaxation of its stringency in any case which comes within its reason": *City of Ft. Wayne v. Rosenthal*, 75 Ind. 156, 39 Am. Rep. 127.

In *Lum v. McEwen*, 56 Minn. 278, 57 N. W. 662, the manager of a lumber manufacturing business agreed with a third person, on the promise of five thousand dollars, to use his influence as such manager to secure the removal by the company of its mill to another place and for the extension of its logging road to that place. The court says: "Actual injury is not the principle the law proceeds on, in holding such transactions void. Fidelity in the agent is what is aimed at, and, as a means of securing it, the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal."

In *Harrington v. Victoria etc. Dock Co.*, 3 Q. B. D. 549, a railroad company contemplating certain repairs employed the plaintiff as an engineer to advise it in respect thereto. The defendants, having submitted a bid for doing the work, agreed to employ the plaintiff on a five per cent commission to superintend the repairs, if he would use his influence with the railroad company to induce it to accept the defendants' bid. The jury found that the contract, ⁵⁵⁸ though calculated to bias the plaintiff's mind, had not in fact done so, and that he had not in consequence thereof given less beneficial advice to the company as to the defendants' bid than he otherwise would have done. Cockburn, C. J., assuming that the agreement did not influence the mind of the plaintiff, so as to induce him to do anything dishonest toward his employer, entertained "no doubt but the agreement is a corrupt one and is not enforceable at law, whatever the actual effect produced on the mind": See, also, *Edwards v. Estell*, 48 Cal. 194; *City of Toronto v. Bowes*, 4 Grant Ch. 489.

So, in this case, no fact is disclosed by the record to indicate that appellee was negligent or inefficient in protecting the interests of the taxpayers, but, as we have seen, the rule admits of no exception. From these considerations we conclude that appellee, while acting in a trust capacity on behalf of the taxpayers of his own township, and at their expense, in safeguarding their interests in the construction of road No. 2, was not in a position to accept employment from the contractors to work for them in making the road. The law forbids the inconsistent position of pretending to serve both

the people and the contractors at the same time. The contract sued on being illegal, the courts can afford no relief, and the court erred in refusing to give to the jury instruction one, requested by appellants.

Appellee claims that the illegal nature of the contract was not provable under the issues, viz., the general denial and payment. We think otherwise. In the first place, under the general denial it was incumbent upon the plaintiff to establish a contract upon which he had the right to recover. In endeavoring to do this he disclosed the infirmities of his contract. In the second place, any fact which goes to destroy, not to avoid, the plaintiff's cause of action is provable under the general denial. And facts independent of those averred in the complaint, of a nature affirmative, but which have a negative ⁵⁵⁷ effect upon the issues, are also admissible: *Jeffersonville Water Supply Co. v. Riter*, 146 Ind. 521, 45 N. E. 697; *Hess v. Union State Bank*, 156 Ind. 523, 60 N. E. 305; *Gwinnup v. Shies*, 161 Ind. 500, 69 N. E. 158.

For error of the court in refusing to give instruction 1, requested by appellants, the judgment must be reversed.

Judgment reversed, and cause remanded, with instructions to grant appellants a new trial.

The Law does not Permit an Agent to assume duties incompatible with the interests of his principal: *Rice v. Davis*, 136 Pa. 439, 20 Am. St. Rep. 931; *Tyler v. Sanborn*, 128 Ill. 136, 15 Am. St. Rep. 97.

Contracts Tending to Injure the Public Service are against public policy and unenforceable: *Schneider v. Local Union*, 116 La. 270, 114 Am. St. Rep. 549, and cases cited in the cross-reference note thereto.

SEELYVILLE COAL AND MINING COMPANY v. McGLOSSON.

[166 Ind. 561, 77 N. E. 1044.]

CONSTITUTIONAL LAW—Laborer's Wages.—A statute providing for the semi-monthly payment by employers of their employes in money, and in default thereof, after demand made, subjecting employers to the payment of exemplary damages and necessary attorneys' fees for collecting such wages, is constitutional in all respects, nor is it in conflict with a constitutional provision that no law shall grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens. (p. 400.)

T. W. Harper, F. A. Kelley and C. W. Ward, for the appellant.

W. Tichenor and G. G. Rheuby, for the appellee.

⁵⁶³ JORDAN, C. J. This cause was originally appealed to the appellate court, but was transferred to the supreme court on the ground that the constitutionality of a statute was involved.

The action was commenced in the superior court of Vigo county, and on change of venue was tried in the Vermillion circuit court. The suit is based upon sections 1 and 4 of an act of the legislature approved February 14, 1887 (Acts 1887, p. 13; Burns' Rev. Stats. 1901, secs. 7065, 7068). The act is entitled: "An act requiring corporations, companies, associations, firms and persons engaged in mining or manufacturing, in this state, to pay their employés semi-monthly, in lawful money of the United States; prohibiting the issue or circulation of scrip; regulating the sale of merchandise and supplies by employer to employé, and providing penalties for violation."

The first section is as follows: "That every corporation, association, company, firm or person engaged, in this state, in mining coal, ore or other mineral, or quarrying stone, or in manufacturing iron, steel, lumber, staves, heading barrels, brick, tile machinery, agricultural or mechanical implements, or any article of merchandise, shall pay each employé of such corporation, company, association, firm or person, if demanded, at least once every two weeks, the amount due such employé for labor, and such payment shall be in lawful money of the United States, and any contract to the contrary shall be void."

Section 4 provides that "every corporation, company, association, firm or person who shall fail for ten days after ⁵⁶³ demand of payment has been made to pay employés for their labor, in conformity with the provisions of this act, shall be liable to such employé for the full value of his labor, to which shall be added a penalty of one dollar for each succeeding day, not exceeding double the amount of wages due, and a reasonable attorney's fee, to be recovered in a civil action and collectible without relief."

The complaint is in three paragraphs. The first alleges that the defendant is a corporation engaged in the business of mining coal in Vigo county, state of Indiana; that on De-

ember 11, 1901, said defendant became and was indebted to plaintiff in the sum of twenty-four dollars and forty-one cents for labor as a coal miner, performed by plaintiff for defendant at its special instance and request; that said sum became and was due and payable by the defendant to plaintiff on said December 11, 1901, at which time plaintiff demanded the same from defendant, whereupon it refused, and still refuses and neglects, to pay to him said twenty-four dollars and forty-one cents, and the same is now due and wholly unpaid; that there is accrued on said claim of twenty-four dollars and forty-one cents as a penalty the sum of forty-eight dollars and eighty-two cents; that it has been necessary for plaintiff to employ an attorney in collecting said claim, and that a reasonable attorney's fee for said attorney's services is twenty-five dollars. Wherefore plaintiff demands judgment, etc.

The second paragraph, in like manner as the first, alleges that on December 24, 1901, wages had accrued and become due the plaintiff from defendant in the sum of sixteen dollars and sixty-six cents. The third paragraph alleges that on January 13, 1902, defendant became indebted to plaintiff for wages in the sum of seventeen dollars and ninety-two cents. Judgment is demanded in each of the paragraphs for the amount therein alleged to be due, including penalties and attorney's fees.

The defendant unsuccessfully moved that the court strike out all that part of each paragraph of the complaint relating to damages, penalties and attorney's fees. A demurrer ⁵⁶⁴ to each was overruled, to which defendant duly excepted. The answer was a general denial. Upon the issues joined there was a trial by the court and a special finding of facts upon which the court stated its conclusion of law. The facts found by the court are in substance as follows: Appellant, Seelyville Coal and Mining Company, is and was a corporation under the laws of the state of Indiana during the years 1901 and 1902. Appellee herein was employed by said appellant during said year 1901 and the first part of the year 1902, as a laborer for the purpose of mining coal for appellant during said time.

On December 10, 1901, appellant became and was indebted to appellee in the sum of twenty-four dollars and forty-one cents for wages in mining coal. Appellant had adopted the tenth and twenty-fifth days of each month as the regular

pay-days for paying wages to its employés. Said sum of twenty-four dollars and forty-one cents was the wages due for two weeks' labor prior to December 10, 1901. On December 11th appellee demanded said sum of appellant, which demand was refused, and the same is now due and unpaid. On December 25, 1901, appellant was indebted to appellee sixteen dollars and sixty-six cents for wages. Because December 25th was a holiday, appellant selected December 24th as pay-day, and the sum of sixteen dollars and sixty-six cents was for wages for two weeks' labor prior to December 25th. On December 24, 1901, appellee demanded payment of appellant of such sum, which it refused, and such sum is due and unpaid. On January 10, 1902, appellant became indebted to appellee in the sum of seventeen dollars and ninety-two cents for wages due for two weeks' labor prior to that date. On January 13th appellee demanded payment of said sum, which demand appellant refused, and the same is due and unpaid. The labor was performed by appellee for appellant in Vigo county, Indiana, and the wages became due in said county. On February 21, 1902, appellee commenced this action for the recovery of such sums and penalties and he employed an attorney, who has rendered services of the value of fifty dollars.

⁵⁶⁵ As a conclusion of law from the facts so found the court stated that appellee is entitled to recover in the sum of fifty-eight dollars and ninety-nine cents for his labor, and the further sum of one hundred and seventeen dollars and ninety-eight cents as a penalty thereon, and the sum of fifty dollars as his attorney's fees, to the total amount of two hundred and twenty-six dollars and ninety-seven cents. To this conclusion of law the appellant excepted. Over its motion for a new trial judgment was rendered for the above amount in favor of appellee.

Counsel for appellant concede that the amount of fifty-eight dollars and ninety-nine cents, which the court found was due to appellee, is correct. In their brief they say: "There is but one question that we desire to present, which is, Can appellee recover the penalty, damages and attorneys' fees provided for by section 7057 of Burns' Revised Statutes of 1901 (Acts 1885, p. 36, sec. 2)?" They further argue that if this action is founded on sections 7065, 7068, *supra*, which we have hereinbefore set out, then they contend that it cannot be maintained, for the reason that all the laws

fixing the time of payment of wages due to laborers are in conflict with the constitution of this state. It is contended that the invalidity of the provisions of the act of 1887 herein involved is settled by the decision of this court in *Republic Iron etc. Co. v. State*, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136. The argument is further advanced that the act of 1887, providing for semi-monthly payment of wages by the corporations, associations, etc., therein mentioned, is a violation of section 23 of our Bill of Rights (Const., art. 1, sec. 23), which declares that "the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

The case at bar cannot, as insisted by counsel for appellant, be ruled by the decision in *Republic Iron etc. Co. v. State*, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136. The statute in controversy in this latter case and the one herein involved are materially different. The distinction between the two acts is palpable. The invalidity of the statute involved in *Republic Iron etc. Co. v. State*, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136, was, by this court, attributed to the fact that the act deprived both the employer and employé in all lines of labor of the right to contract for employment, except upon the condition that the wages earned by the employé should be paid weekly. The right of the legislature reasonably, or to a limited extent, to regulate the payment of wages, as is done under the statute in the case at bar, was not in that appeal denied by the court.

It will be observed that the act of 1887 does not profess to restrict or abridge the right of contract, except as against its express requirement that the amount due the employé for labor shall be paid in lawful money of the United States. This is the only express provision thereof which prohibits the right to contract. The constitutional validity of this provision of the act was fully sustained by this court in *Hancock v. Yaden*, 121 Ind. 366, 16 Am. St. Rep. 396, 23 N. E. 253, 6 L. R. A. 576.

It will be noted that the provisions of section 1 of the statute include or apply to all persons, natural or artificial, engaged "in mining coal, ore or other minerals, or in quarrying stone, or engaged in manufacturing iron, steel, lumber, staves, heading barrels, brick, tile machinery, agricul-

tural or mechanical implements or any article of merchandise."

This classification certainly cannot be said to be narrow, unreasonable or arbitrary. The statute is general and uniform, and operates upon all persons who come within the class to which it applies. Under the circumstances it cannot in reason be asserted that the act in question, either directly or indirectly, in violation of section 23 of the Bill of Rights, grants, privileges or immunities to any citizen or class of citizens which upon the same terms do not belong to all.

In *Hancock v. Yaden*, 121 Ind. 366, 16 Am. St. Rep. 396, 23 N. E. 253, 6 L. R. A. 576, in considering the validity of the statute, this court, by Elliott, J., said: "It neither ⁵⁶⁷ confers special privileges nor makes unjust discrimination. All who are members of the classes named are entitled to its benefits or subjected to its burdens. It is open to every citizen to become a member of any of the classes designated, and the privileges conferred belong on equal terms to all: *Johns v. State*, 78 Ind. 332, 41 Am. Rep. 577; *McAunich v. Mississippi etc. R. Co.*, 20 Iowa, 338. It denies no privilege to anyone, for it leaves it free to every citizen to become a member of the classes specified, and it operates alike upon all who enter those classes. The statute operates upon both the employer and the employé. It may, it is true, in its practical operation especially benefit the wage-earner, but that is no fault; at all events, the fault is not such a grievous one as to compel the courts to strike it down. It fixes no price upon any man's labor; it leaves the parties to do that, but it does require them to refrain from contracting before the relation of employer and employé begins for payment in anything except the lawful money of the United States. It does not preclude parties from making an accord and satisfaction after wages have been earned and services rendered."

Under the provisions of section 1 of this statute the employers therein mentioned are required to pay each of their employés the amount due him for labor at least semi-monthly. This requirement to pay at the time prescribed by the statute only becomes mandatory upon the employer on the demand of the employé to whom the wages are due and owing. His right under the law to demand semi-

monthly the amount of wages then due him is a matter wholly optional with him. It is a right which he may exercise or not as he chooses. In no manner does the statute require him to exercise this right against his own free volition. The laws enacted by the legislature of several of our sister states, requiring a certain class of employers of laborers to pay them at stated times and prohibiting ⁵⁶⁸ the payment in anything other than lawful money, have been assailed in the courts as unconstitutional with varying success. In the following cases such legislation has been upheld: *Shaffer v. Union Min. Co.*, 55 Md. 74; *State v. Peel Splint Coal Co.*, 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385; *Opinion of the Justices*, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58; *Commonwealth v. Hillside Coal Co.*, 109 Ky. 47, 58 S. W. 441; *Commonwealth v. Reinecke Coal Min. Co.*, 117 Ky. 885, 79 S. W. 287; *Skinner v. Garnett Gold Min. Co.*, 96 Fed. 735; *St. Louis etc. R. Co. v. Paul*, 64 Ark. 83, 62 Am. St. Rep. 154, and authorities cited, 40 S. W. 705, 37 L. R. A. 504; *Leep v. St. Louis etc. R. Co.*, 58 Ark. 407, 41 Am. St. Rep. 109, 25 S. W. 75, 23 L. R. A. 264; *Avent etc. Coal Co. v. Commonwealth*, 96 Ky. 218, 28 S. W. 502, 28 L. R. A. 273.

Appellant especially assails the validity of section 4 of the act in question, for the reason that it provides for a penalty, or, in other words, for the recovery of exemplary damages and a reasonable attorney's fee in a civil action instituted by the employé to recover his wages which are due and unpaid. It is contended that the legislature has no power to authorize an assessment of a penalty and attorney's fees in cases of this character. In *Republic Iron etc. Co. v. State*, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136, this power on the part of the legislature was expressly recognized. The court in that case said: "No act of the legislature can be made effective without some reasonable provision for its enforcement, and the assessment of a penalty for noncompliance has long been recognized by the General Assembly and the courts of this state as an efficient and reasonable means of securing obedience." It will be seen that under the provisions of section 4, the employer who, on a demand upon the part of the employé, has for ten days ⁵⁶⁹ thereafter failed to pay the wages due such employé, is declared to be liable in a civil action to the employé for the amount

of wages due him, together with one dollar for each day succeeding the expiration of the ten-day limit, and for a reasonable attorney's fee. The amount of damages allowed to be assessed, however, can in no event exceed double the amount of the wages due the employé. The statute in this respect is reasonable and the amount of the exemplary damages assessed can neither be said to be excessive nor oppressive.

It is manifest that if the delay in paying after the expiration of the ten days allowed is short, then, consequently, the damages to be assessed will be small. The employer is in a position to prevent the assessment of these damages by either paying or tendering the amount actually due the employé before the expiration of the prescribed limit. The essential purpose of the legislature, under the circumstances, in providing for the assessment of these damages, was to enforce the performance of the duty enjoined upon the employer to pay his employé the amount of his earnings, or wages, within ten days after demand is made for the payment thereof. According to the statute the additional amount of damages authorized to be assessed over and above the actual amount of wages due is regulated, or measured, at the rate of one dollar for each day which the employer allows his default in payment to continue beyond the prescribed limit. The power of the legislature, under the circumstances, as mentioned in the statute, to allow damages of the character and nature of those in question, is fully sustained by the decisions of the higher courts: See *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. Rep. 110, 29 L. ed. 463; *Leep v. St. Louis etc. R. Co.*, 58 Ark. 407, 41 Am. St. Rep. 109, 25 S. W. 75, 23 L. R. A. 264; *St. Louis etc. R. Co. v. Paul*, 64 Ark. 83, 62 Am. St. Rep. 154, 40 S. W. 705, 37 L. R. A. 504; *Minneapolis etc. R. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. Rep. 207, 32 L. ed. 585; *Day v. Woodworth*, 13 How. *363, 14 L. ed. 181; *Huntington v. Attrill*, ⁵⁷⁰ 146 U. S. 657, 13 Sup. Ct. Rep. 224, 36 L. ed. 1123; *Merchants' Bank v. Bliss*, 35 N. Y. 412; *Terre Haute etc. R. Co. v. Salmon*, 161 Ind. 131, 67 N. E. 918, and authorities there cited; *American etc. Co. v. Ellis*, 156 Ind. 212, 59 N. E. 679.

The validity of the provision of section 4, authorizing the assessment of a reasonable attorney's fee as a part of the

damages in the action instituted by the employé to recover the wages due him, is fully sustained by the following decisions: *Duckwall v. Jones*, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797; *Dowell v. Talbot Paving Co.*, 138 Ind. 675, 38 N. E. 389; *Terre Haute etc. R. Co. v. Salmon*, 161 Ind. 131, 67 N. E. 918; *Forrest v. Corey*, 29 Ind. App. 159, 64 N. E. 45; *Pittsburgh etc. R. Co. v. Taber* (Ind. Sup.), 77 N. E. 741.

We find no error, and the judgment of the lower court is therefore affirmed.

A Statute Providing that "Every Corporation doing business in this state shall pay the mechanics and laborers employed by it the wages earned by and due them, weekly or monthly, on such day in each week or month as shall be selected by such corporation," has been held unconstitutional: Slocum v. Bear Valley Irr. Co., 122 Cal. 555, 68 Am. St. Rep. 68. And so has a statute prohibiting, under a penalty, persons or corporations engaged in private enterprises from paying employes in store orders not redeemable in money: State v. Missouri Tie etc. Co., 181 Mo. 536, 103 Am. St. Rep. 614. Compare, however, Harbison v. Knoxville Iron Co., 103 Tenn. 421, 76 Am. St. Rep. 682; Hancock v. Yaden, 121 Ind. 366, 16 Am. St. Rep. 396; State v. Goodwill, 33 W. Va. 179, 25 Am. St. Rep. 863.

CASES

IN THE

SUPREME COURT

OF

IOWA.

HEINMILLER v. WINSTON BROTHERS.

[131 Iowa, 32, 107 N. W. 1102.]

EVIDENCE of Other Accidents from Same Cause.—If a horse is frightened while being driven along the highway, by a steam shovel belonging to a railway company and on its right of way near a crossing, and such fright terminates in an injury to the driver, evidence that other horses were frightened by such shovel at about the same time, and while the shovel was in about the same place, is admissible and does not introduce a collateral issue. (pp. 406, 407.)

EVIDENCE—Opinions.—Horsemen may testify as to whether a steam shovel situated on a railway right of way near a highway crossing is calculated to frighten horses of ordinary gentleness while approaching such crossing. (pp. 408, 409.)

NEGLIGENCE—Operation of Steam Shovel.—A railway company operating a steam shovel on its right of way, and near a highway crossing, is bound to use the shovel, whether within the limits of the highway or not, so as not to unreasonably interfere with the rights of the traveling public. (p. 409.)

NEGLIGENCE—Operation of Steam Shovel.—If a steam shovel belonging to a railway company and operated upon its right of way near a highway crossing is naturally calculated to frighten horses of ordinary gentleness, it is the duty of the company to exercise ordinary care in the use of the shovel so as not to unnecessarily endanger persons lawfully upon the highway. (p. 409.)

NEGLIGENCE—Operation of Steam Shovel.—The question as to whether the operation of a steam shovel owned by a railway company, and in use near a public highway, requires the company to warn travelers of the danger from its operation, is for the jury to determine under all the circumstances proved. (p. 410.)

TRIAL.—Special Interrogatories requested in a personal injury action which relate solely to the extent of the injury, and are not at all determinative of the case, are properly refused. (p. 410.)

TRIAL.—Excessive Verdict.—A verdict for two thousand dollars for a personal injury, in the absence of evidence of serious external injury, and almost conclusive evidence that the internal injury relied upon could not have resulted from the accident, is excessive, (pp. 410, 411.)

Hagemann & Farwell, for the appellants.

Springer, Clay & Condon and Sayer & Sweet, for the appellee.

³⁴ SHERWIN, J. In June, 1902, the defendants were engaged in deepening a cut for the Chicago Great Western Railway Company on its line of railway which had been in use for many years. They used in said work a steam shovel described as being fifty-five feet long, twelve feet high, with a smokestack extending six feet above the car, and with a boom twenty-four or twenty-five feet high. This cut was spanned near its center by a public highway bridge, the floor of which was from twenty-eight to thirty feet above the bottom of the cut. At the precise time that the plaintiff received the injury for which she seeks recovery, the shovel was not in operation; but it was steamed up and was standing on the track on the east side of the cut and north of the highway bridge. During this time the plaintiff approached the bridge from the east in a carriage drawn by a single horse. The horse became frightened before reaching the bridge and suddenly turned around throwing the plaintiff from the carriage and, as she claims, inflicting the injury complained of. The plaintiff averred negligence in having the steam shovel where it was, and negligence in not having some one stationed on the bridge or approach thereto to "warn travelers of the danger of frightening horses and to aid persons whose horses became frightened in passing over the highway and bridge." There is a conflict in the evidence as to the exact location of the shovel with reference to the north line of the highway, some of the testimony tending to show that it was partly in the highway and other witnesses testifying that it was wholly north thereof. Its exact location, however, is not material, as we shall later point out.

The first question discussed by counsel relates to the admission of testimony showing that two other persons with ³⁵ horses had passed over the same bridge in the forenoon in question, and while the shovel was standing in about the same place that it was when the accident in question occurred, and that their horses were frightened by the shovel. The appellants urge that the evidence was incompetent because introducing a collateral issue that they were not prepared to meet. A determination of the question thus presented involves the

consideration of the relative rights of the defendants in their work on the railway and those of the plaintiff in her use of the public highway. The plaintiff, in traveling along the highway, was exercising her lawful right and the defendants in deepening the railway cut were just as clearly within the rights conferred by law upon the railway company, and this is true whether they were operating the shovel or letting it stand idle within or without the limits of the highway. The rule that every person must so use and enjoy his own property as not to unreasonably injure another is applicable to this case, and in deepening the cut the defendants were bound to act reasonably and with due regard for the rights and safety of persons lawfully using the highway. In other words, they were bound to use reasonable care in making the improvement: *Hart v. Chicago etc. R. Co.*, 56 Iowa, 166, 41 Am. Rep. 93, 7 N. W. 9, 9 N. W. 116; *Ochiltree v. Chicago etc. Ry. Co.*, 93 Iowa, 628, 62 N. W. 7; *Wolf v. Des Moines Elevator Co.*, 126 Iowa, 659, 98 N. W. 301, 102 N. W. 517.

There can be no liability in this case unless the steam shovel itself, located as it was at the time of the accident, was reasonably calculated to frighten horses ordinarily safe and gentle for road purposes: *Wolf v. Des Moines Elevator Co.*, 126 Iowa, 659, 98 N. W. 301, 102 N. W. 517. The plaintiff was, therefore, bound to prove such fact, and we know of no better way of doing so than by testimony tending to show that other ordinarily gentle horses were in fact frightened by the shovel at about the same time and when it was in practically the same position. If such testimony cannot be received, the fact must be proven by the testimony of expert horsemen or the question must be left for ³⁶ the jury to determine from its own knowledge. Such testimony is held admissible in *Bemis v. Temple*, 162 Mass. 342, 38 N. E. 970, 26 L. R. A. 254, where it is said: "In the present case the only collateral inquiry which could arise is whether a horse called by a witness "an ordinarily safe and gentle horse" comes within that class. Such an inquiry is certainly simple. We think there would be no practical difficulty in receiving and weighing testimony in regard to the conduct of horses which seem to be like ordinary horses in common use. In *House v. Metcalf*, 27 Conn. 631, the same question arose and the court says the plaintiff "had a right,

not only to show the facts regarding its size, form, location, exposure to view, and mode of operation from which the jury might infer what effects it would naturally, necessarily, or probably produce, but also to prove what effects it had produced in fact. . . . The inquiry in every such case is not whether the evidence offered is sufficient to prove the fact claimed but whether it tends to prove it." Such evidence has also been held admissible in the following cases: *Brown v. Railway Co.*, 22 Q. B. D. 391; *Crocker v. McGregor*, 76 Me. 282, 49 Am. Rep. 611; *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55; *Champlin v. Village of Penn Yan*, 34 Hun, 33; *Quinlan v. City of Utica*, 11 Hun, 217, 74 N. Y. 603; *Wooley v. Grand St. & N. R. R. Co.*, 83 N. Y. 121. See, also, *Hanson v. Chicago, St. Paul etc. Ry. Co.*, 94 Iowa, 409, 62 N. W. 708, and see *Wigmore on Evidence*, sec. 461.

The appellants rely on *Hudson v. Chicago etc. Ry. Co.*, 59 Iowa, 581, 54 Am. Rep. 692, 13 N. W. 735, and other like cases against railway companies and cities, in which it is held that evidence of a prior accident at the same place is inadmissible for the purpose of proving that the way was defective. The decisions are all bottomed on the ground that such testimony concerns collateral facts which the defendants were not bound to meet. We think a distinction may be made between such cases and the instant one. In the former, the ultimate questions³⁷ were whether defects existed. If they did, it was immaterial whether others had been injured thereby, while here it must be proven that the shovel was calculated to produce a certain effect on a certain class of animals. The testimony is not admissible for the purpose of proving that the plaintiff's horse was frightened by the shovel, but for the purpose of showing how it affected a certain kind of animals.

The court also permitted witnesses, who were horsemen, to testify that the shovel was calculated to frighten horses of ordinary gentleness and this ruling is complained of. In *Moreland v. Mitchell County*, 40 Iowa, 394, such testimony was held admissible. This is conceded by the appellants, but they say that the holding is against the weight of authority and that the case should be overruled. It is a rule of evidence that has been long established in this state and that has the support of other courts: See *Clinton v. Howard*, 42 Conn. 294. It may be true that an ordinary jury of farmers

will know in a general way the characteristics and habits of horses, but all farmers are not close observers of the peculiarities of animals any more than are all men engaged in other occupations, and we know of no sound reason for overruling the Moreland case (40 Iowa, 394).

The instructions are criticised generally. It is said that it was error to submit the question whether appellants were negligent in placing the shovel so near the bridge, and in a place where it could not be seen by travelers on the highway until they were within a few feet of the bridge, because the appellants had the lawful right to use the shovel in deepening the cut. And further, that it was error to instruct that "it is not necessary, in order that plaintiff may recover, that you find the steam shovel was actually within the limits of the highway," because in no event would there be liability unless the shovel was within the limits of the highway. There is no merit in these criticisms, however, for, as we ^{as} have already said the defendants were bound to so use the shovel, whether within the limits of the highway or not, as not to unreasonably interfere with the rights of the traveling public: See cases *supra*. O'Donnell v. Chicago etc. Ry. Co., 69 Iowa, 102, 28 N. W. 464, relied upon by the appellants, is not controlling because there it was expressly held that there was no public highway where the plaintiff crossed the defendant's track, and because the car was on a track where cars were usually stored and in plain view of the plaintiff.

The jury was told that the defendants had the right to deepen the cut and to use for such work the means and implements ordinarily adapted to and used for such purpose, and further, that if they found the steam shovel an instrumentality ordinarily used for such purpose, the defendants had the right to use it. It was then said: "If, however, you find it was naturally calculated to frighten horses of ordinary gentleness, when used at or near the public highway, then it was the duty of the defendants to exercise ordinary care in the use of said steam shovel at or near the public highway so that their use of the same would not be an unnecessary interference with or unnecessarily dangerous to persons making lawful use of the public highway." It is said that the language of this instruction was prejudicial in that it emphasized the plaintiff's claim that defendants were negligent in placing the shovel where they did, and because

it cannot be said, as a matter of law, that one using such a shovel near a public highway is required to exercise any care in respect thereto. We think the instruction above criticism. It was entirely fair and did no more than to call the jury's attention to the precise points in issue, and if the jury found that the shovel was calculated to frighten horses of ordinary gentleness, it certainly was the defendants' duty, as a matter of law, to exercise ordinary care in its use at that place.

There also was submitted to the jury the question whether the defendants should have provided some one to ^{so} warn travelers of the danger. It was for the jury to say, under all the facts and circumstances proved, whether ordinary care on the part of the defendants required them to provide such warning, and the instruction so stated. Other instructions are criticised, but an examination of the entire charge leaves no doubt in our minds of the fairness and correctness thereof.

The requests made by the appellants, so far as right, were covered by the instructions given.

There was no error in refusing to submit special interrogatories 1 and 3 asked by the appellants. They were not at all determinative of the case, relating solely to the extent of the plaintiff's injury: *Hawley v. Chicago etc. R. Co.*, 71 Iowa, 717, 29 N. W. 787.

The appellants insist that the evidence fails to show any negligence on their part, and that it does show contributory negligence on the part of the plaintiff. It was undoubtedly the duty of the plaintiff to exercise her faculties in approaching the bridge. That she did this is fairly shown by her own testimony. The danger at an overhead crossing is not as great as at a grade crossing, and it cannot be said, as a matter of law, that a traveler must stop to look and listen, neither can it be said, as a matter of law, that the defendants were not negligent. Both questions were for the jury and we cannot interfere with its finding.

The verdict was for two thousand dollars and it is strongly urged that it is excessive. A very careful examination of the evidence relating to the extent of plaintiff's injury leads us to the conclusion that the contention should be sustained. There is practically no evidence of serious external injury. The only serious injury relied upon is a diseased condition of the right ovary and tube. That such condition could not have been produced by the fall from the buggy, or by any

injury then received, is almost conclusively shown by the medical testimony produced ⁴⁰ by both sides. In view of this we are of the opinion that there should be a retrial of the case unless the plaintiff shall, within thirty days after this opinion is filed, file with the clerk of this court her election in writing to accept a judgment of one thousand dollars. If she does this, the judgment will stand affirmed, otherwise it will be reversed.

Affirmed on condition.

DEEMER, J., Dissenting. Believing that the rule announced in the majority opinion runs counter to the principle announced in *Potter v. Cave*, 123 Iowa, 98, and cases therein cited, as well as others which might be cited, I respectfully dissent.

Ladd, J., concurs in this dissent.

The Admissibility of Similar Accidents on other occasions in actions based upon the alleged negligence of the defendant is discussed in *Cleveland etc. Ry. Co. v. Wyant*, 114 Ind. 525, 5 Am. St. Rep. 644; *McNally v. Colwell*, 91 Mich. 527, 30 Am. St. Rep. 494; *Bloomington v. Legg*, 151 Ill. 9, 42 Am. St. Rep. 216; *Baker v. Hagey*, 177 Pa. 128, 55 Am. St. Rep. 712. In an action for a personal injury by the fright of a horse by the escape of steam from the defendant's mill, situated on the edge of a highway, evidence that other safe horses have been frightened by it is admissible: *Crocker v. McGregor*, 76 Me. 282, 49 Am. Rep. 611; and in an action against a town for an alleged defect in a highway, which defect was a pile of lumber by the side of the road that frightened the plaintiff's horse, evidence to show that other horses had been frightened in passing it is admissible: *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55.

The Owner of a Factory near a Highway was held liable, in *Knight v. Goodyear's Rubber etc. Co.*, 38 Conn. 438, 9 Am. Rep. 408, for injuries sustained by a traveler whose horse is frightened by the blowing of the factory whistle; and in *Snyder v. Philadelphia Co.*, 54 W. Va. 149, 102 Am. St. Rep. 941, the owner of a gas-well situated near a highway was held liable to a traveler whose team was frightened by the blowing off of the gas.

McELROY v. ALLFREE.

[131 Iowa, 112, 108 N. W. 116.]

TRUSTS—Parol Evidence to Establish.—An express trust cannot be established by parol evidence, but a resulting or constructive one can. (p. 413.)

DEEDS as Mortgages—Parol Evidence.—A conveyance, absolute upon its face, may be shown by parol to have been intended as security, and if so shown is a mortgage. (p. 413.)

DEEDS as Security—Parol Evidence to Show.—An agreement by a grantee in a sheriff's deed, made at the time the certificate is outstanding to purchase the latter and hold the title to the land as security for the money paid and other debts of the owner, may be shown by parol evidence. (p. 413.)

EVIDENCE—Transaction with One Since Deceased.—One who asserts ownership of land as against the administrator of a decedent, who at the time of his death held the legal title to such land, is incompetent to testify to any communication or transaction between himself and the decedent. (p. 415.)

Carr, Hewitt, Parker & Wright, McElroy & Cox, H. Silwold and Ryan, Ryan & Ryan, for the appellants.

N. T. Guernsey and E. J. Salmon, for the appellees.

¹¹⁴ **DEEMER, J.** George D. Wood, now deceased, was the managing officer and cashier of a partnership composed of himself and Alexander Wood, doing a banking business in the town of Colfax, under the name and style of the "Bank of Colfax." George D. Wood died by his own hand and W. O. McElroy was appointed receiver of the bank. Allfree was appointed administrator of the George D. Wood estate. Elizabeth Wood is the widow of George D., and Clifton D. and Hazel are his minor heirs. Prior to the year 1897, R. N. Stewart was the owner of the land in controversy. At divers dates about the year named various parties obtained judgments against Stewart, issued executions, caused the land to be sold thereunder, and sheriff's certificates to be issued thereon. George D. Wood in his own name procured assignments of these certificates and thereafter took deeds thereunder. Plaintiff claims that Wood took them in trust for the bank of which he was cashier, and that he obtained them with money belonging to the bank. This was denied by the administrator of Wood's estate, and by the widow and heirs. R. N. and Amelia Stewart also made denial, and they further claimed that Wood took title to the land as security for

money which he had furnished them; that he was in fact a mortgagee, and they asked an accounting, for leave to redeem, and other relief. The Stewart title was established by the trial court, and if its finding in this respect be affirmed there is no need for considering the other issues.

We shall first take up that proposition. The claim of the Stewarts in brief is that after their property had gone to sheriff's sale and while certificates were outstanding, they entered into an agreement with Wood whereby he, Wood, agreed to take assignments of the certificates of sheriff's sale, procure deeds to the ¹¹⁵ land, and hold the title as security for the amount advanced, and for other sums which they (the Stewarts) were then owing the bank, until all should be paid. Of course, the legal title when this action was brought was in Wood, in virtue of the sheriff's deeds, and without testimony on any of the issues the administrator, widow, and heirs of George D. Wood would be entitled to a decree. And the first point made by appellants is that the title of the Stewarts was completely and wholly divested by the sheriff's deeds, and that the attempt by the Stewarts to prove a parol agreement with Wood, whereby he was to take the title acquired by him, is an undertaking to prove an express trust by parol in contravention of section 2918 of the Code of Iowa and of the many decisions of this court. It is true that an express trust cannot be established by parol testimony, but a resulting or constructive one may be; and it may also be shown as a general rule that a conveyance, absolute upon its face was intended as security and was in fact a mortgage. The reasons for this last proposition are fully explained in *Bigler v. Jack*, 114 Iowa, 667, 87 N. W. 700, and need not be repeated here.

Appellants, while conceding the rule, insist that it does not apply here for the reason that Wood secured his title from an independent source, to wit, the sheriff's deeds, and not through the Stewarts, and that, in such cases, parol evidence, to show that it was taken as security simply, is not admissible, for that it tends to ingraft a trust upon an absolute conveyance from one other than a party in interest. They rely chiefly upon *Dunn v. Zwilling*, 94 Iowa, 223, 62 N. W. 746, *Hain v. Robinson*, 72 Iowa, 735, 32 N. W. 417, and other like cases. On the other side, it is argued that Wood's title was derivative and not independent, and that, in any event, it was as much a fraud for Wood to take title in the man-

ner he did and then deny the agreement as if he had taken his title directly from the Stewarts instead of the sheriff. In the first place it should be conceded that the holder of a sheriff's deed does not acquire an independent title, but a derivative one, immediately from ¹¹⁶ the sheriff, but mediately from the judgment debtor. In other words, generally speaking, he gets no other or greater title than the judgment debtor held. This is true both as to foreclosure and judgment sales: *Mathes v. Cover*, 43 Iowa, 512; *Jones on Mortgages*, 6th ed., sec. 1654, and cases cited. The purchaser becomes privy in estate with the mortgagor with respect to the title as it existed when the mortgage was executed, or of the judgment debtor if the sale be under a judgment. So that the title acquired in this case was derivative and not independent. Had title fully passed by sheriff's deed at the time when it is claimed Stewart made his agreement with Wood, there might be some ground for holding that such an agreement is in the nature of a trust and cannot be established by parol.

Authority for this seems to be found in the cases relied upon by appellants, or at least in some of the language used therein. But that is not the case here. At the time it is claimed the agreement was made Stewart in fact had title to the land, although sheriff's certificates of sale were outstanding against it. These certificates did not, under familiar doctrine, transfer title; they created liens, which time alone would ripen into titles, but until that time arrived, the title still remained in the judgment defendant. That one holding title with a right of redemption either from tax, judgment, or mortgage sale may establish such an agreement as is here claimed by parol is well established by our cases and is the rule generally established everywhere: See *Judd v. Mosely*, 30 Iowa, 423; *Jordon v. Brown*, 56 Iowa, 821, 9 N. W. 200; *Byers v. Johnson*, 89 Iowa, 278, 56 N. W. 449; *Green v. Turner*, 38 Iowa, 114; *Rogers v. Davis*, 91 Iowa, 730, 59 N. W. 265; *Trucks v. Lindsey*, 18 Iowa, 504; *Stanhrough v. Daniels*, 77 Iowa, 561, 42 N. W. 443; *Nichols v. Otto*, 132 Ill. 91, 23 N. E. 411; *Dodge v. Brewer*, 31 Mich. 227; *McNew v. Booth*, 42 Mo. 189; *Shoemaker v. Porter*, 41 Iowa, 197; *Leahey v. Witte*, 123 Mo. 207, 27 S. W. 402; *Martell v. Gillespie*, 11 Ves. 356; *Beegle v. Wentz*, 55 Pa. 369, 93 Am. Dec. 762; *Arnold v. Cord*, 16 ¹¹⁷ Ind. 177; *Slowey v. McMurray*, 27 Mo. 113, 72 Am. Dec. 251. The reason for

this is that equity disregards forms and looks to the substance of transactions, and, if the transaction in fact be a mortgage, no matter how the title passed, equity will so declare. There are some expressions in the opinions cited by appellant which seem to run counter to this, but they were either not necessary to the decision, or are squarely in conflict with the rules announced in the cases just cited, and should be disregarded.

Having settled the fundamental legal proposition, we are ready for the facts of the case; and in this connection it is insisted that R. N. Stewart was incompetent as a witness to any personal conversations or transactions between himself and the deceased Wood. The main issues in the action so far as Stewart is concerned are between Stewart and Wood's administrator. Wood had the record title to the land at the time he died; consequently, as to this issue, Stewart was an incompetent witness. The testimony of Mrs. Stewart, the wife of R. N. Stewart, regarding communications and transactions in which she had no part was perfectly competent: *Mallow v. Walker*, 115 Iowa, 238, 91 Am. St. Rep. 581, 88 N. W. 452. And so was the testimony of one James Stewart, who, so far as shown, had no interest in the controversy. Part of the testimony of R. N. Stewart was admissible, and so was a part, if not all, of the testimony of a witness by the name of Meier.

As to the issues between the receiver and the Stewarts, the question of the admissibility of R. N. Stewart's testimony is more difficult. It may be that his testimony would be admissible, but, in order to obtain any relief as against him, he must establish his title as against Wood. That the testimony would be admissible in a controversy between the receiver and Stewart alone seems to be held in *Ruddick v. Otis*, 33 Iowa, 402. But, as all parties are in the case, this becomes largely a moot question, unless the final issue should be that of ejecting defendants Stewart from the possession¹¹⁸ of the property in an action brought by the receiver for that purpose.

Throwing out all incompetent testimony, we have come to the conclusion, after a careful study of the record, that the Stewarts have established the fact that Wood took and held title to the land not only as security for their existing indebtedness to the bank of which he was cashier, but for the advancements made by him to secure the assignments of the

certificates of sale as well as some other advancements to be made by him. Stewart has always been in possession of the land and has made valuable improvements thereon, although part of the time he had apparently leased the land of Wood, under which however he paid no rent. Wood received something like nineteen thousand dollars from the land, ten thousand dollars coming from a sale of coal under the land, which was used in paying Stewart's indebtedness, and nine thousand dollars from a loan secured by mortgage upon the land, part of which was used for the same purpose. Before his death and on March 12, 1903, Wood gave Stewart a statement showing a balance then due from Stewart of six hundred and fifty-eight dollars and ninety-five cents, and this included an item on account of services rendered. The books of the bank clearly indicate that this property was treated as belonging to Stewart. Stewart was charged with all advancements made for him, with expenses, interest, and compensation for Wood's services. He was credited with all returns from the land except rentals, and whatever may be due from Stewart to Wood or the bank is now the subject of litigation in another action—this not being an adjudication thereof. It further appears that practically all the negotiations for the sale of the coal were conducted by Stewart. Moreover there is an express written declaration from Wood in the record to the effect that he held the Stewart land as security and would quitclaim the same to him (R. N.) upon payment of the indebtedness. Neither Wood nor the bank paid taxes on the land, nor did they receive any rentals therefrom. Not only this, but Stewart paid ¹¹⁹ all the expenses of some litigation concerning this land after the title was placed in Wood. Taking the testimony as a whole, and this is but a part of it, the conclusion is irresistible that Wood held title to the land as security only, and that the amount for which he held it has been, to all intents and purposes, fully paid.

We shall not set out more of the testimony, as to do so would unduly extend this opinion. The law and the facts seem to be with the defendants Stewart. We need not further consider the case, for, with this conclusion, the result is apparent. We may say, however, that it is doubtful if plaintiff could recover, in any event, on account of his failure to show that any of the property is needed to pay debts of the bank, while the estate of George Wood is shown to be

insolvent and the real estate is needed to pay his individual creditors: *Crary v. Kurtz* (Iowa), 105 N. W. 590; *Roney v. Conable*, 125 Iowa, 664, 101 N. W. 505, and cases cited. Further we should be constrained to hold, were the issue between the receiver and the administrator, widow, and heirs of law of George D. Wood alone, that the receiver is entitled to the land as property belonging to the bank. Finding, as we do, however, that the *Stewarts* are the equitable owners of the land, and are entitled to have their title quieted, there is no need for considering these other matters.

The decree of the trial court is correct, and it is affirmed.

A Deed Absolute on Its Face may be shown to be a mortgage by parol evidence, although such evidence must be clear and convincing: *Glass v. Hieronymus*, 125 Ala. 140, 82 Am. St. Rep. 225, and cases cited in the cross-reference note thereto: *Perot v. Cooper*, 17 Colo. 80, 31 Am. St. Rep. 258; *Mahoney v. Bostwick*, 96 Cal. 53, 31 Am. St. Rep. 175.

The Creation of Trusts in Land by Parol is the subject of a recent note to *Insurance Co. v. Waller*, 115 Am. St. Rep. 774.

SLY v. BELL.

[131 Iowa, 184, 108 N. W. 227.]

FRAUDULENT CONVEYANCES—Insolvent Debtor.—While a vigilant creditor may procure payment of his debt against a failing or insolvent debtor by a purchase of his property, he cannot go beyond the permissible purpose of securing his own demand, and confer a benefit upon the debtor by purchasing much more than is necessary and paying the difference to the debtor, and if he thus hinders and delays other creditors and impairs their rights, the purchase and conveyance will be set aside. (p. 419.)

FRAUDULENT CONVEYANCES—Unnecessary Purchase from Insolvent Debtor.—A creditor of an insolvent debtor may, with knowledge of his insolvency and fraudulent purpose, purchase of him sufficient property to pay his debt, and pay the debtor a reasonable cash difference if necessary, but if he unnecessarily purchases a large additional amount of property from his debtor and pays him the difference in cash, the whole transaction is fraudulent at the suit of the other creditors. (p. 420.)

Shaw, Sims & Keuhnle, for the appellant.

F. C. Gilcrest, for the appellee.

¹⁸⁴ LADD, J. The defendant, as sheriff of Crawford county, levied an execution May 23, 1903, on eight head of
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cattle, a wagon, and two sets of harness, as the property of M. F. Sly, who, with Ella H. Sly, his wife, had confessed judgment in favor of W. and J. G. Hinn for two thousand three hundred and seventy-six dollars, March ¹⁸⁸⁵ 13th previous. The property was sold and proceeds applied on the judgment. Before doing so, however, defendant exacted an indemnifying bond, thereby waiving notice of plaintiff's claim of ownership by virtue of a bill of sale, covering this and other property, executed by M. F. Sly to his brother, the plaintiff, February 25, 1903, and in this action the latter prayed judgment for the value of the property taken and sold. The defense interposed was that the purpose of the bill of sale was to hinder, delay or defraud the creditors of the judgment debtor. The evidence showed that one-half of the indebtedness fell due March 1, 1903, but that prior thereto, and on February 21st, M. F. Sly and his wife conveyed the farm on which they resided to plaintiff, and four days later M. F. Sly alone executed to him a bill of sale covering all his personal property except household furniture; that the agreed consideration for the land was an assumption of a mortgage thereon of three thousand six hundred dollars, and the application of one thousand two hundred dollars, and the application of twelve hundred dollars on a note executed by M. F. Sly to plaintiff for nine hundred and sixty dollars, dated March 27, 1885, payable in one year, and that for the personal property was one thousand dollars, of which two hundred and seventy-five dollars was paid in cash and the remainder applied in a satisfaction of the note.

Appellant complains of several instructions, but, in view of our conclusion that the evidence of fraud was conclusive, these need not be considered. The judgment defendant candidly admitted that his purpose in executing the bill of sale was to hinder and delay, if not to defeat, the collection of the indebtedness owing to W. and J. G. Hinn. This was made known to the plaintiff, and he fully understood the object sought to be attained. If, notwithstanding this, he had taken the property at a fair price in satisfaction of his claim against his brother without paying in cash more than was reasonably necessary to effect the collection of the indebtedness owing him, and therein had acted in good faith, the transaction must have been upheld: *Thompson v. Zuckmayer* (Iowa), 94 N. W. 476; *Stroff* ¹⁸⁸⁶ v. *Swafford Bros.*, 81

Iowa, 695, 47 N. W. 1023; *Rosenheim v. Flanders*, 114 Iowa, 291, 86 N. W. 293.

But, while a vigilant creditor may procure payment of his claim against a failing or insolvent debtor by a purchase of his property, he must not go beyond the permissible purpose of securing his own demand. The whole purpose of the creditor must be the payment of the debt. He will not be allowed to go beyond this and confer a benefit on the debtor. This is the boundary of the reward and protection the law gives to the vigilant creditor. In effecting this purpose he must not unnecessarily hinder or delay other creditors, or impair their rights, by placing it in the power of the debtor to screen a part of the proceeds, the creditor having knowledge thereof or of facts sufficient to create reasonable belief that such is his intention. When, therefore, a creditor purchases property from his debtor, a part of the consideration being the payment of an antecedent debt and a part money paid, the rules applicable are the same as to purchasers on a new consideration; the payment of a just debt being a circumstance to be considered as bearing on the bona fides of the transaction. If, however, the payment of money in part has been reasonably necessary in order to effect the collection of the debt, this will not invalidate the transaction. The rule is thus stated in *Bump on Fraudulent Conveyances*, 194: "Although the purchase exceeds the amount of the indebtedness, still, if the excess is reasonably necessary for attaining the lawful purpose of satisfying the actual debt, the purchase to the whole extent may be attributed to the same motives of self-interest, and therefore the mere fact of the excess does not invalidate the transaction, unless there are other circumstances tending to show a fraudulent intent on the part of the purchaser." This necessity is not created by the unyielding demand of the debtor for cash, but must arise from the nature, condition, or situation of the property. Thus, in *Levy & Co. v. Williams*, 79 Ala. 171, the debtor insisted that the creditor buy three ¹⁸⁷ tracts of land when one would have satisfied the indebtedness, and the court held the necessity was not thereby shown, but that, on the contrary, this advised the creditor that the object of the sale was not the payment of an honest debt but the conversion of real estate into money because money was "more easily shuffled out of sight than land," and

the payment of the debt was merely a means to accomplish that object: See, also, *Maddox v. Reynolds*, 69 Ark. 541, 64 S. W. 266. An insolvent debtor cannot be denied the right to dispose of his property, but the design in so doing must be the appropriation of all the proceeds to the satisfaction of his debts, and, if the creditor who purchases his property acts upon the reasonable expectation that they will be so applied, he is not chargeable with participation in the secret fraudulent intent of the debtor. These principles are fully established by the authorities: *Rankin v. Vandiver*, 78 Ala. 562; *Fargason v. Hall*, 99 Ala. 209, 13 South. 302; *McVeagh v. Baxter*, 82 Mo. 518; *Leinkauff v. Frenkle*, 80 Ala. 137; *Young v. Stallings*, 5 B. Mon. (Ky.) 307; *McDonald v. Gaunt*, 30 Kan. 693, 2 Pac. 871; *Oppenheimer v. Guckenhimer*, 39 Fla. 617, 23 South. 9; *Carl & Tobey Co. v. Beal & Fletcher Grocery Co.*, 64 Ark. 373, 42 S. W. 664; *Henney Buggy Co. v. Ashenfelter*, 60 Neb. 1, 83 Am. St. Rep. 503, 82 N. W. 118. See 20 Cyc. 478, for collection of authorities.

In the case at bar, the judgment defendant was insolvent. The bill of sale and deed conveyed to his brother, the plaintiff, all his property. After applying the difference between the mortgage on the land assumed by plaintiff and the price agreed on the note, there remained seven hundred and twenty-five dollars unpaid. They then agreed upon one thousand dollars as the price of the personal property included in the bill of sale, described as follows: "One (1) thoroughbred Hereford bull (Reputation). One (1) thoroughbred Hereford cow (Mabel) and increase. Five (5) grade Hereford cows and increase. Two (2) grade Hereford yearling heifers and increase. Two (2) grade ¹⁸⁸ Hereford bull calves. One (1) gray gelding. One (1) bay gelding. One (1) dun colored mare. Ten (10) head of hogs and increase. Two (2) lumber wagons. One feed grinder. Three (3) sets of harness. One Case plow. One iron harrow." The balance of two hundred and seventy-five dollars was paid in cash. It was too manifest for argument that this payment was unnecessary for the collection of the indebtedness. Items in value to this amount might readily have been omitted. None of them are shown to have been exempt, though M. F. Sly was allowed by the sheriff to select two cows, two calves, and a team, at the time of the levy of execution without otherwise claiming to own them. This was several months after the

execution of the bill of sale, and whether the stock so selected was included therein, or was then exempt, does not appear. The presumption, in the absence of evidence to the contrary, is that property is not exempt. Moreover, this matter does not appear to have entered into the negotiations of these parties. The transfer was entirely without reference to exemptions and the money was paid with the understanding that the sale was being made to hinder and delay creditors in the collection of their claims. The payment of money without the necessity of so doing in connection with the antecedent indebtedness, with knowledge of M. Sly's design to hinder and delay his creditors by effecting the sale, amounted to participation in his unlawful purpose precisely as though the entire consideration had been new and rendered the entire transaction fraudulent: *Rosenheim v. Flanders*, 114 Iowa, 291, 86 N. W. 293. It follows that, as the verdict for defendant might have been directed, the errors, if any, in the instructions, were without prejudice.

Affirmed.

A Debtor may Prefer One Creditor to another: Friedman v. Leshner, 198 Ill. 21, 92 Am. St. Rep. 255; *Shibler v. Hartley*, 201 Pa. 286, 88 Am. St. Rep. 811. But if a debtor in failing circumstances conveys the whole of his goods to a creditor, who pays the difference between the amount of the debt and the fair price of the goods in cash, with notice that the debtor is attempting to defraud his other creditors by the sale, the transfer is void as to them: *Henney Buggy Co. v. Ashenfelter*, 60 Neb. 1, 83 Am. St. Rep. 503. See, too, the note to *State v. Mason*, 34 Am. St. Rep. 397.

WESTINGHOUSE COMPANY v. McGRATH.

[131 Iowa, 226, 108 N. W. 449.]

CHATTEL MORTGAGE—Description, When Insufficient.—The description, "One 15 H. P. traction engine, Westinghouse make; one O a 32x47 Westinghouse grain thresher, one Woods self-feeder main drive belt wagon box elevator tank pump and hose," is insufficient in a chattel mortgage made by a husband and wife, though the mortgage describes the county of their residence, and no other threshing outfit of the same number and style was in the county, as against one having no actual notice of the mortgage, though it is of record, when it does not expressly state which of the mortgagors owns the property. (pp. 423, 424.)

CHATTEL MORTGAGES—Description—Constructive Notice.—To constitute the record of a chattel mortgage constructive notice, the description of the property must be sufficiently definite to direct the mind of the searcher of the record to facts from which he may ascertain the property with reasonable certainty. (p. 424.)

Shaw, Sims & Kuehnle and George A. Richardson, for the appellant.

P. W. Harding, for the appellee.

²²⁶ LADD, J. At the time of the service of the writ of replevin the threshing outfit in controversy was in possession ²²⁷ of the defendant McGrath, as constable, by virtue of levies thereon of a writ of execution and a writ of attachment, under which his interest in the property amounted to four hundred and four dollars and fifty-four cents, considerable less than its value. The statutory notice of ownership had been served, and it was made to appear by stipulation that one A. A. Kuhnes purchased said outfit of the plaintiff, August 12, 1901, and, to secure payment of the six hundred dollars of the purchase price, with his wife and L. V. Kuhnes executed to it a chattel mortgage describing said property as "One 15 H. P. traction engine, Westinghouse make; one O a 32x47 Westinghouse grain thresher; one Woods self-feeder main drive belt wagon box elevator tank pump and hose, to have and to hold the same forever. I, the said party of the first part, will forever warrant and defend the same against all persons whomsoever." In the mortgage, the Kuhneses had been described as of the county of Crawford and state of Iowa, and it was provided therein that in case of an attempt to dispose of or "remove from said county of . . . the aforesaid goods and chattels" the mortgagee might foreclose, and "said sale to take place . . . in the county of . . . Iowa." But the two other threshing outfits of this company had been shipped into Crawford county, and none of the number and style of that in controversy, but this was unknown to the defendant. The name of plaintiff company and the number of the machine were printed conspicuously on the thresher and engine. At the time of the levies by defendant the outfit was on the farm of one Butler, in whose care it had been left by A. A. Kuhnes, some fifteen miles from his place of residence. The defendant was without actual notice of the existence of the mortgage, but it was recorded and the only question for our determination is whether the description of the property was sufficiently definite to impart constructive notice.

The county in which the property was located was reasonably to be inferred from the mortgage; for, after describing

the mortgagors as of Crawford county, foreclosure is authorized ²²⁸ upon attempting "to remove from said county" the encumbered property. By "said county" was meant the one previously named, and this would not be obviated by the omission to write the name of such county in the blank left for that purpose. But location of the property as in the county with a description of the owner as of that county is not sufficient to impart notice: *Muir v. Blake*, 57 Iowa, 662, 11 N. W. 621; *Warner v. Wilson*, 73 Iowa, 719, 5 Am. St. Rep. 710, 36 N. W. 719; *Barrett v. Fisch*, 76 Iowa, 553, 14 Am. St. Rep. 238, 41 N. W. 310. It is also to be noted that though the Kuhneses execute the mortgage, it does not assert the ownership to be in any one or all of them. As A. A. Kuhnes was, in fact, the owner, this omission cannot affect the validity of the instrument (*McGarry v. McDonnell*, 82 Iowa, 732, 47 N. W. 866), but it does not have an important bearing in the determination of whether the recording of the mortgage imparted constructive notice of its existence. No one could tell from the record whether some one or all or none of them owned the property: *Everett v. Brown*, 64 Iowa, 420, 20 N. W. 743; *Warner v. Wilson*, 73 Iowa, 719, 5 Am. St. Rep. 710, 36 N. W. 719; *State Bank v. Felt*, 99 Iowa, 532, 61 Am. St. Rep. 253, 68 N. W. 818; *Syck v. Bossingham*, 120 Iowa, 363, 94 N. W. 920.

Nor was there anything therein to advise a creditor of Kuhnes of its location or in whose possession it might be found. These have been the controlling circumstances in many cases. Thus in *Brock v. Barr*, 70 Iowa, 399, 30 N. W. 652, a somewhat indefinite description was aided by adding that the property was in the possession of the mortgagor in a particular county. In *Shellhammer v. Jones*, 87 Iowa, 520, 54 N. W. 363, it was said that the mortgagor was of the county from which the property was not to be removed, and he certified that he was the owner. He had no other stallions of like description. *Preston v. Caul*, 109 Iowa, 443, 80 N. W. 522, was much like the last case, in that the instrument indicated the mortgagor's ownership of the interest covered and that the stallion was in the county. In the case at bar the description is indefinite. True, there were but two other outfits in the county and these were of different number and style. But the number was not inserted in the ²²⁹ mortgage and there is nothing in the record to show in what

respects the style differed or whether such difference was in the matter of description contained in the mortgage. Aside from this, however, the defendant was not bound at his peril to search the county to ascertain whether there were other like machines therein, in the absence of any assertion in the mortgage that this was the only one. There was nothing in the mortgage to suggest such an inquiry, and without this a purchaser was not charged with notice of such fact. The case falls within those cases where the mortgages describe property in a general way; that is, in such indefinite terms that any number of articles or animals may well fall within its terms. Thus in *Hayes v. Wilcox*, 61 Iowa, 732, 17 N. W. 110, a description of "one oscillating thresher, size 6, 30-inch cylinder and also one Chicago, Pitts 10-horse power" was held insufficient. Other analogous cases are *Ormsby v. Nolan*, 69 Iowa, 130, 28 N. W. 569; *Plano Mfg. Co. v. Griffith*, 75 Iowa, 102, 39 N. W. 214; *State Bank v. Felt*, 99 Iowa, 532, 61 Am. St. Rep. 253, 68 N. W. 818; *Gilchrist v. McGhee*, 98 Iowa, 508, 67 N. W. 392. The rule regarding the certainty of description of property in a mortgage is that if it contains enough to so direct the mind of the searcher of the record to facts from which he may ascertain the property with reasonable certainty, it is sufficient: *Shellhammer v. Jones*, 87 Iowa, 520, 54 N. W. 363; *City Bank v. Ratkey*, 79 Iowa, 215, 44 N. W. 362.

This was too indefinite to meet this requirement, and the trial court's ruling to this effect is approved.

Affirmed.

The Sufficiency of the Description of the Property in Chattel Mortgages to impart constructive notice is considered in the note to *Barrett v. Fisch*, 14 Am. St. Rep. 239. For recent decisions on this question, see *Commercial State Bank v. Interstate Elevator Co.*, 14 S. Dak. 276, 86 Am. St. Rep. 760; *Reynolds v. Strong*, 10 N. Dak. 81, 88 Am. St. Rep. 680.

CURTIS v. BARBER.

[131 Iowa, 400, 108 N. W. 400.]

COTENANCY—Ouster—Adverse Possession.—A sheriff's deed of the interest of one cotenant followed by possession does not amount to an ouster of the other cotenant so that title by adverse possession can be acquired against him, even though the grantee of the sheriff had no knowledge of the cotenant's interest. (p. 426.)

COTENANCY—Ouster.—As between cotenants, actual notice of claim of title and hostile acts done under such claim are prime requirements to an ouster. (p. 428.)

COTENANCY—Ouster.—As between cotenants, actual notice on the part of one of a claim of ownership of the whole property cannot arise from the fact that he, with the knowledge of his cotenant, makes occasional use of the property for storage purposes, and otherwise assumes to rent it for a nominal rental insufficient in amount to pay the taxes. Such conduct does not constitute an ouster. (p. 428.)

Action to quiet title, in which Adaline A. Shepherd intervened claiming the indorsed one-half of the property. By the decree she and the plaintiff were adjudged to be owners as tenants in common and the title of each was quieted against the other. Plaintiff appealed.

E. L. Smalley, for the appellant.

Long, Hageman & Farwell, for the appellee.

401 BISHOP, J. The property in question is a lot, forty-four feet in width, situated in the city of Waverly, Bremer county, and on November 25, 1881, was owned by one W. F. Barker. On that date Barker conveyed by deed to L. L. Lush and the intervener Shepherd, each an undivided one-half. This deed was never recorded and has been lost. In September, 1887, a sheriff's deed conveying in terms all the right, title, and interest of Lush in and to the property was executed and delivered to plaintiff, Curtis, and this deed was at once recorded. It is the contention of plaintiff that at the time of the sheriff's deed Lush was in the sole occupancy of the property; that upon receiving his deed, and without knowledge of any rights or interests on the part of intervener, he (plaintiff) entered into sole possession, which he has retained ever since, claiming to be the owner, paying the taxes, and taking the rents and profits; and his demand for a decree as against intervener is predicated upon the assumption that his taking possession amounted to an ouster

which he asserts has been followed by possession adverse to intervener for the statutory period and under claim of title. On the other hand, it is the contention of the intervener that there was no ouster; that the possession of plaintiff has been that of a tenant in common, and not adverse, with full knowledge of her rights in the premises.

That under the Barker deed intervener and Lush became tenants in common of the property is conceded; that the possession of one tenant in common is the possession of the other is a rule well settled in law; and there can be no disseisin in favor of the one as against the other, such as will set the ⁴⁰² statute of limitations running without an actual ouster. Now, while a conveyance by one tenant in common of the whole estate to a stranger will ordinarily amount to an ouster (*Kinney v. Slattery*, 51 Iowa, 353, 1 N. W. 626, and *Fielder v. Childs*, 73 Ala. 567, cited and relied on by appellant) still there is no warrant on reason or authority for saying that a mere relinquishment, voluntary or involuntary, by one tenant of his interest in the property can be given such effect. In such case there is no more than a substitution of tenants: 17 Am. & Eng. Ency. of Law, 707. Thus, in the case of a simple quitclaim to a stranger by one tenant in common of his right and interest in the property, the rights of the cotenant remain unaffected thereby. There is no ouster such as will put the statute in motion: *Hume v. Long*, 53 Iowa, 299, 5 N. W. 193. And as a purchaser at sheriff's sale gets only the interest which the execution debtor had in the property, that being all that the sheriff has right and authority to sell, the situation is precisely as if the debtor had made a voluntary relinquishment by quitclaim: *Weaver v. Stacy*, 93 Iowa, 683, 62 N. W. 22. It makes no difference that the purchaser at execution sale has no notice, actual or constructive, of the interests of a person other than the judgment debtor. As said Mr. Justice Dillon in *Hamsmith v. Espy*, 19 Iowa, 444: "In making a sale under execution, the sheriff or other public officer professes to sell only the interest or estate of the judgment debtor. He gives no warranty. The law proclaims in the ears of all who propose to buy: 'Caveat emptor; and look out, take notice, beware, of the title for which you bid'": See, also, *Holtzinger v. Edwards*, 1 Iowa, 383, 1 N. W. 600; *Matless v. Sundin*, 94 Iowa, 111, 62 N. W. 662.

Having concluded, as we must, that the sheriff's deed had no effect to deprive intervenor of her rights and interests in the property, or to put the statute in motion as against her, we proceed to inquire whether anything appears in the subsequent relations of the parties that should be given such effect. ⁴⁰³ The evidence shows the lot to be of the value of about four thousand dollars. Saving the presence of an old and somewhat dilapidated building, and a sidewalk at the street line, the property is unimproved. At the time of the sheriff's deed the building was actually occupied by a tenant for storage purposes, and such tenant continued a few months, paying to plaintiff thirty dollars as rent. Thereafter, and down to 1893, plaintiff and a firm of which he was a member used the property from time to time for storage purposes as their convenience suggested, the firm making no accounting for rent. From 1893 down to the commencement of this action, a period of about ten years, the property was rented by plaintiff to one Hodges, but for what purpose does not appear. Hodges paid rent in labor at the rate of five dollars per annum. Plaintiff paid the taxes and has kept the sidewalk in repair. No other improvements have been made. It is the testimony of plaintiff that the rentals of the property have not been sufficient to pay the taxes and the expense of keeping the sidewalk in repair. Intervenor knew of the occupancy of the property, and says that, knowing the rentals would not pay the taxes and keep the property in repair, she made no objections thereto. Plaintiff insists that he first learned that intervenor had an interest in the property in June, 1893, the information coming through a letter from Lush stating that she (intervenor) was owner of an undivided half. Plaintiff went to the husband of intervenor with the letter, and the subject matter was talked over. There is some dispute between them as to what was said, but we think it fairly appears that Mr. Shepherd, who says he had charge of all his wife's business, declared for her interest in the property and for a recognition of her rights by plaintiff. Moreover, that plaintiff admitted in substance that, it being true that intervenor was named as grantee in the deed from Barker, she would be entitled to a half interest in the property. Except as above indicated, plaintiff did not thereafter give notice to intervenor of a claim on his part of sole ownership, and she was advised of such claim only by the

⁴⁰⁴ commencement of this action. Clearly enough, an ouster cannot be predicated on a state of facts as thus presented. In cases arising between tenants in common, actual notice of claim of title and hostile acts done under such claim are prime requirements to an ouster: *Casey v. Casey*, 107 Iowa, 192, 70 Am. St. Rep. 190, 77 N. W. 844.

There are cases in which it has been held that, where there has been long-continued and undisturbed occupancy, actual notice of claim of ownership may be given through acts done by the occupying tenant, with the knowledge of his cotenant, such as making valuable improvements, retaining all rents and profits, and otherwise treating the property after the manner which obtains generally in cases where absolute ownership is asserted. And such is the case of *Knowles v. Brown*, 69 Iowa, 11, 28 N. W. 409. But the rule of that and other like cases is not authority for holding that actual notice may arise from the mere fact that one tenant, with the knowledge of his cotenant, makes occasional use of the property for storage purposes, and otherwise assumes to rent the same for a nominal rental insufficient in amount to pay the taxes. There is nothing in such conduct to indicate a design to oust the cotenant of his interest. On the contrary, all may very well have been done by the occupying tenant for the protection of his own interest: *Warfield v. Lindell*, 30 Mo. 272, 77 Am. Dec. 614; *Bader v. Dyer*, 106 Iowa, 715, 68 Am. St. Rep. 332, 77 N. W. 469; *Casey v. Casey*, 107 Iowa, 192, 70 Am. St. Rep. 190, 77 N. W. 844. And especially must this be true where, as in this case, the occupying tenant is advised before the period of the statute has run that his cotenant is claiming ownership, and tacitly, at least, acquiesces therein.

Our conclusion is that the decree was right, and it is affirmed.

The Adverse Possession of One Tenant in Common and the creation of prescriptive title thereby are discussed at length in the recent note to *Joyce v. Dyer*, 109 Am. St. Rep. 609.

WRIGHT v. VOORHEES.

[131 Iowa, 408, 108 N. W. 758.]

CHattel Mortgages to Secure Future Advances.—A chattel mortgage may be made to secure future advances which are in contemplation of the parties at the time of the making of the mortgage, and when the indebtedness to be secured, including the advances contemplated, has been fully satisfied and discharged, the mortgage is canceled and extinguished by operation of law. Such a mortgage cannot, however, by subsequent agreement between the parties, be made to cover other advances not in contemplation at the time the mortgage was made unless, possibly, such agreement amounts to a new mortgage in parol. (p. 430.)

CHattel Mortgages—Future-acquired Property—Description.—A chattel mortgage covering "future acquisitions of the above-described property" is not sufficient in description to cover all future acquisitions of property by the mortgagor. (pp. 430, 431.)

Action to recover possession of two horses held by the mortgagee under a chattel mortgage given to secure two notes, "together with any future advances made or indebtedness owing by said mortgagor to said mortgagee, including all renewals thereof until this mortgage is canceled, all of which is secured hereby." The amount covered by the two notes was subsequently paid, but the mortgagee claimed that other advances were afterward made to the extent of sixty dollars and forty-two cents, and recovered judgment therefor against the mortgagor. In the present action the jury returned a verdict in favor of plaintiff and the defendant appealed.

R. A. Ruth, C. A. Meredith and Parrish & Dowell, for the appellants.

Bruce & Zeigler, for the appellee.

⁴⁰⁹ **McCLAIN, C. J.** The errors assigned relate to the giving of instructions and the overruling of various grounds of a motion in arrest of judgment and for judgment notwithstanding the verdict. But, as the errors argued relate to the theory on which the case was submitted to the jury, they may be discussed without setting out specifically the instructions objected to or the grounds of the motion.

The theory of the trial court was that when the notes specified in the mortgage, one of which it is conceded was to cover advances to be made, were fully paid and discharged the mortgage was canceled and could not be relied upon by

defendants as security for subsequent advances made. We think it is clear that a mortgage may be made to secure future advances which are in contemplation of the parties at the time of the making of the mortgage, and that when the indebtedness to be secured, including the advances contemplated, has been fully satisfied and discharged, then the mortgage is canceled and extinguished by operation of law: *Wallard v. Worthman*, 84 Ill. 446; *Loggie v. Chandler*, 95 Me. 220, 49 Atl. 1059; *Shiver v. Johnston*, 62 Ala. 37; *House v. Fultz*, 13 Smedes & M. (Miss.) 39. Such a mortgage cannot, by subsequent arrangement between the parties, be made to cover other advances not in contemplation at the time the mortgage was made unless, perhaps, such agreement amounts to a new mortgage in parol, ⁴¹⁰ which is not contended for in this case: *Marcus v. Robinson*, 76 Ala. 550; *Sims v. Mead*, 29 Kan. 124; *Moran v. Gardemeyer*, 82 Cal. 96, 23 Pac. 6. It is true that a chattel mortgage continues security for the indebtedness intended to be secured although the form of the indebtedness may be changed: *Sloan v. Rice*, 41 Iowa, 465; *Packard v. Kingman*, 11 Iowa, 219. But there is no proof in this case that the indebtedness on which the subsequent judgment in favor of defendant Voorhees against the plaintiff was rendered included any of the items of indebtedness intended to be covered by the mortgage.

The contention for appellant is that the mortgage should be construed as security for any advances so long as it remains uncanceled; that is, until there was some formal act of cancellation. But we think the intention evidenced by the language used was that it was to remain in force so long as the indebtedness of plaintiff to defendant Voorhees continued, and that on the full discharge of the indebtedness evidenced by the notes executed, and future advances contemplated at that time, it should be extinguished. To give the language any other construction would convert the instrument into a mere blanket mortgage, not only uncertain as to the property covered, but also as to the indebtedness secured. No objection is made in this case upon the ground that by the terms of the instrument itself it was to cover future "acquisitions to the above-described property," and that the two horses which plaintiff seeks to recover are not animals described in the instrument, nor the progeny of any animals described. But to give the instrument a construction which would make it cover all future acquisitions of

property, and all future indebtedness, regardless of the contemplation of the parties at the time that the instrument was executed that any such indebtedness should be incurred, would seem to be wholly without authority. The cases authorizing the inclusion of after-acquired property and future advances will all be found to come far short of a general ⁴¹¹ inclusion of everything the mortgagor may subsequently own and every indebtedness to the mortgagee which he may subsequently incur. By way of illustration see *Fidelity & Deposit Co. v. Sturtevant Co.*, 86 Miss. 509, 109 Am. St. Rep. 716, 38 South. 783; *Everman v. Robb*, 52 Miss. 653, 24 Am. Rep. 682; *Cayce v. Stovall*, 50 Miss. 396; *Deeley v. Dwight*, 132 N. Y. 59, 30 N. E. 258, 18 L. R. A. 298; *Shores v. Doherty*, 65 Wis. 153, 26 N. W. 577; *Gray v. Helm*, 60 Miss. 131; *Paxton v. Meyer*, 58 Miss. 445; *Moore v. Terry*, 66 Ark. 393, 50 S. W. 998; *Martin v. Halbrooks*, 55 Ark. 569, 18 S. W. 1046; *Fort v. Black*, 50 Ark. 256, 7 S. W. 131.

The foregoing suggestions are applicable also to the complaint as to an instruction that the future indebtedness referred to in the instrument did not include indebtedness created after the notes and advances referred to had been fully paid and extinguished. Certainly, under the authorities already cited, a mortgage to secure future indebtedness should not be construed to cover indebtedness not in the contemplation of the parties at the time the instrument was executed and having no reference to the subject matter referred to in the instrument. What has been said has direct bearing in this case only on the correctness of the view taken by the trial court that when all existing indebtedness between the parties had been fully satisfied, and there remained no further occasion to make future advances or contract for future indebtedness in connection with the subject matter of the mortgage, it ceased to be of any validity. We are satisfied that this view of the court was correct.

The cases relied on for appellant are not in point as against the view here expressed. In *Hellyer v. Briggs*, 55 Iowa, 185, 7 N. W. 490, the mortgage was given to secure a general liability of the mortgagee as surety for the mortgagor under a bond, and was held to cover all the indebtedness of the mortgagor secured by such bond. In *McDaniels v. Colvin*, 16 Vt. 300, 42 Am. Dec. 512, the mortgage was to secure a note and book account, and it was held to cover ⁴¹² future indebtedness on book account; but the account thus held

to be secured was one commencing prior to the extinguishment of the mortgage and running thereafter as an open current account. In the case before us successive accounts between defendant Voorhees and the plaintiff had been settled by the giving of notes secured by other mortgages than the one here involved, and the judgment which appellant claims as covered by the mortgage in suit was incurred after these successive accounts had been thus fully settled. Looking at the whole transaction in the light of the conduct of the parties, it is clear that there was no intention that the instrument should continue for all time to cover any indebtedness arising out of wholly new accounts which defendants should subsequently open with plaintiff.

Many specific objections are made to the instructions, but they are all disposed of by what has already been said. The trial court adopted, as we think, a correct construction of the instrument, and the judgment is affirmed.

Mortgages to Secure Future Advancements are considered in the note to *Merchants' State Bank v. Tufts*, 116 Am. St. Rep. 690.

GARVIK v. BURLINGTON CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY.

[131 Iowa, 415, 108 N. W. 327.]

RAPE.—Absence of Complaint by the prosecutrix in a rape case is not conclusive against conviction, but the jury must consider that fact in connection with all the facts and circumstances surrounding and connected with the transaction, including the age, intelligence, and experience of the prosecutrix. (p. 434.)

RAPE—Evidence.—In a prosecution for rape the evidence of the accused and of his wife that long prior to, and ever since, the time of the commission of the alleged rape he had been incapable of having an erectio penis or of having sexual intercourse is not conclusive of that fact. (p. 434.)

RAILROADS—Liability for Rape by Employé.—A railroad company is liable in damages for a rape committed by one of its employés on one of its passengers. (p. 434.)

RAILROADS—Duty to Passengers.—Railroad companies must exercise the highest degree of care toward passengers on their trains, and are liable for assaults committed upon them by employés. (p. 435.)

EVIDENCE Taken on Former Trials and used by both parties should be considered by the jury and given the same effect as though taken in open court. (p. 435.)

RAPE by Railway Employé—Damages.—In an action against a railroad company to recover for a rape committed by its employé upon a passenger resulting in pregnancy and childbirth, a verdict for eight thousand dollars is grossly excessive, in the absence of proof of physical disability on account of the birth of such child, great loss of time, or great indignation and mental suffering. (p. 436.)

C. Wright and J. L. Parish, for the appellant.

B. L. Wick, Crosby & Fordyce and L. Heins, for the appellee.

⁴¹⁶ **SHERWIN, J.** The act for which recovery is sought is alleged to have been committed on one of the defendant's trains on the 9th of October, 1899. The controlling facts on which the suit is based are substantially and briefly as follows: The plaintiff is a native of Norway, where she lived until the fall of 1899. Her father and an uncle came to Iowa prior to that time, and in May, 1899, the uncle went ⁴¹⁷ to Norway, returning to this country in the early days of October, accompanied by the plaintiff, her mother, and a brother and sister; the latter twelve years of age. The plaintiff was then twenty-three years old. When the party left Cedar Rapids on the defendant's train, the plaintiff, her mother, and sister occupied seats together in one coach, and the uncle and her brother were in another coach of the same train. Their destination was Larchwood, Iowa. The train left Cedar Rapids about midnight, and the evidence tends to show that, during the remainder of the night, Dye, the brakeman charged with the act, was very attentive and pleasant to the plaintiff and her sister, several times stopping to chat with them, although they could understand nothing that he said. About 6 o'clock in the morning, while it was yet dark, the plaintiff went to a toilet-room in the rear end of the car, and she claims that, immediately after she entered it and closed the door, Dye opened the door, went in, and shut and bolted the door, and that he then by putting her in great fear, and by preventing her attempted outcry, had sexual intercourse with her. After the consummation of the act, Dye left the toilet-room at once, and in a very few minutes thereafter the plaintiff returned to her seat in the car. She made no complaint to anyone, and neither her mother nor her father knew of the transaction until about two months thereafter, when their family physician discovered that she was enceinte, and so informed them. She says, however,

that at about that time she told her sister what had happened on the train. She gave birth to a child on the 28th of June, 1900.

In this connection we may as well dispose of the appellant's contention that the verdict is not supported by sufficient evidence. It may well be conceded that the case made by the plaintiff's own testimony presents some rather unusual features; but, notwithstanding this concession, if it be true that sexual intercourse was accomplished by putting her in fear ⁴¹⁸ and by preventing an outcry while it was being attempted and consummated, she should recover. While the ordinary female who has been ravished will make the fact known to her family or friends at the very earliest possible moment, complaint is not always made, and we have repeatedly held that conviction in criminal cases charging rape is proper though no complaint be made. In other words, absence of complaint is not conclusive, but the jury are to consider all of the facts and circumstances surrounding and connected with the transaction, including the age, intelligence, and experience of the injured party: *State v. Cross*, 12 Iowa, 66, 79 Am. Dec. 519.

In addition to denial of the alleged transaction in the toilet-room, Dye testified that, owing to an injury to his penis received in 1881, he had never since that time had an erection or been able to have sexual intercourse. His wife also testified to the same effect. This testimony was not conclusive, however. Dye would, of course, shield himself as far as possible, and the jury was not bound to believe the wife rather than the plaintiff. The smiles and the attention bestowed on the plaintiff and her sister by Dye during the night journey north from Cedar Rapids are not indicative of copulative incapacity and we are not greatly surprised that the jury did not fully credit the testimony he offered on the subject. The question was for the jury, and the verdict, as to the commission of the act by Dye, is sufficiently supported by the evidence.

The appellant urges that its request for a directed verdict should have been granted because the cause of action set out in the petition could not be maintained against it. It is conceded by appellant that, if Dye made an assault upon the plaintiff while she was a passenger on its train, a cause of action would arise for a breach of the implied duty to furnish

her protection during such time; but it is said that the basis of her claim is that the defendant, through its agent, committed ⁴¹⁹ a criminal assault upon her. It is true the petition alleges an assault amounting to rape, but at the same time it makes other allegations presenting a cause of action concededly maintainable. It alleges that the plaintiff was a passenger on the defendant's train, and that, while it was transporting her, one of its servants or agents committed the act complained of. It is shown without question that Dye was one of the appellant's servants engaged in the operation of the train in question, and, if he committed the assault complained of, the appellant is liable to respond therefor because of its duty to its passengers: 3 Thompson on Negligence, sec. 3184; 2 Shearman and Redfield on Negligence, sec. 513, and cases cited; Garvik v. Burlington Ry. Co., 124 Iowa, 691, 100 N. W. 498, the first appeal in this case; McKinley v. Chicago etc. R. R. Co., 44 Iowa, 314, 24 Am. Rep. 748; Johnson v. Chicago etc. R. Co., 58 Iowa, 348, 12 N. W. 329; Lewis v. Schultz, 98 Iowa, 341, 67 N. W. 266; Goddard v. Grand Trunk Ry. Co. 57 Me. 202, 2 Am. Rep. 39.

It is further said that there was error in not submitting to the jury the question of the plaintiff's contributory negligence. No such instruction was necessary under the rule announced in Bryan v. Chicago Ry. Co., 63 Iowa, 464, 19 N. W. 295. But, were the rule otherwise, there was no conflict in the testimony as to what took place between the plaintiff and Dye in the toilet-room, and, if they were there together, the evidence conclusively shows that the plaintiff did nothing to contribute to her injury. Just what acts on the part of the plaintiff would amount to contributory negligence in a case of this nature are not pointed out. The court instructed that, if she consented to the intercourse, she could not recover, and it is quite evident that whatever she may have failed to do after the wrong was committed was immaterial.

Instructions 4 and 5 are criticised, but we think unjustly so. The fourth told the jury that it was the duty of the defendant to exercise the highest degree of care toward the plaintiff while she was a passenger on its train, ⁴²⁰ and that, if she was assaulted by one of appellant's servants during said time, it was liable for such assault. The instruction is in line with the rule of law governing the case, and unless

we indulge in undue technicality as to the issue presented by the petition, no fault can be found therewith.

Testimony taken on other trials of the case was used by both sides, and the court instructed that it was to be treated and considered by the jury and given the same effect as if the same witnesses had testified in open court. There was no error in so instructing.

It is contended that the court's statement of the issues, in connection with its eighth instruction, authorized the jury to award damages for time lost in caring for the child. The statement of the issues did not fairly imply that the plaintiff was asking such damage, and the instruction told the jury only that it might award damages for the loss of time sustained by reason of Dye's conduct. There is no merit in the complaint.

The verdict and judgment were for eight thousand dollars, and it is urged that the verdict is so excessive as to indicate passion and prejudice on the part of the jury. Considering the entire record before us, we are agreed that the recovery is excessive; but we agree further that the amount found by the jury does not necessarily indicate improper influence. There is some evidence tending to show physical disability on account of the birth of the child, and testimony tending to show some mental pain and suffering. On the other hand, the plaintiff herself testified to conditions existing since the injury, strongly indicating that her mental anguish on account of the outrage was neither great nor lasting. Indeed, her failure to make it known until her condition, the result of the intercourse, was discovered, negatives the thought of great indignation and mental suffering. The jury may ⁴²¹ have acted in perfect good faith in finding that the assault was made by Dye as claimed, and still not have analyzed, as carefully as we have tried to do, the evidence as to the damage suffered on account thereof. The judgment should be reduced to three thousand dollars. If the plaintiff shall elect, in a writing filed with the clerk of this court within thirty days, to accept such sum in full satisfaction of her claim for damage against the defendant, the case will stand affirmed; otherwise it will be reversed.

Affirmed on condition.

A Carrier is Liable to Its Passengers for assaults made upon them by employes, regardless of whether the employes are acting within the scope of their employment: *O'Brien v. St. Louis Transfer Co.*, 185 Mo.

263, 105 Am. St. Rep. 592, and cases cited in the cross-reference note thereto. Where an employé of a railroad company assaults a passenger with intent to commit a rape upon her, the company is answerable therefor in damages: Savannah etc. Ry. Co. v. Quo, 103 Ga. 125, 58 Am. St. Rep. 85.

The Crime of Rape is discussed in the note to *Smith v. State*, 80 Am. Dec. 361. Until the decision in the principal case, we doubt whether anyone defending the well-established rule that a trial court may set aside the verdict of a jury for awarding excessive damages, could have anticipated encountering the phenomenon of a court that assumed to judicially know that three thousand dollars were ample compensation to a young unmarried woman for being subjected to a rape and the consequent bearing and maintaining of a bastard to the villain who raped her.

MOORE v. SCRUGGS.

[131 Iowa, 692, 109 N. W. 205.]

PARENT AND CHILD—Advancements.—If a parent furnishes the purchase money and takes a conveyance in the name of his child, the rule which presumes an advancement does not apply. (p. 439.)

JUDGMENTS are Liens only on the interests of the defendants. (p. 439.)

PARENT AND CHILD—Estoppel Against Creditor of Child.—A parent purchasing land and taking the conveyance thereto in the name of such child may assert title to the land as against a creditor of such child, provided he knew nothing of the extension of such credit. (p. 439.)

L. McMillen, for the appellant.

H. H. Sheriff and J. O. Malcom, for the appellees.

692 SHERWIN, J. Catherine Moore, the plaintiff herein, is the mother of Siddie Moore, against whom the defendant W. D. Scruggs obtained a judgment in 1895. In February, 1904, the real estate in question was purchased of one Taylor, the purchase being negotiated by Siddie Moore, who took the title to the land in her own name. In November, 1904, she conveyed the land to her mother, and in January, 1905, levy was made thereon under a general execution issued on the judgment against Siddie Moore. Thereafter this suit was brought to restrain the defendants from selling the land to satisfy said judgment, the plaintiff alleging ownership of the land by purchase from Taylor, and that the title thereto was taken in the name of her daughter without her knowledge or consent. The defendants answered, denying the ownership of the plaintiff, and alleging the ownership of Siddie Moore, and that the conveyance from her to her mother was for the purpose of defrauding the defendant.

Scruggs. An estoppel by conduct is also pleaded by the defendants based on the allegation that at the time Scruggs extended the credit on which his judgment was founded Catherine Moore permitted him to rely on Siddie Moore's ⁶⁹⁴ apparent ownership of other property, and fraudulently remained silent when equity and good conscience would require full disclosure of the true condition of affairs.

Catherine Moore is a widow, whose husband departed this life many years before any of the transactions in question arose. Before his death her husband deeded to her a valuable farm, which she sold some years after his death, receiving therefor a large sum of money. After this sale, she negotiated for eighty acres of land known in this record as the "O'Connor farm." The purchase thereof was made, the deed being to Siddie Moore, who held the title for a short time only, and then conveyed to her mother. It is on this transaction that the principal controversy in this case hinges, the appellees contending that the O'Connor land was in fact purchased for Siddie Moore and paid for with her money, while the appellant contends that she bought it and paid for it with a part of the money received for the farm that she had previously sold, and that the title was taken in the name of her daughter for temporary purposes only.

A careful examination of the record convinces us that the appellant's contention is sustained. While there seems to have been some disposition on the part of the daughter to take the title in herself regardless of her mother's wishes, the evidence satisfactorily shows that the mother in fact furnished the money to pay for the land. She had means, and it is conclusively shown that the daughter had nothing of her own. The fact that the daughter had acted as the agent of her mother, and had been permitted to make deposits of her mother's money in her own name, is clearly shown, and accounts for the necessity for her presence when payment for the O'Connor land was made. It is undoubtedly true that the land involved in this suit was paid for with money received from the sale of the O'Connor farm to Mr. Sarvis. Indeed, we do not understand that the appellees contend otherwise; their contention being, as we understand their argument, that the conveyance of the O'Connor land and of ⁶⁹⁵ the land in question were advancements made by the plaintiff to her daughter. The trouble with this contention

as to the O'Connor land is that the title was afterward transferred to the mother, and the presumption of an advancement was thereby entirely destroyed.

As to the land in suit, it is conclusively shown that the daughter took the title in herself without the knowledge of her mother, and hence the rule that, where a parent furnishes the purchase money and takes the conveyance in the name of a child, the law, in the absence of a showing to the contrary, presumes an advancement, does not apply. If an agent invest his principal's money in real estate with his knowledge, but takes the title in himself without the consent of his principal, there will be a resulting trust: 1 Perry on Trusts, sec. 135. The record fails to show any advancement to Siddie Moore. It is well settled that a judgment is a lien only on the interest of the judgment defendant: Atkinson v. Hancock & Co., 67 Iowa, 452, 25 N. W. 701; Welton v. Tizzard, 15 Iowa, 495; First Nat. Bank v. Hayzlett, 40 Iowa, 659.

While it is shown that Mr. Scruggs extended credit to Sid-die Moore while she held the title to one forty of the O'Connor eighty, the evidence wholly fails to prove that the ap-pellant knew anything of their dealings, or knew that he had obtained a judgment against her daughter until after the land in suit had been conveyed to her by her daughter.

Our conclusion is that the plaintiff is entitled to the relief demanded, and it is so ordered. The judgment is reversed.

The Purchase of Land by a Father in the Name of His Children is presumed to be an advancement, and the equitable as well as the legal title vests in them: Bogg v. Roberts, 48 Ark. 17, 3 Am. St. Rep. 211. If a parent purchases land in the name of his son, the purchase is deemed prima facie an advancement, so as to rebut the presumption of a resulting trust: Kern v. Howell, 180 Pa. 315, 57 Am. St. Rep. 641.

McLENNAN v. FARMERS' SAVINGS BANK.

[131 Iowa, 696, 109 N. W. 291.]

BANKS AND BANKING—Application of Deposits.—A bank into whose hands money comes by mistake in the name of one who has no interest therein cannot apply it to the satisfaction of his debt to the bank as against the true owner. (p. 442.)

Sullivans & Fry, for the appellant.

H. P. Armitage and Milligan & Lee, for the appellees.

DEEMER, J. C. O. Breed was a stock buyer, and J. R. Webb was his agent, who, upon commission, purchased hogs for shipment. After Webb purchased stock he furnished a statement to Breed, and he (Breed) paid for the animals bought, and shipped them in his own name. At the time of the transaction in question Webb was indebted in a large amount to the defendant, the Farmers' Bank, upon his own account. Webb had purchased hogs for Breed to the amount of forty-four dollars and sixty-five cents, and for which Breed had paid, when he (Breed) was called away from home, and, as a full carload had not been purchased, and as Webb was without funds and irresponsible, it was arranged between Webb and plaintiff McLennan, who was cashier of the Citizens' Bank of Afton, that he (McLennan) would furnish the funds necessary to make up a carload of hogs upon condition that the hogs were to belong to McLennan, be shipped in the name of his bank, and the proceeds to be returned thereto, Webb to have no interest therein save his commission. Pursuant to this arrangement, Webb purchased enough hogs to make up a carload, drawing his own checks upon the Citizens' Bank of Afton in payment therefor. These checks were paid by McLennan, but were not entered upon the books of the bank, the checks being used simply as a means of settlement between Webb and McLennan. When the car was ready for shipment, Webb, without the knowledge or consent of either of the plaintiffs, and entirely upon his own motion, directed that it be sent to a commission firm in St. Joseph, Missouri, with which he (Webb) had theretofore done business, and in conformity to a prior custom, and without express direction from anyone, this commission firm remitted the proceeds of the car of hogs, or sent a letter of advice to the defendant bank for the credit of Webb. Upon the receipt of this advice, defendant applied the amount thereof upon Webb's past-due indebtedness to it. Plaintiffs, Breed and McLennan, bring this action to recover the proceeds of the hogs, claiming that the animals were by mistake billed and shipped in the name of Webb, who was a mere agent for the plaintiffs, and that they in fact were and are the owners of the hogs and the proceeds thereof, Webb having no interest therein save his commission. No question is made regarding the joinder of plaintiffs, nor is there any issue regarding their right to sue.

Something is said in argument ^{and} about these propositions, but it affirmatively appears that they were not presented to or passed upon by the trial court. We go, then, directly to the merits.

Counsel for defendant contend that the proceeds from the sale of the hogs came into the possession of the bank as the property of Webb without notice that any other person had any claim or right thereto, and that it was legally justified in applying same upon Webb's indebtedness to it. They rely upon *Waters v. Cass Co. Bank*, 65 Iowa, 234, 21 N. E. 582; *School Dist. v. First Nat. Bank*, 102 Mass. 174, and other cases. In our opinion, these cases are not applicable to the facts now before us. Here the hogs were to be and were the property of the plaintiffs. Without their knowledge or consent they were shipped in the name of Webb, he having no title thereto. The commission house, without direction from anyone, but relying upon a previous custom, caused to be deposited in the Stock Yards Bank at St. Joseph, Missouri, for the credit of defendant, the proceeds of the hogs as coming from J. R. Webb. Upon the receipt of "advice" of this deposit, defendant credited the amount thereof upon various notes which it held signed by Webb. Defendant received nothing but this advice from the St. Joseph bank, and it is manifest that the law merchant has nothing to do with the case. Webb made no deposit with the defendant or with the St. Joseph bank, and he did not direct that returns should be made to defendant, or deposits made to its credit on his behalf. Neither of plaintiffs gave directions that the stock should be shipped in Webb's name, or that Webb should have credit with the proceeds, nor did Webb direct the shipment in his name.

The sole question is, Who is entitled to the proceeds of these hogs? There are no equities in defendant's favor, for it came into possession of the funds, or such possession as it had, solely through a mistake, and without any laches on plaintiff's part. If the hogs belonged to plaintiffs, they are, under this record, entitled to the proceeds thereof.

The action is at law, and, if there be any evidence to ^{and} sustain the finding of the trial court upon this proposition, the judgment should be affirmed. Turning to the record, we find ample evidence that Webb was buying for Breed simply upon commission, that he had no interest in the hogs,

and that he (Breed) did not authorize Webb to ship in his own name. After Breed left home, Webb explained the situation to McLennan, and McLennan told Webb to check on him, and have the returns come to the Citizens' Bank of Afton. When the shipment came to be made, no directions were given the station agent as to whose name in which to ship them, but upon his own motion he used the name of Webb as consignor. Webb did not at any time, and does not now, claim to own either the hogs or the proceeds. It very satisfactorily appears that Webb had no interest in the hogs save to the extent of his commission, and that the shipment was made in his name through mistake of the railway agent, and not by any direction of the parties in interest. The placing of the credit to the defendant bank in the St. Joseph bank was the result of a mistake on the part of the commissionmen, and not by direction of any party to this litigation. In these circumstances, it surely cannot be seriously claimed that defendant is entitled to the money as against the true owner. No cases have been cited which so hold, and we do not think that any can be found. If Webb were a trustee, and, as such, had intentionally made a deposit in defendant's bank, and defendant had received it without notice of its trust character, and had applied it upon Webb's indebtedness, we should have an entirely different case, one to which the authorities cited by appellant might apply. But that is not the situation here. There was no trusteeship except *ex maleficio*, and there was no deposit by the trustee. The deposit, such as it was, was by another, without any authority or direction in the premises. Such a deposit should not be held to deprive the plaintiffs of their property or of its proceeds. *Cady v. South Omaha Bank*, 46 Neb. 756, 65 ⁷⁰⁰ N. W. 906, supports this conclusion. See, also, *Burtnett v. First Nat. Bank*, 38 Mich. 630.

The judgment of the district court seems to be correct, and it is affirmed.

For Authorities Bearing on the Decision in the Principal Case, see the note to Garrison v. Union Trust Co., 111 Am. St. Rep. 419.

BURCH v. LOWARY.

[131 Iowa, 719, 109 N. W. 282.]

DOGS.—A Married Woman cannot be Charged with Harboring a dog "as owners usually do" under proof showing no more than that the dog belonged to her husband, and that she allowed it to remain on the home premises, the legal title to which was in her. (p. 444.)

DOGS—Married Women as Owners of.—A married woman who owns her own home, and permits dogs belonging to her husband to remain on the premises, is not liable as their owner or as "harboring them as owners usually do" for injuries caused by them to one driving along the public highway. (p. 445.)

W. M. Jackson, for the appellant.

Crum, Jaqua & Crum and Maxwell & Maxwell, for the appellee.

720 BISHOP, J. The defendant is a married woman, and, at the time in question, resided with her husband and family on a farm, the legal title to which stood in her name. Two dogs were kept on the farm, and as plaintiff was driving by on the public road said dogs ran out, and, by their barking, frightened her horses, causing them to run away. As the horses ran, the buggy was tipped over and, plaintiff being thereby thrown to the ground, she sustained the injuries of which she complains.

The trial was proceeded with on the theory that the case came within the statute of this state (Code, sec. 2340), which provides, following other matters: "And the owner shall be liable to the party injured, for the damages done by the dog," etc. There was no evidence that the dogs were vicious in character. At most it was shown that on several occasions they had been known to run out and bark at passing teams; a propensity of which defendant declares she had no knowledge, and counsel for appellee do not contend otherwise. That the dogs were kept on the premises by permission of defendant is not denied. In a motion for a directed verdict, and by requests for instructions, the defendant contended that, as she was not the owner of the dogs, she could not be made liable under the circumstances shown for their depredations, notwithstanding she permitted such **721** dogs to remain on the premises. The motion was overruled, and the requests refused. In the submission of the case, the jury

was told that, under the laws of this state, the owner of any dog is liable to the party injured for the actual damages done by such dog. "And, on the question of ownership of the dogs, you are instructed that, if the defendant had the dogs in question in her possession, and was harboring them on her premises, as owners usually do with their dogs, then she is the owner within the meaning of the law. In determining this matter at the time of the alleged attack, you will consider the defendant's former treatment of the dogs, her declaration, if any, concerning them, and the habits of the dogs as to staying at defendant's place."

We concede to counsel for appellee that the word "owner," as occurring in the statute, is not to be taken in the technical sense in which it is commonly used. Thus, in *O'Harra v. Miller*, 64 Iowa, 462, 20 N. W. 760, we said "that if the defendant had the dog in his possession, and was harboring him on his premises, as owners usually do with their dogs, then he is the owner within the meaning of the law." And to the same effect is *Trumble v. Happy*, 114 Iowa, 624, 87 N. W. 678.

The case before us, then, presents the simple and sole question, whether a married woman can be charged with harboring a dog, "as owners usually do," under proof showing no more than that the dog belonged to her husband, but that she permitted it to remain on the home premises, the legal title to which was in her. We are convinced that such question should be answered in the negative. It is too well understood to require the citation of authorities that as long as the marital relation is maintained, the husband is the head of the family. He directs where the home shall be, and dominates in the management thereof. And the statutes giving to married women the right to contract and separate ownership of property have made no change in the law relating to domestic management. It follows that if the family reside on premises owned by the wife, it is because ⁷²² the husband so wills. His status as the head of the family is not changed thereby; he retains all the rights and privileges incident to headship, as he remains charged with all its duties and responsibilities. Where, therefore, a dog owned by the husband is brought upon the premises, and there maintained, it must be presumed, in the absence of proof to the contrary, that this is in accordance with his dictation. And her assent, whether given willingly or under protest, can

amount to nothing more than an act of wifely compliance. To charge her under such circumstances as one harboring the dog as an owner would be intolerable. In doctrine, it would amount to forcing a liability upon her because of a condition existing which she did not create, and over which she has no legal control. We need not stop to consider what liability there might be, if any, on the part of the wife owning the premises, it being shown that the dog in question was vicious, and known by her to be so. This is not such a case. In principle our conclusion finds support in the following cases cited in 21 Cyc. 1492: *Strouse v. Leipf*, 101 Ala. 433, 46 Am. St. Rep. 122, 14 South. 667, 23 L. R. A. 622; *Bundschuh v. Mayer*, 81 Hun, 111, 30 N. Y. Supp. 622; *McLaughlin v. Kemp*, 152 Mass. 7, 25 N. E. 18.

It follows from what has been said that a new trial should be granted.

Reversed.

If a Vicious Dog is Kept on Premises occupied by a husband and wife, although both the premises and the animal are owned by her, still the keeping of the dog is a matter over which he is authorized to exercise control as the head of the family, and if it escapes and injures a third person, the husband alone is answerable: *Strouse v. Leipf*, 101 Ala. 433, 46 Am. St. Rep. 122.

GRAHAM v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

[131 Iowa, 741, 107 N. W. 595.]

RAILROADS—Trespassers, Duty to.—One who boards the steps of a moving closed vestibule train, where he is compelled to remain, is a trespasser to whom the railroad company owes no duty until his dangerous situation is discovered, and it is then required to act only with reasonable promptness to avoid an injury to him. (p. 447.)

RAILROADS—Trespassers—Negligence.—If a trespasser is discovered riding on the steps of a closed vestibule railroad train, the failure of the trainmen to apply the emergency brakes is not negligence if it appears that that would involve danger to the passengers, and that he might have been assisted from the steps to the car as speedily and effectively as by applying such brakes. (p. 450.)

Action to recover for the death of Roy Graham, who, together with a man named Hooyer, and another named Newgren, boarded the steps of a car on a moving train with

closed vestibules. Hooyer and Newgren were rescued by the trainmen from their perilous position, but Graham either lost his hold and fell against a viaduct structure or was brushed off by such structure and killed. Judgment for plaintiff and defendant appealed.

J. C. Mabry, Clark & McLaughlin and J. C. Davis, for the appellant.

C. W. Whitmore and N. E. Kendall, for the appellee.

⁷⁴³ BISHOP, J. Plaintiff's action is grounded upon negligence of the defendant. One of the grounds alleged is that, when advised by Hooyer and Newgren of the peril to which Graham was exposed, the train employes failed to take such prompt and effective means as were within their reach to accomplish his rescue; and as the case went to the jury such was the only ground of negligence submitted. The plaintiff, of course, is not in position to complain of this, and accordingly we shall have no occasion to make inquiry respecting any of the other grounds alleged. By motion for a directed verdict at the close of all the evidence in the case, by request for instruction, and by motion for a new trial, defendant challenged the right of plaintiff to recover, for that a case of actionable negligence had not been made out. In the motion for a directed verdict counsel for defendant state precisely the grounds of their contention, and they are as follows: 1. The undisputed evidence shows that in boarding the train on the outside of the vestibule, Graham acted not only in violation of the statutes of the state of Illinois, but without notice to, or knowledge on the part of, the defendant. He was therefore a trespasser and only entitled to rights as such. 2. The evidence fails to show that ⁷⁴⁴ defendant's employes in charge of the train were notified of Graham's presence on the train prior to his injury; 3. That as soon as notified that Graham was riding on the outside the employes in charge of the train adopted the quickest and safest way to relieve him, by going to the vestibule, where, according to the information given them, he was supposed to be riding.

1. That under the circumstances Graham was a trespasser, and acted in violation of law, is too clear for argument. The trial court so instructed the jury, and counsel for appellee do not take space to question the correctness of the instruc-

tion. Being a trespasser the defendant owed Graham no duty until his position of danger was made known to the employes in charge of the train, and then only to act with reasonable promptness in adopting such means as were available and appropriate to accomplish his rescue: *Masser v. Chicago etc. Ry. Co.*, 68 Iowa, 602, 27 N. W. 776; *Burg v. Railway*, 90 Iowa, 106; *Baker v. Chicago etc. Ry. Co.*, 95 Iowa, 163, 63 N. W. 667; *Earl v. Chicago etc. Ry. Co.*, 109 Iowa, 14, 77 Am. St. Rep. 516, 79 N. W. 381.

2. Confessedly the first information to the effect that Graham had boarded the train on the outside came to the train employes from Hooyer and Newgren after the latter had been admitted to the train; and, as we have seen, Graham fell or was brushed off at or near the Kedzie avenue viaduct. Of vital importance to plaintiff's case, therefore, is the location of the train with reference to the viaduct when such information was imparted. As we read the record, and we have gone over it with much care, there seems no reasonable grounds to conclude otherwise than at the time in question the train had passed the viaduct. This being true, there is no possible theory upon which the verdict and judgment can be upheld. We shall recite the evidence sufficiently in detail to make clear the situation. The boy Hooyer was the only witness for plaintiff who testified on the subject. He says that he was wholly unacquainted in the neighborhood, ⁷⁴⁵ that he had never been there before, and has never been there since; that he did not know of the existence of Kedzie avenue or the viaduct. On direct examination he testified that he had since been informed as to the existence of the viaduct, and as to the distance thereof from Oakley avenue, and he gave it as his judgment that, at the time he was taken into the train, about one-third of the distance had been traveled. Being asked as to the rate of speed at which the train was running he answered that in his judgment it was about fifteen miles an hour. On cross-examination, he answered that from the time he boarded the car he was standing face inward, hugging close to the vestibule door, and looking steadily through the window in such door; that he gave no attention whatever to landmarks or objects that were being passed by the train; that he realized he was in a position of great peril, and was frightened, and that he kept rapping on the window until the brakeman came to his relief. On the subject of the speed of the train he answered that there was not

very much acceleration as they went on. "Q. They kept increasing speed as you went on? A. I never took particular notice. Q. They might have increased in speed, and you not noticed it? A. Well, they were not going very fast. Q. Are you a judge of the speed of railroad trains? A. No, sir. Q. You cannot tell a vestibule train when you see it? A. I do not know about that. Q. But you can judge as to the speed of a train? A. Well, about as near as anybody in my position, I guess." Now, for the defendant, Newgren testified in positive terms that the train had passed Kedzie avenue before he and Hooyer were taken in; that he was familiar with the viaduct, and knew when they passed it. "Yes, sir; I knew it. I had gone over it lots of times. You can tell by the sound. It is just like going over a bridge or river. When we went over, the railing of the subway just touched my back, just so I could feel it." The porter of the Pullman car who, with a brakeman named Wright, was present when Hooyer⁷⁴⁶ and Newgren were taken in, testified that they were then near the Kedzie viaduct; that he could not say whether it was just before or just after, but thinks it was just after they passed the viaduct. Two brakemen and the conductor of the train each testified that within his positive knowledge the train had proceeded some distance to the west of the viaduct before the presence of the boys on the train was discovered and they were taken in. Each of such witnesses testified further that at the time the train passed the viaduct the rate of speed at which it was running was from twenty-five to thirty miles an hour.

We have not overlooked the contention in argument of counsel for appellee to the effect that Hooyer and Newgren must have been taken into the train before the viaduct was reached because the space between the car and the girder of the viaduct was not sufficient to permit the passage of a man standing on the car steps and clinging to the hand holds; that accordingly, and if the fact as to the location of the train was otherwise than as testified to by Hooyer, all three of the boys would have brushed off when the viaduct was reached. The trouble with this contention arises out of the proof. The distance between the extreme south edge of the car step and the viaduct girder is shown to be eighteen and a fraction inches, while the vestibule door is set in six inches from the outer line of the car. There was then a clearance of fully two feet. Hooyer was a slender boy, and

he says he kept his body close up to the vestibule door, while Newgren, a much larger man, was partially in between the vestibule ends. Such being the facts, it was entirely possible for both to pass through without striking against the girder. Such, then, is the state of the evidence. As it seems to us, consideration thereof from any point of view must lead to the conclusion that the train had reached the viaduct, and Graham had fallen to his death before any warning of his peril had been given. It must be manifest that at best the estimate of Hooyer as to the distance the ⁷⁴⁷ train had traveled can be taken for nothing more than sheer guesswork; a present guess as to a matter of fact respecting which he does not claim to have formed an opinion as of the time, and to which, as he declares, his attention had not been subsequently called until shortly before the trial, some three years after the happening of the accident. Being wholly unacquainted with his surroundings and giving not the slightest heed at the time to any object which could serve as a basis for computing distance with the eye, judgment on his part as to location was only possible by taking into account the speed of the train and estimating therefrom the distance run. Taking the circumstances as presented, it is inconceivable within our view that any judgment could have been formed by him on the subject. Here was an inexperienced boy nineteen years of age in the precarious position of clinging to the outside of a rapidly moving train; he says he fully realized his peril and was frightened thereat; that his attention was centered upon maintaining his hold, and that his hope was to attract attention by continual rapping on the window and his rescue thus be brought about. It was not a time for judgment as to any matter not directly associated with his peril; it was not a time for thought, even, save as connected with his chances for relief. And the witness does not pretend otherwise. His judgment is not as of that time, but of time three years later when a witness on the trial. To permit the mere opinion of such witness thus formed and expressed as to the speed of the train, and its location at the time in question, to outweigh the positive evidence of four witnesses each speaking from knowledge as to the fact involved, would be in our judgment at once absurd and wholly unreasonable.

3. But if it could be said that the conclusion reached by us in the foregoing division of this opinion is open to doubt as to its correctness, still it remains to be said that defendant

was entitled to a favorable ruling on its motion for new trial based on the subject ⁷⁴⁸ matter set forth in the third ground of the motion to instruct. By the third instruction given, the jury was told that the measure of duty on the part of defendant "was not to willfully or wantonly injure him after the said Graham had placed himself in a position of danger, and the employes of the defendant in charge and control of the train had actual knowledge of his position of danger, and, by the exercise of reasonable care, could have extricated him from same." In the tenth instruction it was said that, "If the conductor and brakeman, after being notified of Graham's position, could have stepped to the front end of the car and taken him in from the vestibule as quickly as the train could have been stopped by the use of the emergency, then it was their duty to go to the vestibule rather than stop the train." And in the eleventh instruction this: "In determining whether or not the conductor or brakeman should have stopped the train by using the emergency brake, you must consider the safety of the passengers on the train, and if the use of such brake would have endangered the safety of the passengers there was no duty which defendant owed Graham to so endanger the passengers." And such instructions became the law of the case: *Crane v. Chicago etc. Ry.*, 74 Iowa, 330, 7 Am. St. Rep. 479, 37 N. W. 397; *Reynolds v. Keokuk*, 72 Iowa, 371, 34 N. W. 167. Now, it is the evidence of Hooyer and Newgren that when they were taken into the car, the brakeman, Wright, demanded to know what they were doing out there, and if they had tickets. Hooyer says that he replied saying that "Graham who was on the other end of the coach in the same position he was in had the tickets." Newgren says that Wright was told simply that a friend up ahead had the tickets. Both agree that they at once started forward, and when about halfway through the car they met the conductor, who demanded their tickets. They told him that Graham had them, and that he was on the front end of that car outside. The conductor turned back, and went with them to the vestibule, opened it, and found no one there.

The contention of plaintiff here, as in the court below, ⁷⁴⁹ is that upon being informed that Graham was on the front end of the car it became the duty of the brakeman, and in turn, that of the conductor, to act at once by setting the emergency brakes on the train. And it is the failure to so act that is relied upon to sustain the verdict. A contradic-

tion in the evidence as to what was done by Wright may be here noticed. Hooyer testified that Wright accompanied them as they went forward and met the conductor, while Wright says that he was not told that the boys had a companion on the outside at the head end of the car, and that as the boys started forward he went inside the car and sat down. Now, as bearing upon the phase of the situation instantly under consideration, plaintiff brought forward no evidence save that the conductor who was in charge of the train in question was put upon the stand and testified that the train was equipped with air brakes; that these could be operated either from a valve placed in the closet of each car, or by the engineer upon signal given by pulling a rope which extended through the train and connected with an air whistle located in the cab of the engine. The witness further testified that in his judgment the train running at fifteen miles an hour could have been stopped in from four hundred and fifty to five hundred feet. On cross-examination the witness answered that stopping a train by use of a valve in one of the cars, called an "emergency stop," would be very unwise, unless in case of very serious accident; that the effect is to lock the wheels on the train, and is liable to injure passengers in the train. For the defendant, several witnesses, including the conductor, brakeman, and a division superintendent, were called, and all agree that an emergency stop, whether made by use of car valve or from the engine, is fraught with danger; that it is liable to injure passengers by throwing them down if in the car aisles, or out of their seats if sitting; that if made by use of car valve there is especial danger to the train, as it is liable to be torn in two. This is explained by pointing out that the wheels of the train ⁷⁵⁰ become suddenly locked while the engineer is continuing to work steam; and reference is made to instances of accident and injury thus occurring. In addition to this, said witnesses testify uniformly that less time would be consumed in going the length of a car and opening the vestibule door than would be required to stop the train, whatever the means employed. In the absence of any opposing testimony there can be no reason why such witnesses should not be believed and their evidence given controlling effect. Under the circumstances shown, therefore, it would be unreasonable in the extreme to hold that the conductor was the responsible cause of a willful or wanton injury. Conceding knowledge of the peril to Graham

on the part of Brakeman Wright, it must be said for him, that in view of the uncontradicted evidence on the subject and the law of the instructions as given to the jury, he was doubly justified in not going to the car closet and setting the brakes on the train; there was the danger to the train and its passengers, and the most expeditious method of affording relief was by going to and opening the vestibule door. If, then, as testified to by Hooyer, Wright started forward with the boys to go to the rescue—and plaintiff rested his case upon this theory—there can be no room for complaint of his action. If, on the other hand, as testified to by Wright, he went into the car and sat down—a proceeding scarcely believable if it had come to his understanding that Graham was clinging to the outside of the car—still there is nothing in the record from which it can be said that the work of rescue was interfered with or delayed thereby. The vestibule door was opened just as quick as it would have been had he also gone to the forward end of the car.

The considerations expressed foregoing lead to the conclusion that the motion of defendant for a new trial should have been sustained, and the cause will be remanded that such may obtain.

Reversed.

A Railroad Company ordinarily owes no duty to trespassers on its trains, except to refrain from doing them willful harm: *Earl v. Chicago etc. Ry. Co.*, 109 Iowa, 14, 77 Am. St. Rep. 516; *Dixon v. Northern Pac. Ry. Co.*, 37 Wash. 310, 107 Am. St. Rep. 810, and cases cited in the cross-reference note thereto.

The Question of Who are Passengers and when they become such is considered in the note to *Illinois Cent. etc. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 75.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

HANRION v. HANRION.

[73 Kan. 25, 84 Pac. 381.]

RESULTING TRUST, Statute Abolishing Applies Only to Personal Property.—The statute declaring that when a conveyance for a valuable consideration is made to one person and the consideration therefor is paid by another, no use or trust shall result in favor of the latter, does not apply to transactions concerning personal property. (p. 455.)

RESULTING TRUSTS.—A Mortgage of Real Estate is not a conveyance within the meaning of a statute which provides that when a conveyance is made to one person upon a consideration paid by another, no use or trust shall result in favor of the latter, but the title shall vest in the former. (p. 455.)

MORTGAGE, Title to, is in him who furnishes the money, though another is named as payee. If A loans his money, receiving and retaining therefor a note and mortgage in which B is designated as the payee, the latter acquires no interest therein, and if A has died, the title to the note is in his estate. (p. 456.)

Getty, Hutchings & Dean, for the plaintiff in error.

J. M. Mason, for the defendants in error.

²⁵ MASON, J. Basile Hanrion died intestate leaving a widow, Harriet F. Hanrion, and four sons. There was some disagreement among the heirs as to the proper distribution of the estate, but they all finally entered into a written contract adjusting the matter. One of the sons, however, Louis B. Hanrion, became dissatisfied and brought a suit against the widow and the other heirs to have the settlement set aside as having been wrongfully procured, and to have the property distributed ²⁶ according to the legal rights of the persons interested. He alleged in his petition that he was

the real owner of some of the property which had been treated as assets of the estate, in virtue of its being the proceeds of trust funds placed in the hands of his father by his grandfather for investment for his benefit. He also made a claim that the estate was indebted to him upon an account for services rendered. Issues were joined and the case was tried before a referee, who found that the contract of settlement should be set aside, but that the plaintiff was not a creditor of the estate or the beneficial owner of any of the property involved, and that it should all be distributed among the heirs. The court approved the report of the referee and rendered judgment accordingly. Harriet F. Hanrion began proceedings in error, but later abandoned them. The present hearing is upon a cross-petition in error filed by the plaintiff below, Louis B. Hanrion.

Various assignments of error have been made and argued, but, except for one matter which will be specially noted, they all come under one general head—that the findings of the referee are not supported by the evidence. The record is voluminous, comprising thirteen hundred and seventy pages. To review the evidence in detail would serve no useful purpose. Upon this branch of the case it is enough to say that the judgment could not be reversed without invading the province of the referee and reviewing his conclusions upon the credibility of the witnesses, the weight of their testimony, and the inferences to be drawn from the facts established.

The one contention of the cross-petitioner in error that involves the determination of a debatable proposition of law dissociated from any question of fact is based upon the circumstance that the property which the trial court held to be assets of the estate included a number of real estate mortgages in which Louis B. Hanrion was named as mortgagee, although they were ²⁷ made to secure loans made by Basile Hanrion. The argument is made that such a transaction was the conveyance to one person upon a consideration paid by another within the meaning of section 6 of the statute of trusts and powers, and therefore no use or trust resulted in favor of Basile Hanrion, but the title vested absolutely in Louis B. Hanrion. The section reads: "When a conveyance for a valuable consideration is made to one person and the consideration thereof paid by another, no use or trust shall result in favor of the latter; but the title shall vest in the

former, subject to the provisions of the next two sections": Gen. Stats. 1901, sec. 7880.

It is obvious from the context, if not from the language quoted, that the section is intended to apply only to transactions concerning real property, and not to transfers of personalty: *Baker v. Terrell*, 8 Minn. 195. In the case of *Robbins v. Robbins*, 89 N. Y. 251, the question whether such a statute had application to the execution of a real estate mortgage to one person, where the consideration was paid by another, was involved, discussed, and decided, although the result reached was also justified upon other grounds. The view of the court upon this matter is indicated by the conclusion of the first paragraph of the syllabus: "Held, that the provision of the statute of uses and trusts . . . declaring that where a grant is made to one person, the consideration being paid by another, no use or trust shall result in favor of the latter, but title shall vest in the former, had no application; that plaintiff, by operation of law, took the bond and mortgage as trustee for defendant, and those securities being personal property the statute had no application."

In the opinion it was said: "Although the bond and mortgage, in form, ran to the plaintiff, he took as trustee for the defendant, by implication of law, if not by agreement. Those securities were personal property only and had no relation to the statute": Page 258.

²⁸ An attempt is made in the brief of the cross-petitioner in error to distinguish that case from the one at bar upon the ground that our statute, although otherwise substantially the same as the one there interpreted, reads "conveyance" instead of "grant." It is manifest, however, that the words are employed interchangeably in the New York statute, for the section following the one referred to begins, "Every such conveyance," etc.

In the case of *Meier v. Bell*, 119 Wis. 482, 97 N. W. 186, cited in 2 Current Law, 1933, note 4, the supreme court of Wisconsin held that under this statute where one takes a note and mortgage in the name of another the title vests in the person named as mortgagee, but the decision is made without discussion, upon the authority of three earlier cases. Two of these relate wholly to absolute transfers of title. The third has no connection with the subject and is obviously cited by mistake, the case intended being probably the

one immediately preceding it in the report, which contains an allusion to the statute but is barren of any reference to a mortgage.

It is true that the words "grant" and "conveyance" are sometimes construed to include a mortgage, even in jurisdictions where, as in Kansas, such an instrument passes no estate in the land. For various reasons that are unassailable, but which are peculiar to each of the several classes of cases, such interpretation has been adopted in the construction of statutes relating to the homestead right, to the alienation of public lands by a settler before acquiring title, to the registration of instruments affecting real estate, and to other matters. These reasons have no application here. A mortgage is but an incident to the note it secures. It inures to the benefit of the owner of the debt without formal assignment, and is incapable of assignment as a separate and independent right. It is extinguished by the payment of the indebtedness. The possession ²⁹ of the note, as well as the designation of the payee, is evidence of its ownership, and the inapplicability of the statute is illustrated by the consideration that here the note was delivered to, and retained by, the person who made the loan. If the note had been unsecured it would hardly be contended that the beneficial title vested in Louis B. Hanrion because it was made payable to his order. The circumstance that its payment was guaranteed by the pledge of a tract of land does not alter the essential character of the transaction so as to bring it within the operation of the act in question. The judgment is affirmed.

All the justices concurring.

Porter, J., not sitting, having served as referee in the court below.

A Trust Resulted at the common law when one person paid money for land and the conveyance was taken to another, but under the statutes of some of the states no trust now results under such circumstances, except where the grantee takes the conveyance in his own name without knowledge of the person paying the consideration, or when, in violation of some trust, he purchases land with money belonging to another: *Leary v. Corvin*, 181 N. Y. 222, 106 Am. St. Rep. 542, and cases cited in the cross-reference note thereto.

VOSS v. GOSS.

[73 Kan. 120, 84 Pac. 564.]

EXEMPTIONS—Feed for Exempt Stock.—A statute that exempts to the head of a family the necessary food for the support of his exempt stock does not entitle him to claim an exemption in grain which he does not intend to feed his animals but which he intends to sell in order to obtain other grain for their food. (p. 460.)

Dale & Amidon, for the plaintiffs in error.

Adams & Adams, for the defendant in error.

¹²⁰ PORTER, J. W. O. Goss brought this action against Thomas Voss, marshal of the city court of Wichita, and the State Bank of Goddard, to recover damages for the conversion of a crop of wheat levied upon in attachment proceedings in the city court in an action in which the bank was plaintiff and he was defendant. The action is based upon the claim that the wheat was exempt from seizure and sale. Goss' interest in the crop of wheat was a three-fifths share, the remainder belonging to the owner of the land. There was a trial before the court and a jury, which resulted in a verdict for plaintiff in the sum of one hundred and eighty-three dollars and eighty-five cents. A motion for judgment upon the special findings was denied, as was the motion for a new trial, and defendants bring error.

Several errors are assigned, but it will not be necessary to consider all of them. Plaintiff is the head of a family, and claims that the wheat in controversy was ¹²¹ exempt to him under section 3018 of the General Statutes of 1901, for the reason that he owned a team of horses and that the wheat was necessary as food for their support. That part of section 3018 which must be considered reads as follows: "Every person residing in this state, and being the head of a family, shall have exempt from seizure and sale upon any attachment, execution or other process issued from any court in this state, the following articles of personal property: . . . Sixth. The necessary food for the support of the stock mentioned in this section for one year, either provided or growing, or both, as the debtor may choose; also, one wagon, cart or dray, two plows, one drag, and other farming utensils, including harness and tackle for teams, not exceeding in value three hundred dollars."

The clause preceding the sixth exempts a span of horses to the head of a family.

It is the contention of plaintiff that inasmuch as he had raised no crops that season except this wheat, and because it was customary in that vicinity to feed wheat to horses, he was entitled to claim the wheat as exempt for that purpose. It is argued that as the statute makes provision for food necessary for the support of stock for one year, without making any distinction with reference to the particular kind of food to be used for any class of animals, it was intended to leave to the debtor the selection of the kind of food. The principal witness for plaintiff was the plaintiff himself. He testified that it would have probably required two hundred and fifty bushels of wheat to feed this team for a year, but that he had never fed any wheat himself to horses; also, that he had at the time the levy was made six tons of cane, but intended to sell the cane and buy food for his family. It appears that when the levy was made he claimed fifty bushels of this wheat as exempt for bread for his family, and that amount was set apart to him, but that he made no claim at that time that any of the wheat was necessary ¹²² for the support of his stock. He claimed it, however, before the sale. On cross-examination he testified:

"Q. You know, as a matter of fact, that you would not feed ninety cents a bushel wheat, would you? A. No, sir. But I would sell it and buy feed with it.

"Q. That is what you intended to do with this? A. Yes, sir.

"Q. Didn't intend to feed this wheat? A. No, sir; intended to have feed out of it. I intended to sell wheat and buy feed."

It also appeared by others of his witnesses that, while they had known of wheat being fed to horses, it was not the custom to do so when wheat was ninety cents a bushel and corn and oats much less; and none of the witnesses could give an instance where wheat was fed to horses the fall and winter after the levy of the attachment.

The principle involved in this case has been decided by this court in *George v. Hunter*, 48 Kan. 651, 30 Am. St. Rep. 325, 29 Pac. 1148. The facts in that case are the same as in this, except that the debtor there claimed all the wheat for the support of his family, and contended that having no other provisions he had the right to take, in addition to suf-

ficient wheat for bread for the family, enough more to sell and purchase other necessary provisions. The case turned upon the construction of the word "support," in the seventh subdivision of the statute, and also the same word in the sixth subdivision. The court, after quoting both subdivisions of the statute, said:

"The language of subdivision 6 of the paragraph is 'the necessary food for the support of the stock mentioned in this section for one year.' It will not be said that the word 'support,' in this subdivision, means anything more than sufficient food to feed the stock for a year, and we think the word 'support' in the seventh subdivision is employed in the same sense, and simply means, in connection with the other substantive words therein, grain, meat, or groceries on hand, sufficient to ¹²³ feed the family for one year, or sufficient for the use of the family as food for one year. If a family has on hand one thousand bushels of wheat, but no meat or groceries, we do not think they may have as exempt sufficient wheat to bread the family a year, and in addition thereto sufficient to sell and purchase meat and groceries, or vegetables or other provisions. If the construction contended for by the plaintiff is correct, then, by the same reasoning, if the family had on hand a stock of groceries worth one thousand dollars, but had no grain, or meat, or vegetables, or 'other provisions,' they might have exempt the whole stock, provided there was no more than sufficient, in addition to the necessary groceries for use of the family, when sold, to purchase grain, meat, vegetables and other provisions for the use of the family for one year. . . . The amount of exemption, or the benefit to be derived from any particular class of property, cannot be made to depend upon the possession or want of possession by the debtor of any of the other classes of property made exempt by any of the provisions of the exemption law": Pages 652, 653.

This court has uniformly given a liberal construction to the exemption laws, but to uphold the contention of plaintiff would be to hold that if he possessed five thousand bushels of wheat he should be permitted to keep and sell a sufficient amount of it to purchase any of the numerous necessary articles mentioned in the fifth or sixth subdivisions which he happened to be without. If he could claim as exempt two hundred and fifty bushels of ninety cent wheat for

the purpose of sale to buy necessary feed for the support of his stock, he would, upon the same principle, be entitled to claim the same amount of any other personal property to be sold for the same purpose. This construction would render the various classifications of exempt property in the statute useless.

Defendants' demurrer to the evidence should have been sustained upon the admission of plaintiff that it was not his intention to feed this wheat to his horses, but, on the contrary, to sell it and buy other food, and ¹²⁴ the uncontradicted testimony offered by him that wheat was not regarded in the vicinity as food for horses at the time the wheat was taken. The judgment is reversed.

All the justices concurring.

Under a Statute Exempting from Execution grain, meat, vegetables, groceries, and other provisions on hand necessary for the support of the debtor and his family for one year, he is entitled only to the grain necessary for food for himself and family for that time, and is not entitled to hold as exempt an amount of grain sufficient, in the absence of other property, to support him and them for a year: George v. Hunter, 48 Kan. 651, 30 Am. St. Rep. 325.

GARNER v. MILWAUKEE MECHANICS' INSURANCE COMPANY.

[73 Kan. 127, 84 Pac. 717.]

DEFINITIONS.—The Word "Interest" means any right, in the nature of property, less than title. (p. 462.)

FIRE INSURANCE—Forfeiture by Change "in Interest."—The word "interest" in a policy providing a forfeiture "if any change takes place in the interest, title or possession of the subject of insurance" applies only where the insured owns a right in the property less than the title. (p. 462.)

FIRE INSURANCE—Forfeiture by Contract to Sell.—Where one who owns the title of property procures a policy of insurance thereon which provides that it shall be void "if any change takes place in the interest, title or possession of the subject of insurance," a forfeiture does not result from his making a contract to convey the property, under which he receives the consideration but does not actually transfer the title or the possession. (p. 463.)

Sutton & Scates and F. D. Smith, for the plaintiff in error.

F. J. Oyler and Fyke & Snider, for the defendant in error.

128 GREENE, J. The plaintiff was defeated in an action on a fire insurance policy, and to reverse the judgment he prosecutes this proceeding.

The policy contained a provision that it should become void "if any change other than by the death of an insured take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured, or otherwise." When the insurance was obtained the insured was the owner of the title to the property; subsequently he entered into the following contract:

"This contract and agreement, made and entered into this 16th day of June, 1903, by and between Joseph W. Baker, of Bates county, Missouri, party of the first part, and T. F. Garner, of Ford county, Kansas, party of the second part, witnesseth: That the party of the first part has this day sold to the party of the second part all his land situated in sections 4 and 5, township 39, range 30, Bates county, Missouri, consisting of 364 acres, in consideration of which the party of the second part agrees to pay to the party of the first part the sum of \$10,920, to be paid as follows: ¹²⁹ To assume the present mortgage on said land to the amount of \$4,800, and half of the interest on same from March 1, 1903, to date, and one livery-stable in Dodge City, Kan., with lots comprising site of same [describing them], to be valued at \$6,000, and thirteen head of horses, two surreys, one spring wagon, one cart, seven buggies, one farm wagon, four sets of double driving harness, one set of heavy work harness, seven sets of single harness, one side-saddle, one man saddle, and all other fixtures now a part of said stable; said chattel property to be valued at \$1500.

"It is further agreed that the said second party is to loan the first party the sum of \$3,880, at eight per cent. per annum, to be secured by said above-mentioned livery-barn and chattels.

"Party of the first part agrees to give a clear and perfect abstract to his land, with a warranty deed to the same, subject to the above-mentioned encumbrance.

"Party of the second part agrees to give to the first party a good bond for a deed, said deed to be made when said above-mentioned loan shall be repaid; and also a good and perfect

abstract to same; each party is to give immediate possession to property.

"Witness our hands and seals, this day and year above written.

(Signed) JOSEPH W. BAKER.

(Signed) T. F. GARNER.

"Witness:

"G. G. COOK.

"U. S. G. POWELL."

Baker deeded to plaintiff the Missouri land, which was the full consideration to be paid by him for the insured property. The plaintiff made no conveyance, nor had he delivered possession at the time the property was destroyed by fire—July 29, 1903. The defense was that by this contract a change had taken place in plaintiff's interest in the subject of insurance, which, under the condition quoted, forfeited the policy.

Forfeitures are not favored, and will never be enforced if by a reasonable interpretation of the agreement and contract of the parties they can be avoided. The provision was intended to protect the company ¹³⁰ against any increased hazard resulting from a change of interest, title or possession of the insured. An insurance company may contract against such a contingency, and if such provision of the contract be violated it would have the right to insist upon being released from liability. The company contracted for the care, supervision and vigilance of the assured in protecting the property from fire. This is largely its security against loss, and a disposition by the assured of all of his interest, title or possession in the property, or of such a substantial part thereof as would entirely or partially abate this diligence, would be a violation of the contract.

The word "interest" as used in the policy is not synonymous with title. It means some right different from title. It cannot mean a greater estate than title, since "title" as there used was intended to mean the entire estate. It must therefore have been used with the meaning generally attached to it when used in contradistinction to title—as "any right, in the nature of property, less than title": Anderson's Law Dictionary, 562. "In a narrower sense it was used in the English common law of real property to designate a right less than an estate": 3 Century Dictionary, 3142. This we think is the sense in which it was used in the policy. In the

interpretation of the policy this word is important. The form of the policy was intended to cover two classes of risks. There are large interests in real estate owned by persons who have neither title nor possession. The form of this policy is adapted to the insurance of such interests, as well as to the insurance of property where the insured is the owner of the title. Where the insured is the owner of only an interest in the estate the word "interest" used in the forfeiture clause has force, and any change in such interest would forfeit the policy; but where the insured is the owner of the title the word "interest" has no application. In the latter case, if any change take ¹³¹ place in the title the policy would become forfeited.

The insurance in the present case was procured by one owning the title; as to him only a change in the title would forfeit the policy. We do not feel inclined to follow the decision of *Gibb v. Philadelphia Fire Ins. Co.*, 59 Minn. 267, 50 Am. St. Rep. 405, 61 N. W. 137, because we do not believe that the word "interest" as used in the policy in that case, which was the same as the one we are considering, is broader than, and inclusive of, title; and because in that case it was wholly unnecessary to define "interest." After *Gibb* had procured the insurance he sold the insured property by a written contract, and gave possession to the purchaser, who remained in possession until the property was destroyed. This of itself was such a violation of the express terms of the policy against change of title or possession as would render the policy void.

The main contention of defendant is that the contract between Baker and Garner for the sale of the insured property, having been fully performed by Baker, is enforceable in equity against Garner; therefore, it operated as a present change of interest in the property, within the forfeiture clause of the contract. A party pleading a forfeiture must make it clear that a forfeiture has taken place; he cannot speculate upon what a court of equity would do in a given case, or anticipate its decrees, and upon an assumption that his forecast is correct ask a court to declare a forfeiture. For the purpose of finding grounds for a forfeiture courts of law will not go so far afield as to determine the enforceability of a contract in equity between parties not before it. If, however, this court should believe that specific performance of that contract could be decreed, the relief asked

for by defendant would not be granted. It has been held that an executory contract to convey insured real estate does not operate as a forfeiture of the policy under a provision that it should be void "if the interest of the ¹³² assured be or become other than the entire, unconditional, unencumbered and sole ownership of the property" (Arkansas Fire Ins. Co. v. Wilson, 67 Ark. 553, 77 Am. St. Rep. 129, 55 S. W. 933, 48 L. R. A. 510; Franklin Ins. Co. v. Feist, 31 Ind. App. 390, 68 N. E. 188), or where the condition of the policy is that it shall be void in case "the property be sold or transferred, or any change take place in title or possession" (Browning v. Home Ins. Co., 71 N. Y. 508, 27 Am. Rep. 86), or "if any change take place in the interest, title, or possession of the subject of insurance": Erb v. German-American Ins. Co., 98 Iowa, 606, 67 N. W. 583, 40 L. R. A. 845; Home Mutual Ins. Co. v. Tompkins & Co., 30 Tex. Civ. App. 404, 71 S. W. 812.

The judgment is reversed, and the cause remanded.

All the justices concurring.

Conditions in Policies of Insurance against alienation of the property insured are construed strictly, courts having in view the object of the insurer in inserting them. The change in title contemplated is such a change as is likely to induce the insured to be less watchful in guarding the property against fire, or as to offer a temptation to burn it: Commercial Union Ins. Co. v. Scammon, 126 Ill. 355, 9 Am. St. Rep. 607; Schloss v. Westchester Fire Ins. Co., 141 Ala. 566, 109 Am. St. Rep. 58. A transfer by the insured of less than his entire interest in the property does not avoid the policy: Clinton v. Norfolk etc. Ins. Co., 176 Mass. 486, 79 Am. St. Rep. 325; neither does a sale of the premises which is not fully consummated: Magoun v. Firemen's Fund Ins. Co., 86 Minn. 486, 91 Am. St. Rep. 370; Hanover etc. Ins. Co. v. Brown, 77 Md. 64, 39 Am. St. Rep. 386; International Wood Co. v. National Assur. Co., 99 Me. 415, 105 Am. St. Rep. 288. A mere executory contract of sale does not work a forfeiture: Arkansas Fire Ins. Co. v. Wilson, 67 Ark. 553, 77 Am. St. Rep. 129. Compare Skinner Shipbuilding etc. Co. v. Houghton, 92 Md. 68, 84 Am. St. Rep. 485.

PAGE v. HARPER.

[73 Kan. 229, 84 Pac. 1024.]

SURETY'S Accountability to Principal and Cosureties.—Where a surety converts into a judgment notes assigned to himself and cosureties as security for the indebtedness of their principal, and at the execution sale thereunder purchases in his own name the land levied upon, and thereafter he and a cosurety buy notes secured by a trust deed on the land, and purchase the land at the sheriff's sale under such deed, and then rent and finally sell the land to an innocent purchaser, they must account for the profits of the entire transaction to the principal and another surety, such surety having paid part of the principal indebtedness and both he and the surety having been ignorant of the transactions of the other sureties. (p. 467.)

Sapp & Wilson, for the plaintiff in error.

A. L. Majors and Sapp & Brown, for defendants in error.

229 SMITH, J. In 1893, defendant in error, W. L. Harper, who is also a cross-petitioner in error, became the agent of the Aetna Powder Company at Galena, Kansas, probably to sell the goods of the company on commission. At any rate Harper gave a bond, with Page, Leeman and Prehm as his sureties, conditioned that he would pay the company all the moneys which might become due to it from him as agent. About two years thereafter Harper had become indebted to the company in the sum of three thousand seven hundred and ninety-one dollars and forty cents, and the company called upon his sureties to settle the debt, which they did on July 25, **230** 1895, by giving their four joint promissory notes for nine hundred and forty-seven dollars and eighty-five cents each, to become due in six, twelve, eighteen and twenty-four months, respectively, and bearing interest at six per cent from date.

To indemnify his sureties Harper assigned to one of them (Leeman) a large number of notes and accounts, under an agreement that the same were to be collected by Leeman as far as possible and the proceeds applied to the payment of Harper's debt to the powder company, the remainder, if any, to be returned to Harper. Harper also secured the indebtedness by a real estate mortgage to Page, another of the sureties. The mortgaged land was afterward sold and the proceeds properly applied, as to which there is no controversy.

Leeman was able to make but slow progress in the collection of the notes and accounts, and the sureties had in the first instance to pay the greater part of the indebtedness, which was afterward repaid, in part, from the proceeds of the sale of the mortgaged land. Page was unable to meet his portion of some of the notes as they became due, but later he paid to Leeman and Prehm the portion they had advanced for him.

Among the claims assigned by Harper to Leeman to indemnify the sureties were some notes against one Harden, who resided in Missouri, and these were sued upon by Leeman and judgment was procured against Harden for something over one thousand dollars. Leeman caused execution to be issued thereon and to be levied on a business lot and building in Carterville, Missouri. At the sheriff's sale Leeman bought the property for ten dollars, and took the sheriff's deed in his own name. Leeman then took his co-surety Prehm into the deal, and together they bought some notes for about fifteen hundred dollars which were secured by a trust deed on this property, caused the property to be advertised and sold under the trust deed, bid it in, and took a sheriff's deed in their own names jointly. Thereafter they rented the property, receiving, ²³¹ it is claimed, about seven hundred dollars as rent, and then sold it for about five thousand three hundred dollars.

This suit was brought by Page against his cosureties, Leeman and Prehm, for an accounting of the proceeds of the Harden judgment and the Carterville property. Harper, being made a party defendant, filed a cross-petition for the same purpose.

The case was tried without a jury and judgment was rendered in favor of Page for fifty-nine dollars and seven cents, being his portion of three hundred dollars, less some costs or expenses, which had been received by Leeman and Prehm from the sale of the balance of the Harden judgment to Mrs. Harden. Judgment was rendered against Harper, and the costs were divided. Page brings the case here, and Harper files a cross-petition in error.

Eleven assignments of error are made by the plaintiff in error, Page, and thirteen by the cross-petitioner in error, Harper. There is, however, practically only one question presented for consideration, viz., Should Leeman and Prehm account to Harper and Page for the profits received from

the Harden property, including the rents and the amount received from the sale of the property, deducting expenses and amounts paid in perfecting title? The issue on this question was fairly presented by the petition and cross-petition, which alleged the facts as above recited. To these pleadings the defendants, Leeman and Prehm, answered by general denial only.

The relation of the several parties as above recited is established by uncontroverted evidence, and is admitted by the brief of defendants in error, but they say there was no evidence that Leeman agreed to act ²³² as trustee for Harper and Page in the purchase at the execution sale, or that Leeman and Prehm agreed to act as such trustees in the purchase of the trust deed and the notes secured thereby or in purchasing the property at the sale had thereunder. No such agreement was necessary. Their admitted former relation to their principal and cosurety, and to the judgment debt, on which it was their duty to realize as much as possible, made Leeman, at least, such trustee, and Prehm also if, as it is to be presumed, he knew all the facts.

When the owner of a judgment or mortgage lien on land, or one who represents such owner, bids at a sale ordered to satisfy such lien, the very fact that the one who makes such bid may raise it to the entire amount of such lien without the investment of an additional dollar often gives such bidder a decided advantage over other bidders, who must back their bids with their cash; especially is this true where the lien or the lien and prior liens approximate or exceed the value of the property. Thus other bidders are deterred from competing in the uneven contest and often refuse to bid at all. It is unconscionable that one who stands in the place of the owner, as Leeman did in this case, the judgment being in his name, should be allowed to take such advantage of his position to the detriment of his principal, and probably to the detriment of the judgment debtor also: *Case v. Carroll*, 35 N. Y. 385; 1 *Beach on Trusts and Trustees*, sec. 100.

That Leeman held the lien in trust for himself, his cosureties and Harper will not be questioned. He held the property, which he acquired to an advantage, through his relation to such lien, and must hold the same in the same way he held the lien: *Winkfield v. Brinkman*, 21 Kan. 682. The trust in the land arises by implication of law from the facts and circumstances of the case: *Bank v. Woodrum*, 60

Kan. 34, 55 Pac. 330. In an analogous situation it is said: "The cestuis que trust may call him to an account ²³³ having an option to make him replace it [the property—in this case to set aside the sale of the land] or, if it is for their benefit to affirm his [their] conduct and take what he has sold it for, they may take that and charge him with legal interest": 1 Beach on Trusts and Trustees, sec. 184.

The court excluded evidence of the rents and price received on the sale of the property, and sustained a demurrer to the evidence of the cross-petitioner, in opposition to the views herein expressed. The judgment as to both the plaintiff in error and the cross-petitioner in error is reversed, and a new trial is awarded in accordance with the principles expressed in this opinion.

All the justices concurring.

When One of Several Sureties obtains from the principal any mortgage or other security for his indemnity, it inures to the benefit of all the sureties (*Farmers' Nat. Bank v. Snodgrass*, 29 Or. 395, 54 Am. St. Rep. 797), since the relation between cosureties is one of mutual trust and confidence: See the note to *Gross v. Davis*, 10 Am. St. Rep. 642.

MISSOURI PACIFIC RAILWAY COMPANY v. PERUVAN ZANDT IMPLEMENT COMPANY.

[73 Kan. 295, 85 Pac. 408, 87 Pac. 80.]

CARRIERS—Action by Commission Agent for Damages.—

When goods consigned to a commission agent are negligently delayed in transit and converted by the carrier, so that sales previously made by the consignee are canceled, he may in his own name recover damages on account of his lost commissions and also for the value of the property. (p. 472.)

CARRIERS—Delay in Transit—Damages in Excess of Freight.

When a carrier negligently delays the delivery of goods so that the damages thereby occasioned amount to more than the charges due for transportation, the consignee may demand delivery without paying the freight, and the refusal of the carrier to surrender possession amounts to a conversion. (pp. 473, 474.)

CARRIERS—Knowledge of Effect of Delay in Shipment.—

When a threshing-machine is consigned in June to an implement dealer in Kansas, the carrier will be deemed to have notice that the machine, if not already sold, is intended for immediate sale, and that a delay until the close of the threshing season will defeat the purpose of the shipment. (p. 474.)

CARRIERS—Damages for Delay in Shipment.—When machinery consigned to a commission agent is negligently delayed in transit and converted by the carrier, so that sales previously made by the consignee are canceled, the measure of damages in an action for the loss of his commission and the value of the property is the amount for which the sale had been made. (p. 474.)

J. H. Richards, C. E. Benton and Prigg & Williams, for the plaintiff in error.

George A. Vanderveer and F. L. Martin, for defendant in error.

²⁹⁶ GRAVES, J. The Port Huron Engine and Thrasher Company, of Port Huron, Michigan, manufactures threshing-machines and sells them throughout the country through local agents. Its agent at Hutchinson, Kansas, is the Peru-Van Zandt Implement Company (defendant in error). By the contract of agency it is the duty of the Peru-Van Zandt company to advertise, introduce and sell the machines to those desiring to purchase, and when a sale is made an order is taken from the purchaser, in writing, directing the Port Huron company to ship the machinery desired, stating price, manner of payment, and other particulars constituting the conditions of sale, which order is signed by the purchaser and delivered to the local agent. This order is forwarded to the Port Huron company by the agent making the sale. Upon this order the machinery is shipped by the designated route, consigned to the local agent. It is the duty of the agent to receive the machinery and hold possession thereof until payment is made or secured as stipulated in the order of the buyer. In completing the sale the agent takes in payment cash, notes, mortgages, or other security, as directed, but delivers the machinery only after the sale has been approved by the Port Huron company. Until such approval and delivery ²⁹⁷ the title to the machinery does not pass from the seller.

The Peru-Van Zandt company receives for its services in making such sales a commission of forty per cent of the selling price. If any machinery is taken back, or returned, the local agent takes charge thereof, and may resell it and receive a commission therefor.

The local agent pays all expenses incident to the sales made. The buyer pays the freight, in addition to the price stipulated for the machinery. Where payment is made by

the purchaser with notes, collection is made by the agents; and out of the proceeds the commission is deducted. The commission always comes out of the proceeds of each sale when collected. The Peru-Van Zandt company under this employment sold two machines for the aggregate sum of nine hundred and twenty dollars, and took from the purchasers written orders therefor, which were duly forwarded to the Port Huron company. Upon receipt of the orders the machines were shipped over the road of the plaintiff in error, consigned to the Peru-Van Zandt Implement Company, at Larned, Kansas, with stopover to unload one of them at Seward, Kansas, being the points where the purchasers lived. The bill of lading contained nothing to indicate the relation existing between the consignor (the Port Huron company) and the consignee, whether that of vendor and vendee, or principal and agent.

The machines were shipped June 12, 1903, and in ordinary course would have arrived at their destination within ten days, but on account of negligent delays they did not arrive until some time in the month of August, long after the threshing season had closed and the sale contracts had for that reason been canceled. By the contract of shipment the freight was payable before delivery of the machinery to the consignee. The consignee declined to pay the freight, claiming that the damages suffered on account of delay far exceeded the amount of the freight bill. The carrier refused to deliver the goods until the freight ^{was} paid. Thereupon the defendant in error demanded that the machinery be delivered to it without payment of freight, and upon refusal commenced this action. The demand was made in the name of the Port Huron company, by the Peru-Van Zandt company, as agent. The petition alleged that the plaintiff was the agent and factor of the Port Huron company, and averred the facts constituting their relationship substantially as hereinbefore set forth. In the first cause of action the plaintiff asked judgment for the amount of commission lost by it, and in the second cause of action demanded judgment for the value of the machines. The carrier retained, and still keeps, possession of the machines. The plaintiff recovered judgment for the price for which the machines were sold. The defendant brings the case here for review.

Many assignments of error have been presented, but they are all substantially covered by these three: 1. It is insisted

that the plaintiff has no interest in the machinery in controversy, and, therefore, cannot maintain an action for its conversion; 2. That the proper measure of damages in case of a recovery is the difference between the market value of the machinery at the time and place of delivery and the market value thereof when it in fact arrived at such place; 3. That damages for loss of commission cannot be recovered, because a sale of the property was not within the contemplation of the parties when the shipment was made.

Concerning the first proposition, there is considerable confusion among the authorities as to whether ²⁹⁹ the consignee or consignor is the proper party plaintiff in an action against a carrier, but the rule that an action for the conversion of goods must be brought by the owner or one having a beneficial interest in the property converted seems to be fairly well established: Hutchinson on Carriers, 2d ed., secs. 731-734; 6 Cyc. 510; Wood's Browne on Carriers, sec. 599. The consignee is always presumed to possess the necessary ownership, until the contrary is shown: Ray on Carriers of Freight, 1006; Griffith v. Ingledew, 6 Serg. & R. (Pa.) 429; 9 Am. Dec. 444; Smith v. Lewis, 3 B. Mon. (Ky.) 229; Arbuckle v. Thompson, 37 Pa. 170; Pennsylvania Co. v. Poor, 103 Ind. 553, 3 N. E. 253. The ownership need not be extensive, and an agent, factor, broker, bailee or other person having rights in the property to be protected may maintain an action, and recover both for himself and the general owner: Chamberlain v. West, 37 Minn. 54, 33 N. W. 114; Harrington v. King, 121 Mass. 269; Finn v. Western R. R. Corp., 112 Mass. 524, 17 Am. Rep. 128; Green v. Clarke, 12 N. Y. 343; Boston etc. R. R. Co. v. Warrior Mower Co., 76 Me. 251. We think the plaintiff in this case had sufficient interest in the property to enable it to maintain this action. In the case of Boston etc. R. R. Co. v. Warrior Mower Co., 76 Me. 251, a case very similar to this, the court said:

"Ordinarily when a plaintiff sustains his action it is presumed that the whole amount of damages recovered will belong to him. In fact, the injury to him or to his property is the measure of the damages. But while this is the general rule, there are exceptions, not to the extent or measure of damages, but to the interest the plaintiff may have in them. It is true that an action cannot be maintained unless the plaintiff has an interest in the subject matter of the suit, but he may do so when he is not interested to the full ex-

tent of the damages to be recovered. Such are the familiar cases of injury to property in which there is a general and special owner, as bailor and bailee, consignor and consignee, principal and factor. In such cases the action may not be brought in the names of the two jointly, ³⁰⁰ but may in the name of either. In the action now in question the subject matter was mowing-machines and parts of mowing-machines. The damage claimed rests upon a neglect of the carrier by which the property was improperly delayed in its transit. The facts show that the title to the property was in the mower company; that it had consigned and forwarded the machines to Dunham by virtue of a contract under which Dunham was to sell them for a specified commission and account to the company for them at a specified price. Dunham was also to pay the freight. This contract, while it did not change the title in the machines and pieces, gave Dunham such a special property in them as to enable him to maintain the action in his own name, and the consignment and forwarding [of] the property, thus setting it apart and putting it into the hands of the carrier for his benefit gave him a constructive possession sufficient for that purpose; and as the injury was the result of a single wrongful act to the whole property, the damage could not be apportioned but must all be recovered in that one action, the judgment in which would be conclusive against any suit by the general owner. . . . Hence Dunham, in his suit, is entitled to recover not only his own damages but such as have accrued to the mower company as general owners. The measure of damages as held by the court in that case can be applicable upon no other theory. If, then, Dunham should receive the whole damage recoverable in his suit, he would be entitled to retain his own share, and the balance he would hold as trustee for the mower company": Pages 259, 260.

In the case of *Southern Exp. Co. v. Armstead*, 50 Ala. 350, it was said: "The consignee of goods has a right to sue for their loss by the carrier, notwithstanding another party may be the owner of them. The obligation is to deliver to him. Generally the property vests in him by the mere delivery to the carrier. Although the absolute or general owner of personal property may support an action for any injury thereto, if he have the right of immediate possession, this does not necessarily divest the right of the consignee to sue,

notwithstanding he has never had the actual possession": Page 352.

A judgment in favor of the plaintiff can work no ²⁰¹ harm, as it would be a bar to an action for the same injury by the Port Huron company: *White v. Bascom*, 28 Vt. 268; *Green v. Clarke*, 12 N. Y. 343; *Harker v. Dement*, 9 Gill (Md.), 7, 52 Am. Dec. 670; *Little v. Fossett*, 34 Me. 545, 56 Am. Dec. 671. The plaintiff holds in trust for the Port Huron company whatever remains of the amount recovered, after payment of its commission: *Chamberlain v. West*, 37 Minn. 54, 33 N. W. 114; *Finn v. Western R. R. Corp.*, 112 Mass. 524, 17 Am. Rep. 128; *White v. Bascom*, 28 Vt. 268; *Little v. Fossett*, 34 Me. 545, 56 Am. Dec. 671.

A consignee has the right to withhold a freight bill, when its damages exceed that amount, and in such a case the refusal of the carrier to deliver the goods until the freight is paid amounts to a conversion: 5 Am. & Eng. Ency. of Law, 232; *Miami P. Co. v. Port Royal etc. Ry. Co.*, 38 S. C. 78, 16 S. E. 339, 21 L. R. A. 123, 55 Am. & Eng. R. R. Cas. 688; 6 Cyc. 497; *Missouri Pac. R. Co. v. Goodholm*, 61 Kan. 758, 60 Pac. 1066. The measure of damages is compensation for the injury sustained. An amount which will place the injured party in the same condition he would have occupied if no loss had occurred will satisfy this requirement. If in this case the machinery had been delivered according to contract, the price for which it had been sold would have been realized. Out of this amount the commission due the plaintiff would have been deducted. The freight would have been paid by the purchasers of the machinery. The selling price at the place of delivery seems, therefore, to be the true measure of damages. We think the amount recovered in the district court fairly compensates all parties for the losses sustained. Out of this amount the plaintiff will retain a sum equal to the commission lost, and must account to the Port Huron company for the remainder.

Finally, it is insisted that a sale of the machinery was not within the contemplation of the parties at the time of shipment, and, therefore, the commission is ²⁰² not a proper element of damages. A railroad company must be held to know facts familiar to ordinary people. It is fair to assume that a carrier of threshing-machines knows what they are used for, and that the only purpose implement dealers have in shipping such property into the heart of a great wheat

country is to sell it. When a shipment of threshing-machines is made in June of any year, the inference follows that, if they are not already sold, an immediate sale is intended. We think, therefore, that the loss of a commission is not so remote as to be excluded as an element of damages in this case.

The general rule that damages caused by the loss of a sale not within the contemplation of the parties cannot be recovered has no application to the facts here shown. No error appearing, the judgment of the district court is affirmed.

All the justices concurring.

OPINION ON REHEARING.

GRAVES, J. This case was decided at the March, 1906, sitting of this court. A rehearing was granted upon the proposition of law stated in the second paragraph of the syllabus, which reads:

"When a common carrier negligently delays the delivery ³⁰³ of goods, so that the damages occasioned by such delay exceed the amount of freight due for the transportation of such goods, the consignee may rightfully demand the delivery of the goods without payment of the freight, and a refusal by the carrier to surrender possession upon such demand is wrongful, and amounts to a conversion": Ante, p. 468.

The plaintiff in error urgently objects to this statement of the law, and insists that it is opposed to both reason and authority. This particular point received very little attention at the first argument of the case, and very few cases directly in point have since been cited by either party. Under some of the older cases, especially in England, the consignee was required first to pay the freight and bring an action for damages afterward. This rule obtained because of the law then existing concerning the forms of action in which a setoff for unliquidated damages might be litigated. Under the modern procedure of this country, however, and especially in this state, where the policy is to litigate every controversy between the parties in the same suit, and thereby avoid circuity and multiplicity of actions, this class of cases cannot be controlling: See 25 Am. & Eng. Ency. of Law, 484, subject of "Setoff, Recoupment, and Counterclaim."

Apparently the plaintiff in error relies upon the case of *Miami P. Co. v. Port Royal etc. Ry. Co.*, 38 S. C. 78, 16 S. E. 339, 21 L. R. A. 123, which may also be found in 55 Am. & Eng. R. R. Cas. 688, and the cases therein cited. This case was cited in the former opinion in support of the proposition in question. The citation was made upon the assumption that the syllabus of the case stated the law as given in the opinion, but on further examination they do not seem to be alike. We have since carefully examined that case, and find that the only question really decided by it is that the evidence in the case did not justify the instructions given.

The trial court in that case adopted the law as ³⁰⁴ stated by this court, and to which the plaintiff in error objects. In doing so it followed *Ewart v. Kerr*, 1 Rice (S. C.), 203, which had been affirmed in 2 *McMull.* (S. C.) 141. Neither of these cases has been modified or reversed, but so far as we have been able to ascertain they still stand as the law of South Carolina. The supreme court did not reverse the trial court because the law given was erroneous, but for the reason that, if correct, it did not apply to the facts of that case, as the evidence did not show whether the damages claimed equaled or exceeded the freight bill. The court made the suggestion, apparently for the future guidance of the trial court, that the rule of law stated in the cases of *Shaw v. South Carolina R. R. Co.*, 5 Rich. (S. C.) 462, 27 Am. Dec. 768, and *Nettles v. Railroad Co.*, 7 Rich. (S. C.) 190, 62 Am. Dec. 409, was more applicable to the facts of that case than the one followed. That suggestion is not inconsistent with the former cases followed by the trial court, nor with the rule stated by this court in the paragraph of the syllabus under consideration.

In the case of *Shaw v. South Carolina R. R. Co.*, 5 Rich. 462, 27 Am. Dec. 768, the goods shipped consisted of ten barrels of molasses, two of which leaked during transit. The consignee accepted eight barrels, but refused to accept the two that were leaking, and sued the carrier for the value of two full barrels. It was held that the plaintiff should have received all of the barrels and sued for the value of the amount of loss by leakage.

In the case of *Nettles v. Railroad Co.*, 7 Rich. 190, 62 Am. Dec. 409, the carrier tendered the goods to the consignee, who refused to accept them, and sued for the value of the entire shipment. It was held that he ought to have re-

ceived the goods and sued for the difference in their value when tendered and when they ought to have been delivered. It is true the damages were caused by delay in transit, but no question as to payment of freight was considered. The discussion related to the ³⁰⁵ proper measure of damages. The case cannot, therefore, be considered of any weight as an authority here.

In the case of *Miami P. Co. v. Port Royal etc. Ry. Co.*, 38 S. C. 78, 16 S. E. 339, 21 L. R. A. 123, the goods shipped consisted of kegs of powder, only a few of which were injured. The consignee refused to receive any of them and pay the freight, but sued in trover for the value of all. It will be observed that the damages complained of in that case were not the result of delay in delivery, but because of a direct injury to a part of the goods. In such a case it would not be unreasonable to say that when freight is shipped in bales, barrels, kegs or other forms where the injured parcels can be readily separated from those which are uninjured without affecting the value of the shipment as a whole, the rule as to whether the consignee would be entitled to possession of the entire shipment without payment of freight might be different from that which should be applied when the entire shipment consists of a single machine, which cannot be separated without destroying its value. We conclude, therefore, that the case of *Miami P. Co. v. Port Royal etc. Ry. Co.*, 38 S. C. 78, 16 S. E. 339, 21 L. R. A. 123, does not decide the question here in controversy either way. The facts in the two cases are dissimilar.

The other cases cited by the plaintiff in error relate to what constitutes a conversion, and to the proper measure of damages where goods are injured in transit by the negligence of the carrier.

In argument the plaintiff in error objected to the rule stated by this court because of the embarrassments which might be imposed upon carriers by dissatisfied shippers. But the rule contended for by it would, in our view, enable carriers to impose much greater embarrassment upon shippers. A rule which would require a shipper to pay his debt to a carrier who owes him a greater sum does not seem to be a just and fair way to settle a controversy.

³⁰⁶ It is conceded by the plaintiff in error that in an action by the carrier for the freight, after the goods had been

delivered to the consignee, damages to the goods might be collected, and that replevin would lie against the carrier for the goods without payment of the freight if the damages equaled or exceeded the freight bill, but it insists that an action for the value of an entire shipment will only lie when there has been a conversion, which has not been shown here.

On the other hand, the defendant in error claims that both reason and authority sustain the law as stated in the paragraph of the syllabus objected to by the plaintiff in error. It argues that the right of the carrier to possession rests upon its lien for freight; that where the carrier becomes liable to the consignee, on account of damages to the property while in transit, in a sum equal to or greater than the freight bill, the lien thereby becomes extinguished, because "where there is no debt, there can be no lien." It argues further that under such circumstances the right of possession is in the consignee, and a refusal of the carrier to deliver upon demand constitutes conversion. In support of these contentions it cites the case of *Dyer v. Grand Trunk Ry. Co.*, 42 Vt. 441, 1 Am. Rep. 350. That was an action of replevin, but the court said, in substance, that when the damages to the goods equal the freight bill one debt offsets the other, and the lien of the carrier vanishes, leaving the right of possession in the owner. In the case of *Moran Bros. Co. v. Northern Pac. R. R. Co.*, 19 Wash. 266, 53 Pac. 49, the supreme court of Washington said: "If a carrier has negligently delayed delivery of goods, or otherwise subjected itself to liability for damages in respect to the property carried, equal to or greater than the amount of the freight, the consignee may maintain replevin without a tender; and the claim for freight and the claim for damages may be adjudicated in the replevin suit." (Syllabus.)

³⁰⁷ Section 515 of the second edition of *Cobbey on Replevin* reads: "The right of a carrier to retain property until its charges for carriage are discharged rests upon the performance of the contract of carriage upon its part. If it has negligently delayed the delivery of the property at its destination, or otherwise subjected itself to liability for damages to the consignee in respect to the property carried, that would disentitle it to the extent of such liability to demand and recover freight; and if the damage should exceed the amount of the freight to which it would otherwise be en-

titled, of course it would not be entitled to demand and recover anything for the carriage of the property. And in such cases the owner or consignee may maintain a replevin without a tender, and the claim for freight by the defendant, and the claim for damage by the plaintiff, at least to the extent of the freight charge, may be adjudicated in the replevin suit."

The case of *Bancroft v. Peters*, 4 Mich. 619, is to the same effect. In the case of *Marsh v. Union Pac. Ry. Co.*, 3 McCrary (U. S.), 236, 9 Fed. 873, 6 Am. & Eng. R. R. Cas. 359, Judge Hallett, of the United States district court of Colorado, held that trover would lie for the value of freight held by a carrier under a lien which did not exist. In volume 1 of *Jones on Liens*, second edition, section 331, it is said: "The carrier's lien may be defeated by an injury to the goods carried, happening by the carrier's fault, to an amount larger than his charge for freight. His right to freight, and to detain the goods for its payment, results from his performance of the contract to carry the goods. If he fails to carry the goods and have them ready for delivery, he cannot claim his freight": See, also, 8 Am. & Eng. Ency. of Law, 1st ed., 978.

The proposition seems reasonable that, when a carrier's lien is gone, subsequent retention of possession of freight against the wish of the owner is wrongful, and the owner may thereafter sue for the possession thereof in replevin or for the value as upon conversion.

³⁰⁸ We understand the general rule to be that a refusal to deliver the possession of personal property upon demand by an owner who has the right to possession amounts to a conversion, and the owner may sue for the value at once: 28 Am. & Eng. Ency. of Law, 705; *Roberts v. Yarboro*, 41 Tex. 449; *Briggs v. Haycock*, 63 Cal. 343; *Northern Trans. Co. v. Sellick*, 52 Ill. 249; *Singer Mfg. Co. v. King*, 14 R. I. 511.

We conclude that the rule stated in the syllabus is more in harmony with modern procedure, and more in consonance with fairness between the parties and less liable to lead to embarrassments, than the rule contended for by the plaintiff in error, and therefore do not feel inclined to make any change therein.

All the justices concurring.

A Carrier is Ordinarily Entitled to Retain Possession of Goods it has transported until the freight charges thereon are paid: *Sonia Cotton Oil Co. v. Steamer "Red River,"* 106 La. 42, 87 Am. St. Rep. 293. But when by its delay in transportation a carrier injures the consignee to an amount equal to the freight charges, its lien ceases, and the consignee may maintain replevin for the goods without first paying or tendering the freight: *Dyer v. Grand Trunk Ry. Co.,* 42 Vt. 441, 1 Am. Rep. 350.

A Consignee of Machinery cannot Recover Damages from the carrier for losses due to the idleness of his mill in case the carrier negligently delays the transportation of the machinery, unless the carrier is chargeable with notice of the use for which the machinery is to be put by the consignee: *American Express Co. v. Jennings,* 86 Miss. 329, 109 Am. St. Rep. 708; *Traywick v. Southern Ry. Co.,* 71 S. C. 82, 110 Am. St. Rep. 563, and cases cited in the cross-reference note thereto.

STATE v. WILSON.

[73 Kan. 343, 84 Pac. 737.]

MONOPOLIES—Statutory Construction.—Chapter 158 of the Laws of Kansas of 1891, prohibiting combinations to prevent competition among persons engaged in buying and selling livestock, is superseded by the general anti-trust act of 1897, and is no longer in force. (p. 481.)

MONOPOLIES—Dealing in Livestock.—An agreement among the members of an association which practically controls the business of buying and selling cattle at a great commercial center that they will make no purchases or sales for others for a commission less than fifty cents on each head of cattle handled, creates a restriction in the full and free pursuit of a lawful business and constitutes a trust within the terms of chapter 265 of the Laws of 1897 of Kansas; and the exaction of such a commission by a member of the association is a misdemeanor, and a contract to pay it is void. (pp 483, 486.)

CONTRACTS—Illegal Consideration.—A Note and Mortgage, a part of the consideration of which is illegal because based upon a transaction pronounced criminal by statute, are wholly void. (p. 486.)

CONTRACTS—Illegal Consideration.—When Two Notes secured by a mortgage are given for a consideration in part illegal, both the notes and mortgage are wholly void. (pp. 489, 490.)

FALSE PRETENSES—Evidence in Favor of Accused.—In a prosecution for obtaining money under false pretenses through selling as unencumbered cattle which in fact are mortgaged, the defendant may show that the mortgage, although fair on its face, is void because based in part upon a consideration made illegal by an anti-trust statute. (p. 492.)

C. C. Coleman, attorney general, Otis E. Hungate, county attorney, and Aaron P. Jetmore, for the state.

Frank Hagerman and Botsford, Deatherage & Young, amici curiae.

Eugene Hagan, A. F. Williams, A. E. Crane, Hayden & Hayden and D. A. Hite, for the appellant.

³⁴⁴ MASON, J. Charles L. Wilson was prosecuted and convicted upon a charge of obtaining money by false pretenses by selling cattle which he represented to be clear of encumbrance, when in fact they were covered by a mortgage. At the trial, for the purpose of establishing that the mortgage in question was void, and therefore in law no mortgage at all, he offered to prove that the mortgagee was a member of the Kansas City Livestock Exchange, that this exchange was an unlawful combination under the provisions of various statutes of Kansas known as the anti-trust laws, and that the mortgage was given in pursuance of the unlawful purposes of such combination, and was therefore, by the very terms of these acts, illegal and unenforceable. The trial court rejected all evidence bearing upon this matter, and at the original hearing of the defendant's appeal the most serious question presented was whether this ruling was erroneous. Three statutes were invoked by the defendant in this connection, namely: Chapter 257 of the Laws of 1889 (Gen. Stats. 1901, secs. 2430-2438), which forbids divers enumerated agreements in restraint of trade; chapter 158 of the Laws of 1891 (Gen. Stats. 1901, secs. 2439-2441), which relates specifically to combinations of persons engaged in buying or selling livestock; and chapter 265 of the Laws of 1897 (Gen. Stats. 1901, secs. 7864-7874), which denominates associations for various purposes as ³⁴⁵ trusts, makes them unlawful, and provides direct and indirect penalties for the doing by their members of the prohibited acts.

This court upon first consideration was of the opinion that the statutes of 1891 and 1897 should be construed together. Under such construction it was held that the validity of the mortgage must be tested by the provisions of the act of 1891, because of their more specific reference to transactions of the character of that involved, and that as so tested it was not void. This view involved deciding in the negative a question which in the course of the discussion had been suggested

by the state, but had not been fully argued upon either side, namely, whether the statute of 1897 was intended to cover the whole subject matter of the act of 1891, and therefore to supersede it entirely. By reason of a very serious doubt of the correctness of the first impression of the court in this respect a rehearing was granted, and upon further consideration in the light of a full presentation of the matter the unanimous conclusion is reached that the later enactment was designed as a complete substitute for the earlier one.

The legislation of 1891 was entitled "An act prohibiting combinations to prevent competition among persons engaged in buying or selling livestock," etc. It forbade any agreement among such persons having the purpose or effect to prevent competition in the business of selling livestock for others, or to fix a minimum commission for such services. The act of 1897 makes no specific reference to agreements concerning commissions for the purchase or sale of livestock, and in the opinion announcing the decision of the case in this court it was said that the mere general expressions of the later act did not evince a purpose to replace the more definite provisions of the earlier one. However, the first subdivision of section 1 of the act of 1897 (Gen. Stats. 1901, sec. 7864) makes unlawful any combination "to create or carry out restrictions in trade or ³⁴⁶ commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state," and our final conclusion is that, whether or not any other provisions of this act should be construed as having that purpose, the portion quoted was intended to reach among other evils the very one denounced by the statute of 1891, for an agreement between persons engaged in buying and selling livestock for others that a minimum commission for their services shall be maintained is of necessity a restriction in commerce and in the full and free pursuit of a lawful business. Upon this ground we hold that the law of 1897 leaves no field for the operation of that of 1891, and therefore becomes a substitute for it and effects its repeal by implication.

This view is supported by two additional considerations: The act of 1897 presents a plan of handling the whole subject of trusts, and it is difficult to fit into it the provisions of the act of 1891 without marring its completeness and recognizing distinctions between essentially similar matters, such

as we cannot believe the legislature intended; and, while there is no repealing clause in the law of 1897, section 11 (Gen. Stats. 1901, sec. 7874) provides that the act of which it is a part shall not be construed to affect any action pending under any earlier law. This saving clause, which expressly retains the vitality of the former statutes so far as concerns proceedings already begun under them, fairly implies that they are to have no further force, but are to be regarded as repealed except to the extent indicated.

The view that the law of 1897 is complete in itself, and does not require to be interpreted in connection with that of 1891, reopens the entire question whether the defendant should have been permitted to give in evidence the circumstances under which the mortgage referred to was made. He offered, among other things, to prove that it was given to a member of the Kansas City Livestock Exchange; that this exchange was an ³⁴⁷ association of persons engaged in buying and selling livestock for others, and practically controlling that business at Kansas City; that a by-law of such association forbade its members to charge a less commission for such services than fifty cents a head; that a part of the consideration of the two notes to secure which the mortgage was given was a charge of two hundred and one dollars for the services of the mortgagee in purchasing for the mortgagor the four hundred and two head of cattle covered by the mortgage; that this commission was fixed and exacted in pursuance of the by-law already mentioned. Would these facts, if proved, render the mortgage void? It follows from what has already been said that they would show that the Kansas City Livestock Exchange was a trust within the terms of the statute of 1897. Section 1 of that statute reads:

“A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any or all of the following purposes:

“First. To create or carry out restrictions in trade or commerce or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state.

“Second. To increase or reduce the price of merchandise, produce or commodities, or to control the cost or rates of insurance.

“Third. To prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

“Fourth. To fix any standard or figure, whereby its price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state.

“Fifth. To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which they shall bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure or by which they shall agree ³⁴⁸ in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that its price may in any manner be affected.

“And any such combinations are hereby declared to be against public policy, unlawful and void”: Laws 1897, c. 265, sec. 1; Gen. Stats. 1901, sec. 7864.

It is needless to determine in this connection the effect of any of the subdivisions of the section except the first, for that is sufficient for the present purpose. The business of buying and selling cattle is one permitted by the laws of this state. An agreement among the members of an association which practically controls this business at a great commercial center that they will make no purchases or sales for others without charging as a commission for their services at least fifty cents for each head of cattle handled obviously creates a restriction in the full and free pursuit of that business. It also seemingly creates a restriction in commerce, although *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. Rep. 40, 43 L. ed. 290, and *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. Rep. 50, 43 L. ed. 300, are cited as holding against this. These cases, however, merely decide that agreements

such as that referred to are not in direct restraint of interstate commerce, as such.

Was the mortgage void if it was made to a member of a trust under the circumstances claimed by the defendant? The question is rendered one of great importance by reason of the possible far-reaching consequences of an affirmative answer. It, together with related questions, has been argued at length, not only by counsel for the parties to this action but also by ²⁴⁰ attorneys appearing as amici curiæ, presumably in behalf of clients whose interests may be affected by the conclusion reached. Since the motion for a rehearing was granted requests for extensions of time for presentation of the matter have been repeatedly granted, in order that the fullest opportunity for discussion might be given. The parts of the statute especially relied upon by the defendant in this connection read:

"Sec. 5. Every person, company or corporation within or without this state, their officers, agents, representatives or consignees, violating any of the provisions of this act, within this state, are hereby denied the right, and are hereby prohibited from doing any business within this state. . . .

"Sec. 6. Each and every person, company or corporation, their officers, agents, representatives or consignees, who, either directly or indirectly, violate any of the provisions of this act shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to a fine of not less than one hundred dollars nor more than one thousand dollars, and shall be imprisoned not less than thirty days nor more than six months. . . .

"Sec. 7. Any contract or agreement in violation of any of the provisions of this act shall be absolutely void and not enforceable in any of the courts of this state, and when any civil action shall be commenced in any court of this state, it shall be lawful to plead in the defense thereof that the plaintiff or any other person interested in the prosecution of the case is at the time or has within one year next preceding the date of the commencement of any such action been guilty, either as principal, agent, representative, or consignee, directly or indirectly, of a violation of any of the provisions of this act, or that the cause of action grows out of any business transaction in violation of this act": Laws 1897, c. 265; Gen. Stats. 1901, secs. 7868-7870.

They who contend that the mortgage in question would be valid notwithstanding this statute, although executed under the circumstances stated by the defendant, rely upon the cases of *Barton v. Mulvane*, 59 Kan. 313, 52 Pac. 883, *Crystal Ice Co. v. Wylie*, 65 Kan. 104, 68 Pac. 1086, and *State v. Jack*, 69 Kan. 387, 76 Pac. 911, 1 L. R. A., N. S., 116. ³⁵⁰ These cases, however, proceed upon the theory that a wrongdoer is not to be deprived of his right to maintain an action in court merely because he has violated the law in some matter having no relation to the subject of the litigation. This principle forbids the enforcement of the literal terms of the section last quoted, but leaves an abundant field for their operation as reasonably construed. As was said in the case last cited:

"The provisions of section 7 [Gen. Stats. 1901, sec. 7870] that in any civil action there may be pleaded in defense that the plaintiff, or any person interested in the prosecution, has within one year been guilty of a violation of any of the provisions of the act, as held in *Barton v. Mulvane*, 59 Kan. 313, 52 Pac. 883, under a very similar provision of the anti-trust act of 1889 (Laws 1889, c. 257), contemplates only civil actions relating to, and growing out of, transactions prohibited by the act. It was not intended by the legislature to deprive the litigant of the right to resort to the courts for the protection of property rights and interests not connected with such combinations or trusts. Thus interpreted, the provision is a valid exercise of legislative power, and is not open to the charge of appellant that it constitutes outlawry": Page 399.

The contention here made is that the mortgage was void, not because it was given to one who was a member of an unlawful combination, but because a part of its consideration—the charge made for commission—was itself illegal. This is not an instance of an attempt to fasten a disability to sue upon an individual because of his violation of the law in some independent or collateral matter; the objection goes to the contract itself. The statute forbids a member of a trust to do any business in the state—that is to say, as properly interpreted, to do any business in promotion of, or in pursuance of, the purposes of the trust. Assuming the facts to be as alleged by the defendant, the mortgagee, a member of the trust, bought these cattle for him, and in pursuance of the obnoxious by-law made him a charge of fifty cents a head for such service. This was an illegal act, and the contract to pay such ³⁵¹ commission was a contract to pay a sum ex-

acted in defiance of the law. The contract for this payment was, therefore, a contract in violation of the statute, by the very terms of which such contracts are made not merely non-enforceable, but absolutely void: 9 Cyc. 475.

A part of the consideration of the mortgage was therefore illegal, if the facts were as the defendant attempted to show. Would this render the mortgage itself void? The generally accepted rule is that if any part of a single consideration or either of two separate considerations of a contract is illegal the entire contract is void, although where two promises, one of which is illegal, are made upon a lawful consideration, the promise which is unobjectionable is ordinarily held to be enforceable: See 9 Cyc. 564-566, where the cases bearing upon the matter are collected and classified by states. It is true that there are cases arising upon contracts based in part upon a legal, and in part upon an illegal, consideration where the courts have permitted an enforcement to the extent of the good consideration. But for the most part such cases purport to follow the general rule as above stated, but reach a result at variance therewith by failing to distinguish between a consideration which is merely insufficient to support a promise and one which is actually against the law or contrary to good morals. Where one of two considerations, or a distinct part of one consideration, is for any reason not capable of sustaining a contract, but is not otherwise obnoxious to the law, the courts universally recognize the situation as a partial failure of consideration and permit a pro tanto recovery. But where one of two considerations, or a distinct part of one consideration, is unlawful, as being forbidden either by the statute or by the common law, the prevailing view is that the partial illegality taints the entire transaction, and the contract itself is void. According to the great weight of authority, and as we think also according to the better reason, this doctrine ³⁵² is applicable where a note or series of notes is given for a consideration a specific and ascertained amount of which is illegal—for example, for an indebtedness composed of various items, some lawful and some unlawful. A typical and often-cited case is that of *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664, where an action was brought upon a note given in settlement of an account which included various separate charges made for intoxicating liquor sold in violation of law. In the opinion it was said:

“The concurrent doctrine of the text-books on the law of contracts is that if one of two considerations of a promise be void merely, the other will support the promise; but that if one of two considerations be unlawful, the promise is void. When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful, and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected, and the remainder established. But this cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act, or two or more acts, part of which are unlawful; because the whole consideration is the basis of the whole promise. The parts are inseparable: Citing text-writers. Whilst a partial want or failure of consideration avoids a bill or note only *pro tanto*, illegality in respect to a part of the consideration avoids it *in toto*. The reason of this distinction is said to be founded, partly at least, on grounds of public policy, and partly on the technical notion that the security is entire, and cannot be apportioned; and it has been said with much force that, where parties have woven a web of fraud or wrong, it is no part of the duty of courts of justice to unravel the threads and separate the sound from the unsound. . . . The suit was upon a promissory note alone—upon a single and entire promise. This note was given in settlement of an account embracing transactions between the parties for a period of eighteen months. The evidence tended to show that whilst some of these transactions were proper and legal, yet many of the items of the account were for intoxicating liquors sold by the plaintiff to the defendant in direct violation of ²⁵³ the provisions of a highly penal statute. The contract evidenced by the note was illegal and void, because these sales of liquors, which formed a part of its consideration, were clearly illegal.

“With respect to the items of the plaintiff’s account which were unconnected with the illegal sales, he might well have maintained an action on the original contracts of sale, even after the giving of this note, for, being utterly void, it discharged none of the just indebtedness of the defendant. But he chose to sue upon the note which was *prima facie* evidence of indebtedness to the extent of the whole sum promised to be paid, and thus attempted to throw upon the defendant the burden of showing how much of it was given upon an illegal

consideration, and upon the court the task of separating the sound from the unsound. If this effort should result in his losing what was justly due him, we can but repeat what was said in a similar case: 'It is but a reasonable punishment for including with his just due that which he had no right to take'': Pages 435, 437.

So in the case of *Wadsworth v. Dunnam*, 117 Ala. 661, 23 South. 669: "The doctrine of the common law, as it is laid down in the text-books, and supported by numerous adjudications, is that 'if any part of the entire consideration for a promise, or any part of an entire promise, is illegal, whether by statute or at common law, the whole contract is void. Indeed, the courts go far in refusing to found any rights upon wrongdoing': Citing authorities. . . . There has not, perhaps, been more frequent application of the doctrine than to promissory notes, or other evidences of debt, taken in settlement of accounts for goods, wares, or merchandise, items of which were for goods sold on Sunday, or for spirituous liquors sold in violation of law. The accounts may have contained items having no connection with the illegal sales; items for goods not sold on Sunday, or items for the sales of goods not prohibited. When all are blended, and a promissory note is taken for the whole, the note is entire and indivisible, and upon it there can be no recovery. . . . The complaint declares on eight several promissory notes, and the uncontroverted fact is that these notes were given in settlement of an account for goods and merchandise ³⁵⁴ sold by the plaintiffs to the defendant. And there was evidence tending to show that some of the sales were made on Sunday, and some were ginseng cordial, an intoxicating drink, in violation of a law prevailing in the locality of the sale, rendering such sale an indictable offense. If there were items of the account closed by the notes not tainted with illegality—unconnected with the illegal sale—the plaintiffs could have maintained an action on the original contracts of sale, though the notes had been taken. The notes, if tainted with illegality, are utterly void; incapable of discharging the just indebtedness of the defendant'': Page 670.

To the same effect are: *Hanauer v. Doane*, 79 U. S. 342, 20 L. ed. 439; *Douthart v. Congdon*, 197 Ill. 349, 90 Am. St. Rep. 167, 64 N. E. 348; *Bick v. Seal*, 45 Mo. App. 475; *Cotten v. McKenzie*, 57 Miss. 418; *Charleton v. Woods*, 28 N. H. 290; *Snyder v. Willey*, 33 Mich. 483; *Deering v. Chap-*

man, 22 Me. 488, 39 Am. Dec. 592. This application of the doctrine is almost universally upheld by the text-writers. For instance, in volume 1 of Daniel on Negotiable Instruments, fifth edition, section 204, the author says:

"When the defense is founded on illegality of consideration it is to be distinguished from a defense on the ground of a want or failure in the consideration by this peculiarity—that a partial illegality vitiates the bill or note in toto, while the partial want or failure of consideration only vitiates it pro tanto. And a mortgage to secure a bill or note of which the consideration is in part illegal is also wholly void. The reason of the distinction is based mainly upon the ground of public policy, the court not undertaking to unravel a web of fraud for the benefit of the party who has woven it. If, however, the legal portion of the consideration were distinctly severable, the party could still recover by the proper action to its proportionate extent, though not upon the bill or note." See, also, 1 Parsons on Contracts, 9th ed., 456; Chitty on Contracts, 10th Am. ed., 730; Jones on Chattel Mortgages, 4th ed., sec. 350; Pollock's Contracts, 1st Am. ed., 318; Anson on Contracts, 2d Am. ed., 252; 1 Edwards on Bills and Notes, 355 3d ed., sec. 471; Bishop on Contracts, sec. 74; 2 Beach on Modern Law of Contracts, sec. 1422; Benjamin's Principles of Contracts, 27; Comyn on Contracts, 3d Am. ed., 20; Metcalf on Contracts, 247; MacLaren on Bills, Notes and Checks, 2d ed., 185; Story on Promissory Notes, 5th ed., sec. 190; Wood's Byles on Bills and Notes, 146; 1 Story on Contracts, 5th ed., sec. 583; 1 Page on Contracts, 777; Lawson on Contracts, 2d ed., sec. 335; 2 Addison on Contracts, 8th ed., with American notes, 1169, note; Clark on Contracts, 471; 4 Am. & Eng. Ency. of Law, 192; 17 Am. & Eng. Ency. of Law, 308.

The second paragraph of the syllabus in *Rathbone v. Boyd*, 30 Kan. 485, 2 Pac. 664, seemingly does not accord with the general rule already stated. It reads: "Where a chattel mortgage is made to secure, in part, a valid debt, and, in part, money advanced upon an illegal contract, the chattel mortgage may be enforced to the extent of the valid debt, although void as to the residue."

This portion of the syllabus and the corresponding part of the opinion may not have been essential to the determination of the case, but whether this be so or not we cannot accept the view there expressed as controlling upon the matter now

under consideration, for the reason that it was announced without discussion and seemingly without examination of the consequences attached by the courts to a partial illegality of consideration, as distinguished from mere insufficiency. In a later case, *Fleming v. Greene*, 48 Kan. 646, 30 Pac. 11, while the precise point was not directly involved, the court quoted with approval a statement of the general doctrine taken from *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664, which is included in the quotation already made from that case: See, also, *Gerlach v. Skinner*, 34 Kan. 86, 55 Am. Rep. 240, 8 Pac. 257; *Stansfield v. Kunz*, 62 Kan. 797, 64 Pac. 614.

There are cases holding that where a mortgage is given to secure two separate debts, one only of which is unlawful, the mortgage may be enforced to the extent of the valid indebtedness. In *Shaw v. Carpenter*, ³⁵⁶ 54 Vt. 155, 41 Am. Rep. 837, although the court professed to approve and follow *Carleton v. Woods*, 28 N. H. 290, a mortgage given to secure several notes a part of the consideration of which was illegal was permitted to be enforced to the extent of the valid consideration, upon the theory that equity was thereby done. In a dissenting opinion these cases were reviewed, and it was pointed out that even if a mortgage securing two notes, one good and one unlawful, may have vitality as to the valid note, yet where the notes themselves are void because tainted with an illegal consideration the mortgage can have no efficacy whatever. The distinction is obviously sound, and even though the correctness of the conclusion in *Rathbone v. Boyd*, 30 Kan. 485, 2 Pac. 664, were conceded, it would not give force to the mortgage in the present case, for the two notes secured by it are equally affected by the illegality of consideration, and if the notes are void the mortgage is necessarily so.

The supreme court of Indiana, in *Hynds v. Hays*, 25 Ind. 31, repudiated the generally accepted doctrine in an opinion which presents a plausible and complete argument in favor of the position taken, based upon the view that a note given for two distinct considerations is to be treated as a severable contract. We cannot, however, regard it as affording sufficient ground for departing from a rule so reasonable in itself and so firmly entrenched in the authorities.

The case of *Carradine v. Wilson*, 61 Miss. 573, is one which supports the validity of the mortgage, but upon a different theory. It was there held that where two notes were given

for a consideration a part of which was illegal, each note being for a greater amount than the illegal portion of the consideration, and a mortgage was given securing both notes, the unlawful consideration could be referred to one of the notes, rendering it void, but thereby purging the other note of the illegality and leaving the mortgage as a valid security for the second note. The facts of the present case are substantially ³⁵⁷ the same. The illegal consideration was but two hundred and one dollars. Two notes were given, respectively for six thousand dollars and seven thousand three hundred and sixty-six dollars and eighty cents. We cannot agree, however, that there is any doctrine of law or reason that would justify considering the commission charge as having entered as an entirety into one note and none of it as having been incorporated in the other. There was in fact but one transaction. The Mississippi court bases its view largely upon *Yundt v. Roberts*, 5 Serg. & R. (Pa.) 139, and *Warren v. Chapman*, 105 Mass. 87. The former case is at variance with the prevailing view, and has done much to promote such conflict as there is in the decisions. The latter holds that where one owes two debts, one legal and one illegal, and gives his creditor a note for an amount less than the valid part of his obligation, with no express direction as to its application, the law will apply it to the good and not to the bad account, and treat it as supported by a valid consideration. This is an entirely reasonable proposition, but it has no tendency to support the conclusion reached in *Caradine v. Wilson*, 61 Miss. 573. It results from what has been said that the view of this court is that upon the facts as the defendant sought to develop them the mortgage given by him was void.

Some attack has been made upon the constitutionality of the anti-trust statute of 1897, but we think the questions so suggested are set at rest by the decisions of this court and of the federal supreme court: *State v. Smiley*, 65 Kan. 240, 69 Pac. 199, 67 L. R. A. 903; *Smiley v. Kansas*, 196 U. S. 447, 25 Sup. Ct. Rep. 289, 49 L. ed. 546.

Was it competent for the defendant to show that the mortgage was in fact void for the reason suggested, although the invalidity did not appear on the face of the instrument? The notes were non-negotiable, so that the question is not affected by any considerations of the possible rights of an innocent purchaser. There was evidence that the complaining

witness, who bought the cattle from the defendant, was required to pay the ³⁵⁸ mortgage, not being advised of any fault in its origin. There is an obvious incongruity under the circumstances in permitting the defendant to escape punishment by showing that his representations that the cattle were clear were in fact true because the mortgage upon them was void under the anti-trust law, although fair and legal on its face. The wrong and fraud practiced upon the complainant are not mitigated by the existence of this concealed defense to the mortgage. Yet the criminal law can only be administered in accordance with fixed and unyielding rules. And no principle of criminal law is better settled than that in order to sustain a prosecution for obtaining property by false pretenses the pretenses must be shown to have been false. It is not enough even that the defendant believed them to be false; there can be no conviction unless they were false in fact: 19 Cyc. 394. The allegation in an information that a defendant obtained money by false pretenses through the sale of property represented to be clear when in fact there was a mortgage upon it can only be responded to by proof of the existence of a valid mortgage: *Satchell v. State*, 1 Tex. App. 438; *State v. Asher*, 50 Ark. 427, 8 S. W. 177; *State v. Garriss*, 98 N. C. 733, 4 S. E. 633; *Keller v. State*, 51 Ind. 111. If, for instance, the mortgage had been paid, there is no doubt that the establishment of this fact would require an acquittal, although the notes and mortgage were outstanding, uncanceled and unreleased, and although the purchaser might have been inconvenienced thereby.

The information in this case charged in set terms that the mortgage in question constituted a valid lien on the cattle. But even in the absence of an express averment of its validity the mortgage referred to must have been understood to be a valid and not a void one. It is possible that if this defense had been anticipated a good information might have been framed by charging the defendant with selling cattle under the representation that he had signed no instrument purporting ³⁵⁹ to encumber them by which a colorable claim of lien upon them might be asserted, whereas in truth he had executed what appeared to be a good mortgage upon them, which fact caused them to be less valuable to the purchaser than they would otherwise have been, and that by reason of this apparent lien the purchaser, not being advised of any defect in the mortgage, was required to pay the

amount or lose the cattle. Under such allegations a conviction might perhaps have been sustained irrespective of the legal sufficiency of the mortgage.

The judgment of conviction is reversed, and a new trial ordered.

All the justices concurring.

CONTRACTS, THE CONSIDERATION FOR WHICH HAS PARTLY FAILED, OR IS PARTLY ILLEGAL.

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I. Scope of Note.

The title to this note indicates its scope. The general question of the effect of illegality of contracts, without respect to the specific question whether the illegality affected only part of the consideration, has been considered in many notes in this series of reports. See notes on validity of contracts in restraint of trade, attached to *Angies v. Webber*, 92 Am. Dec. 751, and *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235; note on when a contract for services is void on the ground of being against public policy, attached to *Parsons v. Trask*, 66 Am. Dec. 506; note on what contracts with newspapers are against public policy, attached to *Livingston v. Page*, 93 Am. St. Rep. 909; note on the general relation of attorneys toward their clients for services which are of a champertous character or in relation to matters before legislative bodies, attached to *Shirk v. Neible*, 83 Am. St. Rep. 159; note on the validity of contracts to furnish evidence, attached to *Wood v. Casserleigh*, 97 Am. St. Rep. 145; note on marriage brokerage contracts and their effect, attached to *Jangraw v. Perkins*, 104 Am. St. Rep. 919; note on rights of parties to illegal contracts, attached to *Tracy v. Talmage*, 67 Am. Dec. 153; note on the rule of *pari delicto*, attached to *Hobbs v. Bostright*, 113 Am. St. Rep. 724; and a note on the defense against the recovery of money collected on the ground that

it was collected on an unlawful contract or for an illegal purpose, attached to *Lemon v. Grosskopf*, 99 Am. Dec. 61.

II. General Effect of Partial Failure of Consideration.

The mere fact that part of the consideration for a contract or obligation has failed does not invalidate the contract if there is a sufficient consideration remaining to sustain the contract. The failure of a part of the consideration does not taint that part of the consideration which remains: *Desha's Exrs. v. Robinson*, 17 Ark. 228; *Case v. Guin*, 77 Ind. 565; *Wilson v. Webster*, Morr. 312, 41 Am. Dec. 230; *Hodgdon v. Golden*, 75 Me. 293; *Gilmore v. Aiken*, 118 Mass. 94; *Wesleyan Seminary v. Fisher*, 4 Mich. 515; *Cotten v. McKenzie*, 57 Miss. 418; *Wilson v. Crosnoe*, 53 Mo. App. 241; *Allen v. Bank of the United States*, 20 N. J. L. 620; *Payne v. Ladue*, 1 Hill, 116; *Evans v. Williamson*, 79 N. C. 86; *Burton v. Schermerhorn*, 21 Vt. 289. If, however, the failure of the consideration is of such a degree that the remaining consideration may be deemed as no substantial consideration, the contract will fail: *Clark v. Continental Imp. Co.*, 57 Ind. 135; *Stansberry v. Morgan*, 6 T. B. Mon. 306; *Corliss v. Putnam*, 37 Vt. 119. A partial failure of consideration is frequently held to be a defense pro tanto: *Evans v. Murphy*, 1 Stew. & P. 226; *Pacific Iron Works v. Newhall*, 34 Conn. 67; *Doebler v. Waters*, 30 Ga. 344; *Baylor v. Morrison*, 2 Bibb, 103; *Folsom v. Mussey*, 8 Me. 400, 23 Am. Dec. 522; *Smith v. Busby*, 15 Mo. 388, 57 Am. Dec. 207; *Marsten v. Swett*, 66 N. Y. 206, 23 Am. Rep. 43; *Marlow v. King*, 17 Tex. 177; *Peterson v. Johnson*, 22 Wis. 21, 94 Am. Dec. 581.

III. Distinction Between Partial Failure or Insufficiency of Consideration and Illegality Thereof.

"Whilst a partial want or failure of consideration avoids a bid or note only pro tanto, illegality in respect to a part of the consideration avoids it in toto. The reason of this distinction is said to be founded, partly at least, on grounds of public policy, and partly on the technical notion that the security is entire and cannot be apportioned; and it has been said with much force that where parties have woven a web of fraud or wrong, it is no part of the duty of courts of justice to unravel the threads and separate the sound from the unsound. And, in general, it makes no difference as to the effect, whether the illegality be at common law or by statute": *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664. If one of two considerations for a contract is void, merely for insufficiency and not for illegality, the other, if sufficient, will support the contract: *King v. King*, 63 Ohio St. 363, 81 Am. St. Rep. 635, 59 N. E. 111, 52 L. B. A. 157.

Mr. Justice Campbell, in delivering the opinion of the court in *Cotton v. McKenzie*, 57 Miss. 418, said: "The doctrine deducible from the multitude of authorities, which we have examined, as applicable to the main question in this case, is that if a contract is based on several considerations, some of which are merely insufficient and not

illegal, it is not void, but may be upheld by the consideration which is sufficient; but that, if one of several considerations of an entire contract, as a note is, be illegal, the whole contract is void: 1 Parsons on Contracts, 455, 457; Metcalf on Contracts, 216, 246; 1 Daniel on Negotiable Instruments, sec. 204; 1 Parsons on Notes and Bills, 217; 1 Chitty's Pleading, 295; *Widoe v. Webb*, 20 Ohio St. 431, and authorities cited; *Featherston v. Hutchinson*, Cro. Eliz. 199; *Shackell v. Rosier*, 2 Bing. N. C. 634; *Scott v. Gillmore*, 3 Taunt. 226; *Bradburne v. Bradburne*, Cro. Eliz. 149; *Coulston v. Carr*, Cro. Eliz. 847; *Crisp v. Gamel*, Cro. Jam. 128; *Robinson v. Bland*, 2 Burr. 1077; *Jones v. Waite*, 5 Bing. N. C. 341; *King v. Sears*, 2 Crompt. M. & R. 48; *Deering v. Chapman*, 22 Me. 488, 39 Am. Dec. 592; *Donallen v. Lennox*, 6 Dana, 89; *Brown's Admrs. v. Langford's Admrs.*, 3 Bibb, 497; *Collins v. Merrell*, 2 Met. (Ky.) 163; *Saratoga Bank v. King*, 44 N. Y. 87; *Pettit's Admr. v. Pettit's Distributees*, 32 Ala. 288; *Wynne v. Whisenaut*, 37 Ala. 46; *Clark v. Ricker*, 14 N. H. 44; *Carleton v. Whitcher*, 5 N. H. 196; *Hinds v. Chamberlin*, 6 N. H. 225; *Barton v. Port Jackson Plank Road Co.*, 17 Barb. 397; *Woodruff v. Hinman*, 11 Vt. 592, 34 Am. Dec. 712; *Valentine v. Stewart*, 15 Cal. 387; *Bliss v. Negus*, 8 Mass. 46; *Kimbrough v. Lane*, 11 Bush, 556; *Bixby v. Moor*, 51 N. H. 402; *Carleton v. Woods*, 28 N. H. 290; *Collins v. Blantern*, 1 Smith's Lead. Cas. 489; *Warren v. Chapman*, 105 Mass. 87; *Crawford v. Merrell*, 8 Johns. 253.

"In *Coulter v. Robertson*, 14 Smedes & M. 18, the court said: 'The distinction between a mere failure or want of consideration and its illegality is obvious. The principle which recognizes the distinction is founded in public policy.' In *Shackell v. Rosier*, 2 Bing. N. C. 634, *Tindal, C. J.*, said: 'When a promise rests on two considerations, one of which is impossible or unintelligible, you may reject the impossible or unintelligible, and resort to that which is possible and plain. But all the books take a distinction as to the case where part of the consideration is illegal.' In *Collins v. Blantern*, 1 Smith's Lead. Cas. 502, it is said: 'Though the illegality of one of the considerations vitiates the contract, yet it is otherwise, if one or more of them be merely void or nugatory, as, for instance, a promise by a man to pay his own just debts; for then the void consideration is a nullity, and the others which remain support the contract.'"

A partial want or a failure of consideration of a note will avoid the note only pro tanto, but illegality in a part of the consideration upon which the note is founded will invalidate the entire consideration and render the note uncollectible: *Douthart v. Congden*, 197 Ill. 349, 90 Am. St. Rep. 167, 64 N. E. 348. This rule was also stated in the principal case, the court saying: "Where one of two considerations, or a distinct part of one consideration, is for any reason not capable of sustaining a contract, but is not otherwise obnoxious to the law, the courts universally recognize the situation as a partial failure of consideration, and permit a pro tanto recovery. But where

one of two considerations, or a distinct part of one consideration, is unlawful, as being forbidden either by the statute or by the common law, the prevailing view is that the partial illegality taints the entire transaction, and the contract itself is void": *State v. Wilson*, 73 Kan. 343, ante, p. 479, 84 Pac. 737.

IV. General Rule Where the Consideration is Entire and Indivisible.

Where the consideration for a contract is entire and a part of such consideration is illegal, but the illegal portion is not separable from the whole consideration, and no means of apportioning it is furnished by the contract, the whole contract is generally declared unenforceable: *Wadsworth v. Dunnam*, 117 Ala. 661, 23 South. 699; *Edwards v. Randle*, 63 Ark. 318, 58 Am. St. Rep. 108, 38 S. W. 343, 36 L. R. A. 174; *Douthart v. Congdon*, 197 Ill. 349, 90 Am. St. Rep. 167, 64 N. E. 348; *Chicago etc. Ry. Co. v. Southern Indiana Ry. Co.* (Ind. App.), 70 N. E. 843; *Flersheim v. Cary*, 39 Kan. 178, 17 Pac. 825; *McNamara v. Gargett*, 68 Mich. 454, 13 Am. St. Rep. 355, 36 N. W. 218; *Case v. Smith*, 107 Mich. 416, 61 Am. St. Rep. 341, 65 N. W. 279, 31 L. R. A. 282; *Rand v. Mather*, 11 Cush. 1, 59 Am. Dec. 131; *Woodruff v. Wentworth*, 133 Mass. 309; *Bishop v. Palmer*, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299; *Clark v. Ricker*, 14 N. H. 44; *Carleton v. Woods*, 28 N. H. 290; *Woodruff v. Hinman*, 11 Vt. 592, 34 Am. Dec. 712. Thus where there are several considerations for one or more promises, and it cannot be ascertained which one of the considerations induced the promise or promises, the contract is generally declared void: *Sims v. Alabama Brewing Co.*, 132 Ala. 311, 31 South. 35; *Santa Clara etc. Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; *Pueblo etc. R. Co. v. Taylor*, 6 Colo. 1, 45 Am. Rep. 512; *Allen v. Pearce*, 84 Ga. 606, 10 S. E. 1015; *St. Louis etc. R. Co. v. Mathers*, 104 Ill. 257; *Ricketts v. Harvey*, 106 Ind. 564, 6 N. E. 325; *Dennis v. Kuster*, 57 Kan. 215, 45 Pac. 602; *Kimbrough v. Lane*, 11 Bush, 556; *Sandige v. Sanderson*, 21 La. Ann. 757; *Taylor v. Jaques*, 106 Mass. 291; *Fosdick v. Van Arsdale*, 74 Mich. 302, 41 N. W. 931; *Sumner v. Summers*, 54 Mo. 340; *Merrill v. Carr*, 60 N. H. 114; *Foley v. Speir*, 100 N. Y. 552, 3 N. E. 477; *Haynes v. Rudd*, 102 N. Y. 372, 55 Am. Rep. 815, 7 N. E. 287; *Covington v. Threadgill*, 88 N. C. 186; *Gage v. Fisher*, 5 N. Dak. 297, 65 N. W. 809, 31 L. R. A. 557; *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664; *Springfield etc. Ins. Co. v. Hull*, 51 Ohio St. 270, 37 N. E. 1116, 25 L. R. A. 37; *Bredin's Appeal*, 92 Pa. 241, 37 Am. Rep. 677; *Sullivan v. Horgan*, 17 B. I. 109, 20 Atl. 232, 9 L. R. A. 110; *Massey v. Wallace*, 33 S. C. 149, 10 S. E. 937; *Potts v. Gray*, 3 Cold. 468, 91 Am. Dec. 294; *Reed v. Bremer*, 90 Tex. 144, 37 S. W. 418; *Bowen v. Buck*, 28 Vt. 308. This rule is frequently applied in suits to recover on promissory notes given for the purchase of goods, some of which it is illegal to sell, as, for instance, where intoxicating liquors which were illegally sold, constituted a part of the goods sold and there is no method of ascertain-

ing the price of the several articles constituting the account. In such cases a recovery on the note is denied: *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Wadsworth v. Dunnam*, 117 Ala. 661, 23 South. 699; *Allen v. Pearce*, 84 Ga. 606, 10 S. E. 1015; *Braitche v. Guelick*, 37 Iowa, 212; *Gipps Brewing Co. v. De France*, 91 Iowa, 108, 51 Am. St. Rep. 329, 58 N. W. 1087, 28 L. R. A. 386; *Gerlach v. Skinner*, 34 Kan. 86, 55 Am. Rep. 240, 8 Pac. 257; *Deering v. Chapman*, 22 Me. 488, 39 Am. Dec. 592; *Gould v. Leavitt*, 92 Me. 416, 43 Atl. 17; *Cotten v. McKenzie*, 57 Miss. 418; *Bick v. Seal*, 45 Mo. App. 475; *Kidder v. Blake*, 45 N. H. 530; *Sanderson v. Goodrich*, 46 Barb. 616; *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664. So, also, where by a contract it is agreed that a party, upon payment of certain rates for real estate advertising is to take charge of the real estate advertisements of the daily, Sunday and weekly editions of a newspaper, and for so doing he is to receive the difference between the rates paid by him and those received by him from the advertisers, the taint of illegality by reason of the violation of the Sunday law in regard to conducting business on that day so taints the whole, that he cannot recover from the newspaper: *Handy v. St. Paul Globe Pub. Co.*, 41 Minn. 188, 16 Am. St. Rep. 695, 42 N. W. 872, 4 L. R. A. 466. And where the consideration of a note secured by a trust deed arose by reason of an illegal combination agreement, foreclosure of the trust deed will be denied even though only a part of the consideration was illegal: *Evans v. American Strawboard Co.*, 114 Ill. App. 450. And where an elevator, its site and stock in certain elevator company are given in exchange for stock in another elevator company, and the contract as to the conveyance of the elevator is void under the statute of frauds, the contract, being indivisible, is void in toto: *Todd v. Bettingen*, 98 Minn. 170, 101 N. W. 1049. Likewise where one railroad company granted to another railroad company the right to run tracks across its tracks and the grantees agreed not to run tracks to certain stone quarries connected with grantor's road, that agreement being stated as the express consideration, the whole contract was declared illegal, since the illegal portions were not separable from the valid portions: *Chicago etc. Ry. Co. v. Southern Indiana Ry. Co. (Ind. App.)*, 70 N. E. 843.

V. General Rule Where the Consideration is Separable.

Where the consideration for a contract is made up of several distinct transactions or several parts, some of which are legal while others are illegal, but the legal portions of the consideration can be separated from the illegal portion, the contract will be upheld: *Hanauer v. Gray*, 25 Ark. 350, 99 Am. Dec. 226; *Treadwell v. Davis*, 84 Cal. 601, 94 Am. Dec. 770; *Ragsdale v. Nagle*, 106 Cal. 332, 29 Pac. 628; *Hoyt v. Macon*, 2 Colo. 502; *Allen v. Pearce*, 84 Ga. 606, 10 S. E. 1015; *Emshwiler v. Tyner*, 21 Ind. App. 347, 69 Am. St. Rep. 360, 52 N. E. 459; *Casady v. Woodbury County*, 13 Iowa, 113;

Sawyer v. Smith, 109 Mass. 220; Eaton v. Kegan, 114 Mass. 433; Carleton v. Woods, 28 N. H. 290; Feldman v. Gamble, 26 N. J. Eq. 494; Stewart v. Lehigh Valley R. Co., 38 N. J. L. 505; Leavitt v. Blatchford, 5 Barb. 9; State v. Board of Education, 35 Ohio St. 519; Frazier v. Thompson, 2 Watts & S. 235; Cobb v. Cowdery, 40 Vt. 25, 94 Am. Dec. 370; Sprigg's Admr. v. Rutland R. Co., 77 Vt. 347, 60 Atl. 143; Conradt v. Lepper, 13 Wyo. 473, 81 Pac. 307, 82 Pac. 2. Thus, if the terms of a contract in restraint of trade may be construed so as to be valid as to certain limits, it may be sustained as to those limits although it would be deemed unreasonable or excessive as to the full limits described in the contract: Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581; Consumer's Oil Co. v. Nunnemaker, 142 Ind. 560, 51 Am. St. Rep. 193, 41 N. E. 1048; Dean v. Emerson, 102 Mass. 480; Hubbard v. Miller, 27 Mich. 15, 15 Am. Rep. 153; Rosenbaum v. United States Credit System Co., 65 N. J. L. 255, 48 Atl. 237, 53 L. R. A. 449; Arnot v. Pittson etc. Co., 2 Hun, 591; Thomas v. Miles' Admr., 3 Ohio St. 274; Western Union Tel. Co. v. Burlington etc. R. Co., 3 McCrary, 130, 11 Fed. 1. Chief Justice Marshall, in Armstrong v. Toler, 11 Wheat. 258, 6 L. ed. 468, approved the rule "that a new contract, founded on a new consideration, although in relation to property respecting which there had been unlawful transactions between the parties, is not itself unlawful."

In the principal case, it was held after an exhaustive discussion of the subject, that where two notes secured by a mortgage are given for a consideration in part unlawful, although the unlawful portion of the consideration is less than either of the notes, both notes and the mortgage are void: State v. Wilson, 73 Kan. 343, ante, p. 479, 84 Pac. 737. But as we understand the decision in the principal case, the court does not dispute the proposition that if the legal portion of the consideration is distinctly severable, a recovery could be had in a proper action to the extent of the legal consideration. The distinction which the court makes is that when the legal and illegal considerations are blended and a promissory note is taken for the whole, the note is entire and indivisible. The decisions in Hynds v. Hays, 25 Ind. 31, Warren v. Chapman, 105 Mass. 87, Carradine v. Wilson, 61 Miss. 573, Yundt v. Roberts, 5 Serg. & R. 139, and Shaw v. Carpenter, 54 Vt. 155, 41 Am. Rep. 837, are not in accord with that of the principal case.

So, also, in Nebraska, the rule was flatly laid down that where an illegal transaction constitutes a part of the consideration for a promissory note, the other portion of the consideration being lawful, the illegality of the part taints the whole consideration, and the courts will not enforce the collection of a note in the hands of the original holder, which is based thereon: Padget v. O'Connor, 71 Neb. 314, 98 N. W. 870. If defendant by giving an order assigns money due from his debtor partly in consideration of a debt

honestly due and owing from the assignor to the assignee, but also partly given for the purpose of preventing other creditors trusteeing, and to enable the assignee to take out of the assignor's monthly pay such sum as debtor sees fit to let him take, the contract, though it is to the extent of the debt founded upon a valuable consideration, is beyond that extent in contravention of the statute against fraudulent conveyances, and hence the whole assignment is void: *Dow v. Taylor*, 71 Vt. 337, 76 Am. St. Rep. 775, 45 Atl. 220. But it has been held in some instances that where goods are sold at a separate price for each article, the fact that the sale of some of the articles is illegal does not invalidate the transaction: *Boyd v. Eaton*, 44 Me. 51, 69 Am. Dec. 83; *Barrett v. Delano* (Me.), 14 Atl. 288; *Walker v. Lovell*, 28 N. H. 138, 61 Am. Dec. 605; *Chase's Exrs. v. Burkholder*, 18 Pa. 48; *Shaw v. Carpenter*, 54 Vt. 155, 41 Am. Dec. 837. In an action upon several notes given for independent shipments of fertilizer, each consisting of several sacks, the fact that one sack did not have a tag attached to it as required by law was held in Alabama to defeat a recovery upon the note which was given for the sacks of fertilizer of which that sack formed a part, but that it would not defeat a recovery upon the other notes: *Alabama Nat. Bank v. C. C. Parker & Co.*, 146 Ala. 513, 40 South. 987. And where a note and mortgage were given for an account, consisting in part of items for liquors sold to the mortgagor on credit and without a license, both of which were prohibited by statute, and sales of that character declared to be void, the court refused to enforce the note and mortgage under the rule that "if the consideration of any contract, either in whole or in part, be illegal, this defeats the entire contract, and it is wholly immaterial whether the contract discloses such illegality or it be established by evidence aliunde": *Bick v. Seal*, 45 Md. App. 475. So, also, in *Hanauer v. Doane*, 12 Wall. 342, 20 L. ed. 439, which was an action upon two promissory notes, a part of the consideration of which was the purchase price of goods sold by the plaintiff for the purpose of being used in aid of war against the authority of the United States. The court, through Mr. Justice Bradley, said: "A portion of their consideration was stores and supplies furnished to the army contractor of the Confederate government, and another portion was duebills issued for the same consideration, and received by Hunter and Oakes, with full notice of their character. If either of these portions of the consideration on which the notes were given was illegal, the notes are void in toto. Such is the elementary rule, for which it is unnecessary to cite authorities."

But in Washington, it was held that a provision in a contract for the sale of stone at a certain price would not be invalid merely because the contract contained a provision that the seller would pay over to the buyer any rebate in the freight made by the carrier,

since such a provision was separable and not *malum in se*: *Minnesota Sandstone Co. v. Clark*, 35 Wash. 466, 77 Pac. 803.

VI. How the Divisibility of the Consideration may be Ascertained.

The test by which to determine whether or not a demand connected with an illegal contract can be enforced is whether or not the plaintiff requires any aid from the illegal transaction to establish his case: *Oliphant v. Markham*, 79 Tex. 543, 23 Am. St. Rep. 363, 15 S. W. 569. But an illegal contract cannot be divided and held valid in part when the inducement thereto and the sole object in view was the formation of an unlawful combination, which cannot be separated from the other parts of the contract and leave any subject matter capable of enforcement: *Santa Clara Valley etc. Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391.

VII. Rule Where There is No Means of Apportionment Furnished by the Contract.

Where the parties to a contract made in consideration of the sale of a business plant, property and its contracts combined the various items in such a way as to form an entire consideration, and there was no way of ascertaining from the contract itself what valuation was put on the various items, no action will lie on the contract where a part of it was in restraint of trade: *Bishop v. Palmer*, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299.

VIII. Rule Where the Illegal Portion of the Consideration is Merely Incidental.

A contract is not void under a statute making contracts in consideration of the marriage of the parties void, where the marriage is but an incident of the contract and the contract is supported by a sufficiently valuable consideration aside from the marriage: *Larsen v. Johnson*, 78 Wis. 300, 23 Am. St. Rep. 404, 47 N. W. 615.

IX. Rule Where an Executory Contract may be Performed in Either a Legal or Illegal Manner.

Where a contract could have been performed in a legal manner as well as in an illegal manner, it will not be declared void because it may have been performed in an illegal manner, since "bad motives are never to be imputed to any man where fair and honest intentions are sufficient to account for his conduct": *Favor v. Philbrick*, 7 N. H. 326. So, also, in *Wangh v. Morris*, L. R. 8 Q. B. 202, the court said: "We quite agree that, where a contract to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think, that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention

to break the law; and if this be so, the knowledge of what the law is becomes of great importance."

And where an agreement is capable of being performed in a legal manner, the mere fact that the other party to the agreement intended to perform it in an illegal manner will not preclude its enforcement: *Lurton v. Gilliam*, 2 Ill. 577, 33 Am. Dec. 430; *Pixley v. Boynton*, 79 Ill. 351; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. Rep. 441; *Commagere v. Brown*, 27 La. Ann. 314; *Gregory v. Wendell*, 40 Mich. 432; *Williams v. Tiedemann*, 6 Mo. App. 269; *Labbe v. Corbett*, 69 Tex. 503, 6 S. W. 808; *Bartlett v. Smith*, 13 Fed. 263, 4 McCrary, 388.

X. Effect of Knowledge of Contemplated Performance of Contract in an Illegal Manner or of Such a Performance.

It is quite generally held that the mere knowledge of the seller of goods or of the lessor of property that the goods or property are to be used for illegal or immoral purposes is no defense to an action for the price or rent: *Thedford v. McClintock*, 47 Ala. 647; *Parson Oil Co. v. Boyett*, 44 Ark. 230; *Rose v. Mitchell*, 6 Colo. 102, 45 Am. Rep. 520; *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907; *Brunswick etc. Co. v. Vallean*, 50 Iowa, 120, 32 Am. Rep. 119; *Feinman v. Sacks*, 33 Kan. 621, 52 Am. Rep. 547, 7 Pac. 222; *Hedges v. Wallace*, 2 Bush, 442, 92 Am. Dec. 497; *Sampson v. Townsend*, 25 La. Ann. 78; *Cheney v. Duke*, 10 Gill & J. 11; *Gamb v. Sutherland's Estate*, 101 Mich. 355, 59 N. W. 652; *Anheuser-Busch Brwg. Assn. v. Mason*, 44 Minn. 318, 20 Am. St. Rep. 580, 46 N. W. 558, 9 L. R. A. 506; *Walker v. Jeffries*, 45 Miss. 160; *Sprague v. Rooney*, 82 Mo. 493, 52 Am. Rep. 383; *Kittle v. De Lamater*, 4 Neb. 426; *Smith v. Godfrey*, 28 N. H. 379, 61 Am. Dec. 617; *Bryson v. Haley*, 68 N. H. 337, 38 Atl. 1006; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *Armfield v. Tate*, 29 N. C. 258; *Goodall v. Gerke Brewg. Co.*, 56 Ohio St. 257, 46 N. E. 983; *Waugh v. Beck*, 114 Pa. 422, 60 Am. Rep. 354, 6 Atl. 923; *Read v. Taft*, 3 R. I. 175; *Wallace v. Lark*, 12 S. C. 576, 32 Am. Rep. 516; *Henderson v. Waggoner*, 2 Lea, 133, 31 Am. Rep. 591; *Lewis v. Alexander*, 51 Tex. 578; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Hanauer v. Doane*, 12 Wall. 342, 20 L. ed. 439. But where, for instance, money is loaned for the express purpose of being used in an illegal transaction, it is not recoverable: *Tyler v. Carlisle*, 79 Me. 210, 1 Am. St. Rep. 301, 9 Atl. 356; *Appleton v. Maxwell*, 10 N. Mex. 748, 55 L. R. A. 93, 65 Pac. 158; *Waugh v. Peck*, 114 Pa. 422, 60 Am. Rep. 354, 6 Atl. 923; *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 57 Pac. 777, 45 L. R. A. 420; *Persons v. Jones*, 12 Ga. 371, 58 Am. Dec. 476; *Linn v. State Bank*, 1 Scam. 87, 25 Am. Dec. 71. In other words, the general rule is that contracts made in violation of a penal statute, although the statute does not in express terms prohibit the contract nor pronounce it void: *Woods v. Armstrong*, 54 Ala. 150, 25

Am. Rep. 671; *Youngblood v. Birmingham etc. Co.*, 95 Ala. 521, 36 Am. St. Rep. 245, 12 South. 579, 20 L. R. A. 58; *Fink v. Gallivan*, 49 Conn. 124, 44 Am. Rep. 210; *Cook v. Pierce*, 2 Houst. 499; *Sandage v. Studebaker Mfg. Co.*, 142 Ind. 148, 51 Am. St. Rep. 165, 41 N. E. 380, 34 L. R. A. 363; *Dillon v. Allen*, 46 Iowa, 299, 26 Am. Rep. 145; *Pinney v. First Nat. Bank*, 68 Kan. 223, 75 Pac. 119; *Vanmeter v. Spurrier*, 94 Ky. 22, 21 S. W. 337; *Durgin v. Dyer*, 68 Me. 143; *Allen v. Hawks*, 13 Pick. 79; *Ingersoll v. Randall*, 14 Minn. 400 (Gil. 304); *Downing v. Ringer*, 7 Mo. 585; *Jones v. Surprise*, 64 N. H. 243, 9 Atl. 384; *Covington v. Threadgill*, 88 N. C. 186; *Thorne v. Travelers' Ins. Co.*, 80 Pa. 15, 21 Am. Rep. 89; *McConnell v. Kitchens*, 20 S. C. 430, 47 Am. Rep. 845; *Snoddy v. American Nat. Bank*, 88 Tenn. 573, 17 Am. St. Rep. 918, 13 S. W. 127, 7 L. R. A. 705; *Territt v. Bartlett*, 21 Vt. 184. A contract made in furtherance of a business carried on in violation of the common law or of the public policy of the state is void: *Thomas v. First Nat. Bank*, 213 Ill. 261, 72 N. E. 801.

In the principal case, it was held where a mortgagee, a member of a cattle trust, buys cattle for the mortgagor and in pursuance of the by-laws of the trust, charges fifty cents a head for his services in buying them, the said sum being the minimum allowed by the trust, that the contract to pay such commission is in violation of the anti-trust statute and not merely nonenforceable but absolutely void: *State v. Wilson*, 73 Kan. 343, ante, p. 479, 84 Pac. 737. Where a statute prohibits the keeping of a ninepin alley appurtenant to a tavern, one who contracts for its construction cannot recover: *Spurgeon v. McElwain*, 6 Ohio, 442, 27 Am. Dec. 266; and where goods are sold to be smuggled into a country and the seller so packs them and marks them as to assist the buyer in smuggling them, he cannot recover: *Briggs v. Lawrence*, 3 Term Rep. 454. And where a statute prohibits the killing of game at certain times of the year, and makes it a misdemeanor for any person to have any of the specified game in his possession during the closed season, a contract by a cold storage company to preserve the game during the closed season is void, even though it was the intention of the parties not to dispose of the game before the next open season: *Haggerty v. St. Louis Ice etc. Storage Co.*, 143 Mo. 238, 65 Am. St. Rep. 647, 44 S. W. 1114, 40 L. R. A. 151. A partial assignment of a United States mail contract is illegal: *Nix v. Bell*, 66 Ga. 664. But a contract by which the mail contractor employs others to execute it is legal: *Gordon v. Dalby*, 30 Iowa, 223.

But the mere knowledge on the part of the seller that liquor was thereafter to be illegally sold by the keeper of a house of ill-fame has been held to be no defense to a suit for its purchase price: *Washington Liquid Co. v. Shaw*, 38 Wash. 398, 80 Pac. 536. And where the lender of money knew that it was to be used for an illegal purpose, but did not participate in the contemplated illegal trans-

action, he is not precluded from recovering the loan: *Hines v. Union Sav. etc. Co.*, 120 Ga. 711, 48 S. E. 120. And likewise, the fact that money realized from a note was used to corrupt voters at an election was held not to affect a recovery where the payee did not know that the money was to be so used: *Hale v. Harris*, 28 Ky. Law Rep. 1172, 91 S. W. 660. And it is no defense that the seller of goods knew that the buyer intended to resell them in a state where the sale of such goods was unlawful: *Jameson v. Gregory's Exr.*, 4 Met. (Ky.) 363; *Webber v. Donnelly*, 33 Mich. 469; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205.

XI. Application of the Rule to Various Kinds of Contracts and Agreements.

a. Contracts in Violation of Statutes, Ordinances or Other Laws of the Land.

1. **In General.**—Where the making of a contract in regard to a certain transaction is prohibited by statute, the courts will not entertain an action upon it or upon any rights growing out of it: *Wilson v. Beach*, 11 Ky. Law Rep. 1001. And where one knowingly sells goods to the agent of the enemies of the government to which he owes allegiance, he cannot recover: *Oxford Iron Co. v. Spradley*, 51 Ala. 171; *Tatum v. Kelley*, 25 Ark. 209, 94 Am. Dec. 717; *Kingsbury v. Fleming*, 66 N. C. 524; *Sprott v. United States*, 20 Wall. 459, 22 L. ed. 371. In *Hanauer v. Doane*, 12 Wall. 342, 20 L. ed. 439, in refusing to allow a recovery for goods sold in aid of the rebellion, or with knowledge that they were purchased for the Confederate states, the court said: "No crime is greater than treason. He who, being bound by his allegiance to a government, sells goods to the agent of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose, is himself guilty of treason or a misprision thereof. He voluntarily aids the treason. He cannot be permitted to stand on the nice metaphysical distinction that although he knows that the purchaser buys the goods for the purpose of aiding the rebellion, he does not sell them for that purpose. The consequences of his acts are too serious and erroneous to admit of such a plea. He must be taken to intend the consequences of his own voluntary act."

But the mere fact that the statute provides a penalty for selling any lot in a town or addition thereto before the plat thereof is recorded does not render a note given for the purchase money of lots so sold void: *Pangborn v. Westlake*, 36 Iowa, 546; *Bemis v. Becker*, 1 Kan. 226; *Strong v. Darling*, 9 Ohio, 201. Though the contrary was held in Missouri under a similar statute: *Downing v. Ringer*, 7 Mo. 585.

Where a statute prohibits the transaction of business in the name of a partner not interested in the partnership and requires that the word "Company" or its abbreviation shall represent an actual part-

ner, and provides a penalty for the violation of the statute, it has been held that contracts in violation of the statute are void: *Swords v. Owens*, 43 How. Pr. 176; *O'Toole v. Garvin*, 1 Hun, 92; *Donlon v. English*, 89 Hun, 67, 35 N. Y. Supp. 82.

2. **Violation of Sunday Laws or of Laws Against the Selling of Intoxicating Liquors.**—Quite frequently the courts have held that a note given for intoxicating liquors illegally sold on Sunday is invalid, even though the sum included in the note was also for other articles legally sold: *Wadsworth v. Dunnam*, 117 Ala. 661, 23 South. 699; *Braitch v. Guelick*, 37 Iowa, 212; *Gerlach v. Skinner*, 34 Kan. 86, 55 Am. Rep. 240, 8 Pac. 257; *Ladd v. Dillingham*, 34 Me. 316; *Cotten v. McKenzie*, 57 Miss. 418; *Bick v. Seal*, 45 Mo. App. 475; *Sanderson v. Goodrich*, 46 Barb. 616; *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664. And under a statute providing for the observance of the Lord's day, it has been held that a contract for the services of a band of musicians to play for seven days each week, including the afternoons and evenings of each Sunday, is in violation of the statute, and no recovery can be had for even services performed on secular days: *Stewart v. Thayer*, 168 Mass. 519, 60 Am. St. Rep. 407, 47 N. E. 420. And likewise a contract by which it is agreed that a party, upon the payment of certain rates for real estate advertising is to take entire charge and control for a certain period of the real estate advertising business in the daily, Sunday and weekly issues of a newspaper, in consideration of being allowed the difference between the rates paid and those received by him for advertising, is an entire and individual contract, so that a taint of illegality by reason of violating the law prohibiting the doing of labor, business or work, except only works of necessity and charity, on Sunday: *Handy v. St. Paul Globe Pub. Co.*, 41 Minn. 188, 16 Am. St. Rep. 695, 4 L. R. A. 466, 42 N. W. 872.

So, also, where the seller of liquors so marks the casks that their contents cannot be ascertained by the revenue officers with the purpose of aiding in their being sold in violation of the laws in regard to the sale of intoxicating liquors, no recovery can be had: *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Aiken v. Blaisdell*, 41 Vt. 655. An agreement to pay wages to one who serves as a bartender is invalid where the sale of intoxicating liquors is prohibited: *Bixby v. Moor*, 51 N. H. 402; *Sullivan v. Horgan*, 17 R. I. 109, 20 Atl. 232, 9 L. R. A. 110. But in *Goodwin v. Clark*, 65 Me. 280, the court said: "A person cannot recover for his personal services, portions of which are rendered in an unlawful employment, a part of which employment was to be in selling liquors unlawfully; he can recover nothing upon such a contract or for services rendered in pursuance of it. But if his contract was to render services only in a legal employment, and he seeks to recover for no other, he is not to be debarred therefrom merely because, during the season of his employment, he occasionally as-

sisted in the sale of liquors as a gratuitous service to his employers, and not as a part of his contracted services for which he seeks compensation."

And where one leases premises for the keeping and sale of liquors, and agrees to supply the place with ice to keep the premises cool, if the sale of such liquors is illegal, the tenant cannot recover against the landlord for damages done to the liquors by a failure to keep the premises cool: *Kelly v. Courter*, 1 Okla. 277, 30 Pac. 372.

3. **Violation of Laws Against Gaming.**—Money loaned for gaming is often held not recoverable by reason of the purpose for which it is to be used: *Viser v. Bertrand*, 14 Ark. 267; *Reed v. Reeves' Admr.*, 13 Bush, 447; *Emerson v. Townsend*, 73 Md. 224, 20 Atl. 984; *White v. Buss*, 3 Cush. 448; *Raymond v. Leavitt*, 46 Mich. 447, 41 Am. Rep. 170, 9 N. W. 525; *Hall v. Costello*, 48 N. H. 176, 2 Am. Rep. 207; *Staples v. Gould*, 9 N. Y. 520; *Critchler v. Holloway*, 64 N. C. 526. But it is no defense to a suit to recover for the fitting up and furnishing of a house that the plaintiff knew that the house was to be used for gaming: *Michael v. Bacon*, 49 Mo. 474, 8 Am. Rep. 138. Nor is it a defense that the vendor or lessor of premises knew that they were to be used for gaming: *Brunswick etc. Co. v. Valteau*, 50 Iowa, 120, 32 Am. Rep. 119. "A scheme lawful in itself cannot be made a cover for one that is unlawful. The plaintiff's racetrack and grandstand were lawful to be kept, but when it adds to those the gambling booth, and runs them together, and then makes a contract that is appurtenant to either and appurtenant to both, courts will not entertain it merely because in its application it was not limited entirely to the unlawful purpose": *St. Louis Fair Assn. v. Carmody*, 151 Mo. 566, 74 Am. St. Rep. 571, 52 S. W. 365. One who trains a horse for a race on which money is bet cannot recover for his services, where a horserace is regarded as gaming, but such a trainer may recover money expended for feed and shoes for the horse, since such items are not necessarily a part of the gaming transaction: *Mosher v. Griffin*, 51 Ill. 184, 99 Am. Dec. 541. Where a broker is privy to the unlawful design of parties to contract for the sale of goods to be delivered in future, the transaction being merely a sale on margin, he cannot recover for his services rendered for losses incurred by himself on behalf of either in forwarding the transactions: *Crawford v. Spencer*, 92 Mo. 498, 1 Am. St. Rep. 745, 4 S. W. 713, and monographic note attached thereto.

4. **Violation of Laws Requiring a License to Conduct a Certain Business or Occupation.**—The question whether contracts made by persons engaged in a business or occupation for the following of which the law requires a license is not free from difficulty. The distinction in the cases seems to be that where the license is re-

quired for the protection of the public rather than for the purpose of raising revenue, that the contract will be invalidated by the failure of the person to have the required license: *Vermont Loan etc. Co. v. Hoffman*, 5 Idaho, 376, 95 Am. St. Rep. 186, 49 Pac. 314, 37 L. R. A. 509; *Randall v. Tuell*, 89 Me. 443, 36 Atl. 910, 38 Atl. 143. Though the authorities are apparently in accord where the license is required for the protection of the public, they are not in accord where it is merely for the purpose of revenue. Thus the failure of a physician to have the required license will prevent him recovering for his services: *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. 880; *Orr v. Meek*, 111 Ind. 40, 11 N. E. 787; *Thompson v. Hazen*, 25 Me. 104; *Bailey v. Mogg*, 4 Denio, 60; *Alcott v. Barber*, 1 Wend. 526; *Puckett v. Alexander*, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43; *Leman v. Housley*, L. R. 10 Q. B. 66. Nor can a physician recover for services to be performed at a medical institute conducted by himself, even though the actual services were to be performed by a licensed physician: *Deaton v. Lawson*, 40 Wash. 486, 82 Pac. 879, 111 Am. St. Rep. 922, 2 L. R. A., N. S., 392. The same rule has been followed in respect to contracts by attorneys for legal services: *Hittson v. Browne*, 3 Colo. 304; *Sellers v. Phillips*, 37 Ill. App. 74; *Hughes v. Dougherty*, 62 Ill. App. 464; *Hall v. Bishop*, 3 Daly, 109. And likewise an unlicensed school teacher is precluded from recovering for his services as a teacher: *Wells v. People*, 71 Ill. 532; *Jackson School Tp. v. Farlow*, 75 Ind. 118; *Ryan v. School District*, 27 Minn. 433, 8 N. W. 146. And as a general rule contracts for services as a broker, innkeeper, grocer, plumber or the like, are not enforceable where the person contracting to perform such services has not obtained the license required by law: *Dudley v. Collier*, 87 Ala. 431, 13 Am. St. Rep. 55, 6 South. 304; *Munsell v. Temple*, 8 Ill. 93; *Hustis v. Pickands*, 27 Ill. App. 270; *Denning v. Yount*, 62 Kan. 217, 61 Pac. 803, 50 L. R. A. 103; *Harding v. Hagar*, 60 Me. 340; *Randell v. Tuell*, 89 Me. 443, 30 Atl. 910, 38 L. R. A. 143; *Buckley v. Humason*, 50 Minn. 195, 26 Am. St. Rep. 637, 52 N. W. 385, 16 L. R. A. 423; *Johnston v. Dahlgren*, 31 App. Div. 204, 52 N. Y. Supp. 555; *Johnson v. Hulings*, 103 Pa. 498, 49 Am. Rep. 131; *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230; *De Witt v. Lander*, 72 Wis. 120, 39 N. W. 349. But in several states, under an ordinance imposing a penalty for the failure of a broker to procure a license, it was held that he could recover his commissions: *Reickman v. Bergholz*, 37 N. J. L. 437; *Woodward v. Stearns*, 10 Abb. Pr., N. S., 395; *Fairly v. Wappoo Mills*, 44 S. C. 227, 22 S. E. 108, 29 L. R. A. 215. Of course statutes of the character relate only to professional brokers: *O'Neill v. Sinclair*, 153 Ill. 525, 39 N. E. 124; *Johnson v. Williams*, 8 Ind. App. 677, 36 N. E. 167; *Pope v. Beals*, 108 Mass. 561; *Shepler v. Scott*, 85 Pa. 329. Where the statute requires the owner of a steam threshing-machine to file a bond conditioned to pay all damages from fire, and makes it un-

lawful to operate it without having filed such bond, he cannot recover compensation for work done by the machine where he has failed to file such a bond, even where the grain owner knew of his failure to file the bond: *Johnson v. Berry* (S. Dak.), 104 N. W. 1114. But the failure of an architect to obtain a certificate entitling him to practice architecture, as required by the statute making it a misdemeanor to practice architecture in the state without first having obtained a certificate, does not invalidate a contract for his services made in advance of the issuance of a certificate: *Fitzhugh v. Mason*, 2 Cal. App. 220, 83 Pac. 282. A person may recover for services rendered to a person who is required to be licensed to be engaged in that occupation, where he did not know that the employer was not licensed: *Emery v. Kempton*, 2 Gray, 257; *Roy v. Johnson*, 7 Gray, 162.

5. **Violation of Laws Regulating Labor.**—A contract for the services of a minor in a factory in violation of the statute prohibiting the employment of minors in certain classes of employment is void: *Birkett v. Chatterton*, 13 R. I. 299, 43 Am. Rep. 30. Likewise an agreement to work more than eight hours a day in violation of a law prohibiting more than eight hours of labor in a day in mines and smelters has been declared void in Utah: *Shorb v. Bullion-Beck etc. Min. Co.*, 20 Utah, 20, 57 Pac. 720, 45 L. R. A. 603.

6. **Violation of Statutes Requiring the Inspection, Labeling or Statement of Quality of Articles of Commerce.**—Where the statute imposes a penalty for selling or disposing of goods, wares or merchandise by unsealed and unproved scales or measures, the sales being in violation of law, no recovery can be had for the price: *Finch v. Barclay*, 87 Ga. 393, 13 S. E. 566; *Eaton v. Kegan*, 114 Mass. 433; *Bisbee v. McAllen*, 39 Minn. 143, 39 N. W. 299. In the last-cited case the court said: "The weighing or measuring is not a collateral matter, but is directly involved in the act of selling and the contract of sale. It regulates the quantity to be delivered and the amount to be paid. And where the statute has in view the prevention of fraud by the seller, then, though there be nothing but a penalty, a contract which infringes the statute cannot be upheld: *Griffith v. Wells*, 3 Denio, 226; *Lewis v. Welch*, 14 N. H. 294. Here the intent of the statute is to clearly prevent the sales by unproved and unsealed scales or measures, and its object is undoubtedly to protect the public from fraud or imposition by the use of false or inaccurate balances and measurements. It covers all cases of sales by weights or measure, and this case is clearly within it. The doctrine appears to be too well settled to require extended discussion: *Brackett v. Hoyt*, 20 N. H. 264; *Smith v. Arnold*, 106 Mass. 269; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 675, notes and cases; *Ingersoll v. Randall*, 14 Minn. 400 (Gil. 304). In some cases a remedy has been suggested and recognized

outside the prohibited contract: *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531. But no such question is involved in this case."

The same general rule is observed where the statute requires goods to be inspected, labeled or their weight to be set forth: *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Campbell v. Segars*, 81 Ala. 259, 1 South. 714; *Johnston v. McConnell*, 65 Ga. 129; *Conley v. Sims*, 71 Ga. 161; *Vanmeter v. Spurrier*, 94 Ky. 22, 21 S. W. 337; *Abbott v. Goodwin*, 37 Me. 203; *Prescott v. Battersby*, 119 Mass. 285; *Braunn v. Keally*, 146 Pa. 519, 28 Am. St. Rep. 811, 23 Atl. 389; *McConnell v. Kitchens*, 20 S. C. 430, 47 Am. Rep. 845; *Niemeyer v. Wright*, 75 Va. 239, 40 Am. Rep. 720. Thus under a statute requiring wood, before being sold, to be measured by officers appointed for that purpose, it was held that the seller could not recover the price of the wood: *Pray v. Burbank*, 10 N. H. 377. A like rule was held where shingles were not of the size prescribed by the statute: *Wheeler v. Russell*, 17 Mass. 258.

b. *Contracts Tending to Corrupt Good Morals.*—The court in *Anheuser-Busch Brewing Assn. v. Mason*, 44 Minn. 318, 20 Am. St. Rep. 580, 46 N. W. 558, 9 L. R. A. 506, stated the rule in regard to contracts tending to corrupt good morals to be to the effect that: "The participation must be active to some extent. The vendor must do something in furtherance of the purchaser's design to transgress, but positive acts in aid of the unlawful purpose are sufficient, though slight. While it is certain that a contract is void when it is illegal or immoral, it is equally as certain that it is not void simply because there is something immoral or illegal in its surroundings or connections. It cannot be declared void merely because it tends to promote illegal or immoral purposes." And in accordance with the rule stated, it held that one who sells goods, as, for instance, bottled beer, to a person known to him to be the keeper of a house of prostitution, without knowing just what was to be done with the goods, but supposing that she would sell or use them in her brothel, may, no other facts appearing, recover the price thereof in an action against her.

Hence, a conditional sale of furniture and house furnishing goods for use in a house of ill-fame, with knowledge on the part of the vendor of the use to which the goods are to be put, is a contract against public policy and void: *Reed v. Brewer* (Tex. Civ. App.), 36 S. W. 99; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 79 Am. St. Rep. 960, 51 L. R. A. 889, 62 Pac. 145. In the latter case the court said: "It is true that it is held in many well-considered cases, and it is perhaps the weight of authority, that mere knowledge on the part of the vendor of goods that the vendee designs to and will put them to an immoral or illegal use, is not of itself sufficient to bar an action brought to recover the purchase price of the goods sold. But in all of the cases announcing this rule which

have been brought to our attention, the transaction was one in which the owner of the goods at the time of their delivery to the vendee parted with his title and right of possession, so that thereafter the relation between the vendor and vendee was that of debtor and creditor merely, or that of debtor and creditor with a mortgage over to secure the deferred payments of the purchase price. The sale and delivery of the property was complete, and no element of participation or aid in the immoral or illegal design of the vendee could be imputed to the vendor. On the other hand, it is held by all the cases, even those which announce the rule contended for by the appellant, that if the vendor has knowledge of the immoral or illegal design of the vendee, and in any way aids or participates in that design, or if the contract of sale is so connected with the illegal or immoral purpose or transaction of the vendee as to be inseparable from it, the vendor cannot recover: *Tatum v. Kelly*, 25 Ark. 209, 94 Am. Dec. 717; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Aiken v. Blaisdell*, 41 Vt. 665; *Schankel v. Moffatt*, 53 Ill. App. 382; *Ralston v. Boady*, 20 Ga. 449; *Webster v. Munger*, 8 Gray, 584; *Adams v. Coulliard*, 102 Mass. 167; *Graves v. Johnson*, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, and note to this case in 32 Am. St. Rep. 450; *Beach's Modern Contract Law*, sec. 457.

"And there are cases which hold that knowledge on the part of the vendor that the purchaser intends to devote the property purchased to an illegal use will bar a recovery of the purchase price, even though he does no other act than deliver the property to the vendee. It was so held by the supreme court of the United States in *Hanauer v. Doane*, 12 Wall. 342, 20 L. ed. 439, though the court seems to admit that there might be a distinction between the cases where the use to which the property is to be devoted is only *malum prohibitum*, or of inferior criminality, and the cases where it is to be used in aid of the perpetration of a heinous crime, such as treason, as was the fact in that case: See, also, *Tatum v. Kelly*, 25 Ark. 209, 94 Am. Dec. 717; *Milner v. Patton*, 49 Ala. 423; *Lewis v. Latham*, 74 N. C. 283; *Bickel v. Sheets*, 24 Ind. 1; *Steele v. Curle*, 4 Dana, 381.

"Where the sale is absolute, though on credit, the vendee becomes the owner of the property purchased and has all the rights therein that any owner has over his own property, and he may make such use of it as to him seems fit, without let or hindrance from his vendor. Under an ordinary contract of conditional sale, the law is different. The vendee thereunder, the title being reserved in the vendor, is a mere bailee of the property. If the use of the property be not prescribed in the contract of sale, the purchaser must, nevertheless, use it for a lawful and proper purpose, and in the way its nature contemplates it should be used, or else suffer forfeiture

of his contract. It is clear that the relation between the parties to the contract in the present case was something more than that of debtor and creditor merely, and it would seem it was something more than an ordinary contract of conditional sale. The appellant not only reserved 'title, ownership and possession of the property,' but reserved the right to 'take possession of the aforesaid personal property whenever it may deem itself insecure' even before the maturity of the deferred payments. This practically left the control of the use of the property with the appellant; and as the evidence shows that it had knowledge of the immoral and illegal use to which the vendees intended to and did put the property, it is hard to conceive why it did not aid and participate in that immoral and illegal use. The distinction between knowing that a buyer is intending to put the property to some unlawful use, and participating in that unlawful intent, is, to say the least, somewhat refined; and where a vendor, for the mere sake of gain, makes a contract, the effect of which is to put his own property in the hands of persons who will use it to conduct a house of prostitution, knowing it will be so used, the courts ought not to be astute to find nice distinctions which will enable him to avoid the consequences of his acts. It must be borne in mind that at common law it was an indictable offense to keep a house of ill-fame, or to let a house knowing it was to be used for the purpose of prostitution: Wharton's Criminal Law, sec. 1459; that in this state these acts are made misdemeanors by statute: Ballinger's Code, secs. 7239, 7261; and that 'any contract auxiliary to the keeping of a bawdy-house, or otherwise encouraging prostitution, is void': Bishop on Contracts, sec. 506; Dougherty v. Seymour, 16 Colo. 289, 26 Pac. 823; Hemstock v. Palmer, 4 Tex. Civ. 459, 23 S. W. 294; Chateau v. Singla, 114 Cal. 91, 55 Am. St. Rep. 63, 45 Pac. 1015, 33 L. R. A. 750; Beach's Modern Contract Law, sec. 1443."

Nor can recovery be had for the rent of a place which is rented for the express purpose of being used as a bawdy-house: Dougherty v. Seymour, 16 Colo. 289, 26 Pac. 823; Ralston v. Boady, 20 Ga. 449; Kathman v. Walters, 22 La. Ann. 54; Ashbrook v. Dale, 27 Mo. App. 649; Emert v. Crosby, 140 N. Y. 364, 35 N. E. 603; Hemstock v. Palmer, 4 Tex. Civ. 459, 23 S. W. 294. A contract of partnership to let apartments for purposes of prostitution is illegal and immoral, and neither partner can maintain an action against the other for an accounting: Chateau v. Singla, 114 Cal. 91, 55 Am. St. Rep. 63, 45 Pac. 1015, 33 L. R. A. 750. Likewise the services of a cotenant in letting the premises from day to day to lewd women and collecting the rents cannot be made the basis of a suit against the cotenants for compensation therefor: Ballerino v. Ballerino, 147 Cal. 544, 82 Pac. 199.

It is, however, no defense to a suit for the purchase price of premises that the vendor knew that the premises were to be used

as a residence for the mistress of the purchaser: *Armfield v. Tate*, 29 N. C. 258.

No recovery will be allowed for labor and services of a woman as housekeeper and mistress: *Walraven v. Jones*, 1 *Houst.* 355; *McDonald v. Fleming*, 12 B. Mon. 285. But the fact that a man and woman maintain illicit relations does not preclude the woman from recovery for her labor under an express contract to pay for it where the illicit relations did not form any part of the contract: *Rhodes v. Stone*, 17 N. Y. Supp. 561.

The mere fact that a contract involves moral turpitude is not sufficient to invalidate it: *Nevins v. Chapman*, 15 *L. Ann.* 353; *Moore v. Remington*, 34 *Barb.* 427; *Gay v. Parpart*, 106 U. S. 679, 1 *Sup. Ct. Rep.* 456, 27 *L. R. A.* 256. The fact that an actress who is hired to perform as a "burlesque opera bouffe artist" is required under her contract of employment to "show her limbs in silk stockings" while performing on the stage does not invalidate the contract for her services: *Baumeister v. Markham*, 101 *Ky.* 122, 72 *Am. St. Rep.* 397, 39 *S. W.* 844, 41 *S. W.* 816.

A woman who keeps prostitutes for gain cannot recover for their board and lodging: *Mackbee v. Griffith*, 2 *Cranch C. C.* 336, 15 *Fed. Cas. No.* 8660.

c. Contracts Tending to Create a Breach of Confidence or Trust or Induce Fraud.

1. In General.—Agreements, the object or tendency of which is to constitute a fraud or breach of trust on part of persons standing in a fiduciary or confidential relation, are void: *Byrd v. Hughes*, 84 *Ill.* 174, 25 *Am. Rep.* 442; *Lucas v. Allen*, 80 *Ky.* 681; *Atlee v. Fink*, 75 *Mo.* 100, 43 *Am. Rep.* 385; *Halloway v. Stevens*, 48 *How. Pr.* 129; *Everhart v. Searle*, 71 *Pa.* 256; *Woodstock Iron Co. v. Richmond etc. Co.*, 129 U. S. 643, 9 *Sup. Ct. Rep.* 402, 32 *L. ed.* 819. Hence, a contract, the object or necessary tendency of which is to place a person owing duties to third persons in a position where he is under obligations inconsistent with such duties is void, even though in fact it has no bad effect: *Bolton v. Ainsler*, 95 *N. Y. Supp.* 481. So, also, where one acts as agent of both the seller and purchaser of land without the seller's knowledge of his agency, the contract is void as against public policy: *McClure v. Ullmann*, 102 *Mo. App.* 697, 77 *S. W.* 325. And where the owner of property is willing to take a certain price for it, a secret contract between such owner and one who undertakes to, and does, organize a joint stock company for its purchase at a much larger sum, wherein it is agreed that the avails of such transaction shall be divided between such owner and promoter, and which sale and purchase are affected by the aid and influence of said parties as stockholders and directors in said company, is void as against public policy: *Yale Gas Stove Co. v. Wilcox*, 64 *Conn.* 101, 42 *Am. St. Rep.* 159, 29 *Atl.* 303, 23 *L. R. A.*

90. And an agreement by which a physician was to explain to a railroad company injuries received by a person injured by it, and his compensation for so doing was to vary according to the amount paid by the company, is illegal: *Thomas v. Caulkett*, 57 Mich. 392, 58 Am. Rep. 369, 24 N. W. 154. An agreement to advance the selling price of stocks by fictitious sales is void: *Livermore v. Bushnell*, 5 Hun, 285. An agreement for the sale of seed grain at a price far above its actual value, in which agreement the seller agrees to sell the crop raised from it for the buyer at a price which cannot be obtained without defrauding someone, is invalid: *Schmueckle v. Waters*, 125 Ind. 265, 25 N. E. 281; *Shipley v. Reasoner*, 80 Iowa, 548, 45 N. W. 1077; *McNamara v. Gargett*, 68 Mich. 454, 13 Am. St. Rep. 355, 36 N. W. 218; *Davis v. Seeley*, 71 Mich. 209, 38 N. W. 901. Contra, *Matson v. Blossom*, 50 Hun, 600, 2 N. Y. Supp. 551.

"Parties are not only bound to act fairly in their dealings with each other, but they are not to expect the aid of a court of equity to enforce an agreement made with the intent that it shall operate as a fraud upon the private rights and interests of third persons." Hence, equity will not enforce a secret agreement between certain defendants and the plaintiff in an action of trespass, that he, the plaintiff, if he prevails, will not levy his execution on their property in case they will give no aid to their associate in making defense to the action: *Selz v. Unna*, 6 Wall. 327, 18 L. ed. 799.

But a merchant, buying out the entire stock of another merchant, may lawfully make an agreement with the seller's clerk to make an invoice of the goods: *Shattuck v. Nellis*, 44 Vt. 262.

2. Contracts Tending to Corrupt or Control the Discretion of Officers of Corporations.—The right of officers and directors to enter into contracts with the corporation of which they are officers is exhaustively discussed in the monographic note attached to *Beach v. Miller*, 17 Am. St. Rep. 298, and hence we will not enter into any discussion of the subject except in a very general way. In a general way it may be said that an agreement entered into between an officer or director of a corporation which is contrary to the duty involved by reason of his official connection with the corporation is voidable: *Davis v. Gemmell*, 70 Md. 356, 17 Atl. 259; *Woodruff v. Wentworth*, 133 Mass. 309; *Attaway v. Third Nat. Bank*, 93 Mo. 485, 5 S. W. 16; *Bliss v. Matteson*, 45 N. Y. 22; *Wardell v. Union Pac. R. Co.*, 103 U. S. 651, 26 L. ed. 509; *Woodstock Iron Co. v. Richmond etc. Co.*, 129 U. S. 643, 9 Sup. Ct. Rep. 402, 32 L. ed. 819. It is against public policy to permit any person occupying fiduciary relations to be placed in such a position that he may be tempted to betray his duty as a trustee: *Sims v. Petaluma Gas Light Co.*, 131 Cal. 656, 63 Pac. 1011.

Directors of corporations of a quasi public character, such as railway companies, are regarded as trustees for the general public as

well as the stockholders of such corporations, and hence contracts with the company by which they obtain some private advantage or gain are held to be against public policy and not enforceable: *St. Louis etc. R. Co. v. Mathers*, 71 Ill. 592, 22 Am. Rep. 122; *Fuller v. Dame*, 18 Pick. 472; *Holladay v. Patterson*, 5 Or. 177; *Woodstock Iron Co. v. Richmond etc. Co.*, 129 U. S. 643, 9 Sup. Ct. Rep. 402, 32 L. ed. 819. In *Western Union Tel. Co. v. Union Pac. Ry. Co.*, 3 Fed. 1, 1 McCrary, 418, the court said: "The officers of a railway company are quasi public officers. Their duties are of a fiduciary character. They are, in an important sense, trustees. To pay them individually anything of value for executing a corporate contract is grossly unlawful, and taints such contract with moral turpitude. Vast interests, in which the public, as well as the immediate parties, are deeply concerned, are intrusted to the control and management of such officials; and, in my judgment, there are important considerations of public policy which demand that courts of justice shall hold them to a strict account, and shall never for a moment recognize as valid a contract obtained by paying directly or indirectly to such officials any consideration, whether large or small."

The giving of a large bonus in addition to the amount of a bid for construction work, which bonus was to be divided between the president of the corporation and the bidder, renders the contract invalid: *Standard Lumber Co. v. Butler Ice Co.*, 146 Fed. 359. And where two contracts were made on the same day, one with a railway company to construct its road at a certain percentage upon the cost of construction, the other with five out of seven directors of the company to pay them two-thirds of such percentage, the two contracts will be regarded as one contract and neither will be enforceable while executory: *Stanton v. Sturgis*, 140 Fed. 789.

A contract made by a person when buying a controlling majority of the stock in a corporation that he will use his influence to retain a certain person in the office of vice-president at a fixed salary is void as against public policy, since to do so might oblige him to act contrary to his duty toward the stockholders other than himself: *West v. Camden*, 135 U. S. 507, 10 Sup. Ct. Rep. 838, 34 L. ed. 254. Decisions to the same effect have been made in Kansas and Massachusetts: *Noel v. Drake*, 28 Kan. 265, 42 Am. Rep. 162; *Guernsey v. Cook*, 120 Mass. 501; *Woodruff v. Wentworth*, 133 Mass. 309. And in Montana, under the code provisions, it has been held that a sale of corporation stock with a condition that certain persons should hold certain offices of the company is invalid: *Glass v. Basin etc. Min. Co.*, 34 Mont. 88, 77 Pac. 302. But in Illinois, in a somewhat similar case, the court said: "It is next contended that the provision in the contract that the plaintiffs should hold the offices of president, secretary and treasurer of the Garden City Billiard Table Company for five years from the date of the contract, at a salary of two thousand dollars per annum each, is contrary to

public policy and void. The contract was entered into by all the stockholders of the corporation, and, while it might not have bound the board of directors afterward elected, we think there is no reason, in law, why it should not be held to be binding upon the defendants, and enforceable against them. The entire stock of the corporation was held by the plaintiffs, and, in making a contract with the defendants whereby the latter were to obtain at once six-tenths of said stock, it was open to the parties to make any arrangements with regard to the management of the company mutually agreeable to them. The price to be paid for the stock was a matter to be determined by them, and by them only. They owned all the property represented by the stock, and the mere fact that it was represented by corporate stock could make no difference. No other person had any interest in it and no one else could complain. Instead of paying a different price than that agreed on for the stock not then to be transferred, it was mutually agreed that the plaintiffs should continue in their old official positions for five years, with an increase of salary."

3. **Contracts to Recommend Certain Persons to the Favor of Others.** A secret agreement to pay one "for his trouble" in recommending another as a builder to one who may inquire as to his responsibility and trustworthiness is illegal: *Holcomb v. Weaver*, 136 Mass. 265. But in Connecticut a contract by a physician who was about to leave a town in consideration of five hundred dollars to recommend another physician, who was to occupy the office previously occupied by him, to his patrons and patients in the village and vicinity and to use his influence to induce them to employ him, was declared lawful and not against public policy, though two of the justices dissented: *Hoyt v. Holly*, 39 Conn. 326, 12 Am. Rep. 390.

4. **Contracts Whereby One Person Falsely Represents That He is Financially or Otherwise Interested in an Enterprise.**—A contract whereby one is to receive commissions upon the sale of certain lots is not enforceable where part of the agreement was that the person to receive the commissions was to subscribe for certain lots at a meeting held by persons who had been solicited to buy, and persuade them to buy, but conceal from them the fact that the owner had agreed to take off from his hands such subscriptions for lots as he did not wish to retain. Such an agreement is contrary to public policy and sound morals, in that it tends to deceive persons so being persuaded by inducing them to rely upon advice which they suppose to be disinterested though in fact interested: *McDonnell v. Rigney*, 108 Mich. 276, 66 N. W. 52. And where, in order to successfully organize and install a creamery, it is necessary to induce the farmers in its vicinity to adopt uniform regulations for producing pure cream and a uniform price for the gathering and manufacturing of cream into butter, a secret contract with an influential

farmer to sign the common agreement to furnish cream, but in fact to obtain a rebate of three cents a pound for gathering his cream or to have his cream gathered and manufactured for one cent a pound, both of which stipulations were more favorable than the common agreement which was signed in common with the other farmers furnishing cream, is illegal and not enforceable: *McEwan v. Shannon*, 64 Vt. 583, 25 Atl. 661.

5. **Contracts by Which the Public is Misled as to the Personnel of Professional Workers, Manufacturers or of the Quality of Goods Put on the Market.**—The court in *Hoxie v. Chaney*, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713, said: "There may, no doubt, be cases where the personal skill of an artist or artisan may so far enter into the value of a product that a trademark bearing his name would, or at least might, imply that his personal work or supervision was employed in the manufacture; and in such case it would be a fraud upon the public if the trademark should be used by other persons, and for this reason such a trademark would be held unassignable. It is, in any case, a question whether the use of the trademark would give to the public or to purchasers a false idea as to who made the article; and a court of equity would not lend any active aid to sustain claim to a trademark which would contain a misrepresentation to the public."

The name of an artist, author, musician or the like is not regarded as a trade name, and hence is not salable or assignable. The value of the names of such persons depends entirely upon their personal reputation, skill and experience. Consequently a contract assigning the right to use such name will not be enforced, for the reason that its enforcement would be against public policy and enable the assignee to impose upon and deceive the public: *Messer v. The Faddettes*, 168 Mass. 140, 60 Am. St. Rep. 371, 46 N. E. 407, 37 L. R. A. 721; *Skinner v. Oakes*, 10 Mo. App. 45; *Hegeman v. Hegeman*, 8 Daly, 1; *Blakely v. Sousa*, 197 Pa. 305, 80 Am. St. Rep. 821, 47 Atl. 286.

And a contract by physicians, practicing their profession as specialists, by which they sell their office fixtures and goodwill to another physician with a stipulation that he may practice his profession under their name, is not enforceable, since under such a contract the public might be grossly imposed upon: *Jerome v. Bigelow*, 66 Ill. 452, 16 Am. Rep. 597.

An agreement for the sale of domestic sardines, to be packed in boxes with labels representing them as foreign sardines, is void on the ground of public policy: *Materne v. Horwitz*, 101 N. Y. 469, 5 N. E. 331. And likewise a contract for the delivery of fish will not be enforced where it was the intention of the contract to sell menhaden under a false label as mackerel and thereby deceive the public: *Church v. Proctor*, 66 Fed. 240, 13 C. C. A. 426. And an agreement by a prominent seedsman to sell his empty seed bags

and labels to another to be filled by such person with seeds of good quality will not give rise to a suit for damages because of filling the bags with seeds of a poor quality, since such a contract is against public policy: *Bloss v. Bloomer*, 23 Barb. 604.

d. Contracts Tending to Corrupt or Improperly Influence Members of Legislative Bodies or Other Public Officials.

1. Agreements in the Nature of Lobbying Contracts.

A. In Matters Before Legislative Bodies.—"All persons whose interests may in any way be affected by any public or private act of the legislature have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees, as well as in courts of justice. But where persons act as counsel or agents, or in any representative capacity, it is due to those before whom they plead or solicit that they should honestly appear in their true characters, so that their arguments and representations, open and candidly made, may receive their just weight and consideration. A hired advocate or agent, assuming to act in a different character, is practicing deceit on the legislature. Advice or information flowing from the unbiased judgment of disinterested persons will naturally be received with more confidence and less scrupulously examined than where the recommendations are known to be the results of pecuniary interest, or the arguments prompted and pressed by hope of a large contingent reward, and the agent stimulated to active partizanship by the strong lure of high profit.' Any attempts to deceive persons intrusted with the high functions of legislation, by secret combinations or to create or bring into operation undue influences of any kind, have all the injurious effects of a direct fraud on the public.

"Legislators should act with a single eye to the true interests of the whole people, and courts of justice can give no countenance to the use of means which may subject them to be misled by the pertinacious, impotently and indirect influences of interested and unscrupulous agents or solicitors. Influence secretly urged under false and covert pretenses must necessarily operate deleteriously on legislative action whether it be employed to obtain the passage of private or public acts."

Of course an attorney may contract for the giving of purely professional services in connection with legislation in which his client has an interest: *Spalding v. Ewing*, 149 Pa. 375, 34 Am. St. Rep. 608, 24 Atl. 219, 15 L. R. A. 727; *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55. And where the contract for services does not go further than the drafting of a bill and openly and fairly explaining it to legislative committees, and the services do not go further than that, it will be declared against public policy: *Chesebrough v. Conover*, 140 N. Y. 382, 35 N. E. 633. But where a contract for services

in connection with matters before a legislative body contemplates or has a tendency to interfere with or unduly influence legislative action, the contract is void as against public policy: *Pratt v. Foot*, 6 Conn. 332; *Howell v. Fountain*, 3 Ga. 176, 46 Am. Dec. 415; *Cook v. Shipman*, 24 Ill. 614; *Coquillard's Admr. v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362; *McBratney v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213; *Wood v. McCann*, 6 Dana, 366; *Gil v. Williams*, 12 La. Ann. 219, 68 Am. Dec. 767; *Burney v. Ludeling*, 47 La. Ann. 73, 16 South. 507; *Frost v. Belmont*, 6 Allen, 152; *Buck v. First Nat. Bank*, 27 Mich. 293, 15 Am. Rep. 189; *Houlton v. Dunn*, 60 Minn. 26, 51 Am. St. Rep. 493, 61 N. W. 898, 30 L. R. A. 737; *Richardson v. Scotts Bluff County*, 59 Neb. 400, 80 Am. St. Rep. 682, 81 N. W. 309, 48 L. R. A. 294; *Sedgwick v. Stanton*, 14 N. Y. 289; *Mills v. Mills*, 40 N. Y. 543, 100 Am. Dec. 535; *Basket v. Moss*, 115 N. C. 448, 44 Am. St. Rep. 463, 20 S. E. 733, 48 L. R. A. 842; *Sweeney v. McLeod*, 15 Or. 330, 15 Pac. 275; *Clippinger v. Hepbaugh*, 5 Watts & S. 315, 40 Am. Dec. 519; *Spalding v. Ewing*, 149 Pa. 375, 34 Am. St. Rep. 608, 24 Atl. 219, 15 L. R. A. 727; *Powers v. Skinner*, 34 Vt. 274, 80 Am. Dec. 677; *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55.

In some states it is deemed sufficient to vitiate the contract for services if corrupt action or secret influence on the legislative matter, for the passage of which the services are to be used, is within the scope, even though not employed or expected to be used: *Houlton v. Dunn*, 60 Minn. 26, 51 Am. St. Rep. 493, 61 N. W. 898, 30 L. R. A. 737; *Richardson v. Scotts Bluff County*, 59 Neb. 400, 80 Am. St. Rep. 682, 81 N. W. 309, 48 L. R. A. 294; *Mills v. Mills*, 40 N. Y. 543, 100 Am. Dec. 535; *Sweeney v. McLeod*, 15 Or. 330, 15 Pac. 275; *Clippinger v. Hepbaugh*, 5 Watts & S. 315, 40 Am. Dec. 519; *Powers v. Skinner*, 34 Vt. 274, 80 Am. Dec. 677; *Burke v. Child*, 21 Wall. 441, 22 L. ed. 623. But in other states such contracts are declared valid if it does not appear that improper personal influence was to be used by the person performing the services: *Hunt v. Test*, 8 Ala. 713, 42 Am. Dec. 659; *Foltz v. Cogswell*, 86 Cal. 542, 25 Pac. 60; *Wood v. McCann*, 6 Dana, 366; *Burbank v. Jefferson etc. Co.*, 35 La. Ann. 444; *Greene v. Nash*, 85 Me. 148, 26 Atl. 1114; *Beal v. Polhemus*, 67 Mich. 130, 34 N. W. 532; *Russell v. Burton*, 66 Barb. 539; *Costar v. Brush*, 25 Wend. 628; *Houlton v. Nichol*, 93 Wis. 393, 57 Am. St. Rep. 928, 67 N. W. 715, 33 L. R. A. 166; *Salinas v. Stillman*, 66 Fed. 677, 14 C. C. A. 50.

In a general way, it may be said that a contract under which one agrees to work for the passage of a bill by the legislature is not void as against public policy, provided that the person so working does not conceal his interest in the matter but lets it be known and understood by the members whose judgment he undertakes to influence: *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384; *Stroemer v. Van Arsdell* (Neb.), 103 N. W. 1053. See, also, monographic note to *Parsons v. Traak*, 66 Am. Dec. 506, 508.

B. In Matters Before Public Officials not Acting Collectively.—

The same general rules which apply to contracts for services before legislative bodies also apply to contracts for services in procuring favorable action from executive or administrative officers. If the contract contemplates the use of secret or improper influence, it is held to be void and unenforceable: *Spence v. Harvey*, 22 Cal. 336, 83 Am. Dec. 69; *Pratt v. Foot*, 6 Conn. 332; *Howell v. Fountain*, 3 Ga. 176, 46 Am. Dec. 415; *Bermudez Asphalt Paving Co. v. Critchfield*, 62 Ill. App. 221; *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746; *Hutchen v. Gibson*, 1 Bush, 270; *O'Hara v. Carpenter*, 23 Mich. 410, 9 Am. Rep. 89; *Houlton v. Dunn*, 60 Minn. 26, 51 Am. St. Rep. 493, 61 N. W. 898, 30 L. R. A. 737; *Murray v. Wakefield*, 9 Mo. App. 591; *Hope v. Linden Park etc. Assn.*, 58 N. J. L. 627, 55 Am. St. Rep. 614, 34 Atl. 1070; *Devlin v. Brady*, 36 N. Y. 531; *Basket v. Moss*, 115 N. C. 448, 44 Am. St. Rep. 463, 20 S. E. 733, 48 L. R. A. 842; *Ormerod v. Dearman*, 100 Pa. 561, 45 Am. Rep. 391; *Waterbury v. Laredo*, 68 Tex. 565, 5 S. W. 81; *Baldwin v. Coburn*, 39 Vt. 441; *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 24, 26 L. ed. 539. But many of the courts hold that contracts for services in procuring contracts and the like from executive and administrative officers are not invalid where corrupt means or influences are not intended or expected to be exerted: *Formby v. Pryor*, 15 Ga. 258; *Barry v. Capen*, 151 Mass. 99, 23 N. E. 735, 6 L. R. A. 808; *Beal v. Polhemus*, 67 Mich. 130, 34 N. W. 532; *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060; *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329; *Lyon v. Mitchell*, 36 N. Y. 235, 93 Am. Dec. 502; *Southard v. Boyd*, 51 N. Y. 177; *Winpenny v. French*, 18 Ohio St. 469; *Painter v. Drum*, 40 Pa. 467. See, also, monographic note to *Parsons v. Trask*, 66 Am. Dec. 507.

Thus an agreement to "solicit and promote" the asphalt paving business in Chicago was held void as against public policy where it was inferable that the procuring of ordinances for that purpose was a part of the work: *Critchfield v. Bermudez Asphalt Co.*, 174 Ill. 466, 51 N. E. 552, 42 L. R. A. 347. But a contract to attend to franchise matters at a salary, which is to be increased as the amount of contracts increase, does not necessarily call for corrupt practices, and in Massachusetts it was held not to be invalid because the servant did follow corrupt practices: *Kerr v. American Pneumatic Service Co.*, 188 Mass. 27, 73 N. E. 857. And a contract whereby one who has a large experience in regard to the routine of procuring titles to public lands, is engaged to conduct the proceedings to procure public lands, is not invalid: *Houlton v. Nichol*, 93 Wis. 393, 57 Am. St. Rep. 928, 67 N. W. 715, 33 L. R. A. 166. Likewise a contract to collect facts and submit to the governmental authorities arguments on the merits of having the price of certain lands purchased from the government reduced, is not invalid as against public policy: *Stroemer v. Van Orsdel* (Neb.), 107 N. W. 125.

A contract for services in securing a pardon for one convicted of crime is not invalid where the use of improper or corrupt influence is not contemplated, but the older decisions, proceeding upon the theory that the granting of a pardon should be based on the kindness of the executive, were strongly inclined to look with disfavor upon such contracts: *Formby v. Pryor*, 15 Ga. 258; *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060; *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329; monographic note to *Parsons v. Trask*, 66 Am. Dec. 511.

Contracts to use influence with the prosecuting attorney in regard to a criminal prosecution in which the party is interested are illegal: *Merwin v. Huntingtor*, 2 Conn. 209; *Rhodes v. Neal*, 64 Ga. 704, 37 Am. Rep. 93; *Shaw v. Reed*, 30 Me. 105; *Wilkey v. Collier*, 7 Md. 273, 61 Am. Dec. 346; *Ormerod v. Dearman*, 100 Pa. 561, 45 Am. Rep. 391; *Barron v. Tucker*, 53 Vt. 338, 38 Am. Rep. 684; *Wight v. Rindskopf*, 43 Wis. 344. And a contract by an attorney at law to render services in preventing the finding of an indictment against one accused or suspected of crime is against public policy and void, regardless of the belief of the attorney as to the guilt or innocence of the accused: *Weber v. Shay*, 56 Ohio St. 116, 60 Am. St. Rep. 743, 46 N. E. 377, 37 L. R. A. 230.

2. **Effect Where Person Rendering Services has Close Social, Business or Political Relations with the Officials.**—An agreement to use personal influence or solicitation in respect to matters before legislative bodies or executive or administrative officers renders the contract for services void: *Owens v. Wilkinson*, 20 App. D. C. 51; *McBratney v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213; *Brown v. Brown*, 34 Barb. 533; *Pease v. Walsh*, 49 How. Pr. 269; *Burke v. Child*, 21 Wall. 441, 22 L. ed. 623. A contract for services in securing contracts from state officials for construction work by favoritism by reason of social and political relations with such officials is void as against public policy: *Drake v. Lauer*, 93 App. Div. 86, 86 N. Y. Supp. 986. But the mere fact that a party who contracts to present arguments before a political department of the government in relation to the matter before it is of the same political party affiliations and is in part selected on that account does not make the contract illegal: *Lyon v. Mitchell*, 36 N. Y. 235, 93 Am. Dec. 502.

3. **Effect Where the Compensation for the Services is Contingent upon Success.**—The fact that the compensation for services before legislative bodies or other public officials in matters dependent upon their decision is sometimes regarded with disfavor by the courts, for the reason that it furnishes a strong incentive for the use of corrupt influence upon such officials: *Bermudez Asphalt Paving Co. v. Critchfield*, 62 Ill. App. 221; *Coquillard's Admr. v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362; *Wood v. McCann*, 6 Dana, 366; *Gil v. Williams*, 12 La. Ann. 219, 68 Am. Dec. 767; *Harris v. Roof's Exrs.*, 10 Barb. 489;

Cliffinger v. Hepbaugh, 5 Watts & S. 315, 40 Am. Dec. 519; *Chippewa Valley etc. R. Co. v. Chicago etc. R. Co.*, 75 Wis. 224, 44 N. W. 17, 6 L. R. A. 601. But that fact alone is not regarded as decisive of the question: *Dennison v. Crawford County*, 48 Iowa, 211; *Workman v. Campbell*, 46 Mo. 305. But an agreement to procure the consent of property owners for the construction and maintenance of a trolley line in front of their properties and to obtain a municipal franchise to operate such trolley line, for a fee contingent upon success, the party performing the services to render an account of his disbursements in the event of failure but not otherwise, was declared void as being against public policy: *Sussman v. Porter*, 137 Fed. 161.

4. **Effect Where Person Employing Another Thought that He Might Use Corrupt Methods.**—The fact that one who employed an attorney to render services in regard to the procurement of a land patent thought that he would exercise an unlawful influence with the officers of the land department does not render the contract invalid if the attorney did not so agree: *Mulligan v. Smith*, 32 Colo. 404, 76 Pac. 1003. And the mere fact that a contract for attorney's services with reference to a claim against the United States provided that he should prosecute it in the courts or through such "diplomatic negotiations" as might be deemed best, does not invalidate the contract: *Knut v. Nutt*, 83 Miss. 365, 102 Am. St. Rep. 452, 35 South. 686.

5. **Contracts With Officials Which Tend to Restrain or Control Their Unbiased Judgment or Discretion.**

A. **In General.**—A contract will not be enforced which tends to restrain or control the unbiased judgment of public officers, since it is practically an abdication of their public functions: *Schneider v. Local Union No. 60*, 116 La. 270, 114 Am. St. Rep. 549, 40 South. 700, 5 L. R. A., N. S., 891; *Edwards v. Goldsboro*, 141 N. C. 60, 58 S. E. 652, 4 L. R. A., N. S., 589. An agreement by a private individual to pay a private person for performing the duties of a public office is illegal: *Fawcett v. Eberly*, 58 Iowa, 544, 12 N. W. 580. An agreement to sell postoffice fixtures and use influence to obtain the appointment of the purchaser as postmaster is illegal: *Edwards v. Randle*, 68 Ark. 318, 58 Am. St. Rep. 108, 38 S. W. 343, 36 L. R. A. 174. And where the principal business of a building construction firm was in relation to public works of a city, an agreement to pay the campaign expenses of one of its members in running for president of the city council is against public policy: *Ward v. Hartley*, 178 Mo. 135, 77 S. W. 302.

An agreement by a public officer to accept less than the fees or salary prescribed by law is contrary to public policy and void: *Settle v. Sterling*, 1 Idaho, 259; *Hawkeye Ins. Co. v. Brainard*, 72 Iowa, 180, 33 N. W. 603; *People v. Board of Police*, 75 N. Y. 38; *Tappan v. Brown*, 9 Wend. 175. But in California an agreement

by a constable to charge less than his legal fees for levying an execution and conducting a sale thereunder was sustained as not contrary to public policy: *Bloom v. Hazzard*, 104 Cal. 310, 37 Pac. 1037. But an agreement on the part of a justice of the peace to charge a litigant no fees unless his judgment is collected is void as against public policy: *Willemin v. Bateson*, 63 Mich. 309, 29 N. W. 734. A promise to pay a sheriff or constable greater fees than allowed by law for executing process or for other official acts is void: *Downs v. McGlynn*, 2 Hilt. 14. A person appointed court stenographer, though for a single case, is a public officer, and a contract to pay him more than the statutory fees for transcribing the testimony is void as against public policy: *Dull v. Mammoth Min. Co.*, 28 Utah, 467, 79 Pac. 1050. But an offer to compensate a deputy sheriff for procuring evidence to convict a certain person of a certain crime is not illegal where the crime was committed outside of his county: *Harris v. More*, 70 Cal. 502, 11 Pac. 780. An agreement to pay a delegate to Congress for services rendered in securing payment of a claim, for which legislative action is necessary, is void: *Weed v. Black*, 2 McAr. 268, 29 Am. Rep. 618.

B. Contracts for Services or Material in Which Public Officers are Interested Individually.—A contract by a municipal legislative body and one of its members, or a firm of which he is a member, to perform legal services for such body or the municipality is void as against public policy: *Young v. Mankato*, 97 Minn. 4, 105 N. W. 969, 3 L. R. A., N. S., 849; *Beebe v. Sullivan County*, 64 Hun, 377, 19 N. Y. Supp. 629; *Burkett v. Athens (Tenn. Ch.)*, 59 S. W. 667; contra, *Niles v. Muzzy*, 33 Mich. 61, 20 Am. Rep. 670. Likewise as to the appointment of a member as a physician to vaccinate school children at the expense of the city or care for the poor of the city: *Ft. Wayne v. Rosenthal*, 75 Ind. 156, 39 Am. Rep. 127; *Goodrich v. Waterville*, 88 Me. 39, 33 Atl. 659. Or as "street boss": *Snipes v. Winston*, 126 N. C. 374, 78 Am. St. Rep. 666, 35 S. E. 610.

Contracts for the furnishing of supplies and material made between governmental bodies and persons who are officers or with companies of which they are members, are quite generally held invalid, at least while executory, though in some cases a recovery is allowed in a suit to recover upon a quantum meruit: *McGehee v. Lindsay*, 6 Ala. 16; *Edwards v. Estell*, 48 Cal. 194; *Skeels v. Phillips*, 54 Ill. 309; *Root v. Stevenson's Admr.*, 24 Ind. 115; *Concordia v. Hagaman*, 1 Kan. App. 35, 41 Pac. 133; *Smith v. Albany*, 61 N. Y. 444; *Commonwealth v. Press Co.*, 156 Pa. 516, 26 Atl. 1035; *Willis v. Abbey*, 27 Tex. 202; *Baldwin v. Coburn*, 39 Vt. 441; *Pickett v. Wiota School District*, 25 Wis. 551, 3 Am. Rep. 105. But the fact that a member of a city council is a stockholder of a corporation does not prevent the corporation from recovering on a quantum meruit for work done for the city where the councilman

had no direction or control of the expenditures for the work: *Call Pub. Co. v. Lincoln*, 29 Neb. 149, 45 N. W. 245.

a. Contracts Tending to Oust the Jurisdiction of the Courts or Obstruct the Administration of Justice.

1. **Contracts Ousting the Jurisdiction of the Courts.**—A stipulation in a contract that neither party shall have the right to resort to the courts is void as against public policy: *Hager v. Shuck*, 27 Ky. Law Rep. 957, 87 S. W. 300. And an agreement in advance to submit a question of law to a private party for his decision is invalid: *Sanitary District etc. v. McMahon etc. Co.*, 110 Ill. App. 510. But arbitration clauses in building contracts are not invalid: *White v. Abbott*, 188 Mass. 99, 74 N. E. 305; *Connors v. United States*, 130 Fed. 609.

2. **Contracts in the Nature of Compounding Criminal Prosecutions.** Where a note or other contract for the payment of money is given in settlement of the civil liability of a criminal act, and also for the purpose of prosecuting or suppressing a criminal prosecution for such act, the note or contract is not enforceable: *Mills v. Hudgins*, 97 Ga. 417, 24 S. E. 146; *Ream v. Sauvain*, 2 Kan. App. 550, 43 Pac. 982; *Herrick v. Swonley*, 56 Md. 439; *Taylor v. Jaques*, 106 Mass. 291; *Fosdick v. Van Arsdale*, 74 Mich. 302, 41 N. W. 931; *Merrill v. Carr*, 60 N. H. 114; *Haynes v. Rudd*, 102 N. Y. 372, 55 Am. Rep. 815, 7 N. E. 287; *Lindsay v. Smith*, 78 N. C. 328, 24 Am. Rep. 463; *Springfield etc. Ins. Co. v. Hull*, 51 Ohio St. 270, 37 N. E. 1116, 26 L. R. A. 37; *Wilcox v. Daniels*, 15 R. I. 261, 3 Atl. 204; *Banks v. Searles*, 2 McMull. 356; *Biering v. Wegner*, 76 Tex. 506, 13 S. W. 537; *Woodruff v. Hinman*, 11 Vt. 592, 34 Am. Dec. 712; *Fernekes v. Bergenthal*, 69 Wis. 464, 34 N. W. 238. An agreement not to prosecute may be either express or implied: *Clark v. Pomeroy*, 4 Allen, 534; *Sumner v. Summers*, 54 Mo. 340; *Conderman v. Hicks*, 3 Lans. 108; *Riddle v. Hall*, 99 Pa. 116. Where, however, the criminal prosecution is one of a character that in no way involves the interests of the public, an agreement for its settlement is not illegal: *Moog v. Strang*, 69 Ala. 98; *Breathwit v. Rogers*, 32 Ark. 758; *McMahon v. Smith*, 47 Conn. 221, 36 Am. Rep. 67; *Soule v. Benney*, 37 Me. 128; *Geier v. Shade*, 109 Pa. 180; *Mathison v. Hanks*, 2 Hill (N. C.), 625; *Holcomb v. Stimpson*, 8 Vt. 141. An instance of such compromises is found in that of bastardy cases: *Hinman v. Taylor*, 2 Conn. 357; *Davis v. Moody*, 15 Ga. 175; *Coleman v. Frum*, 4 Ill. 378; *Allyn v. Allyn*, 108 Ind. 327, 9 N. E. 279; *Hoit v. Cooper*, 41 N. H. 111; *Maxwell v. Campbell*, 8 Ohio St. 265; *Wynant v. Leshner*, 23 Pa. 338; *Jangraw v. Perkins*, 77 Vt. 375, 60 Atl. 385.

In other words, it is not illegal to merely compromise the civil injuries resulting from a criminal act where it is not expressly or impliedly agreed that the prosecution for the crime itself is to be

prevented or suppressed: *Bibb v. Hitchcock*, 49 Ala. 468, 20 Am. Rep. 288; *Percheron-Norman Horse Co. v. Downer*, 18 Colo. 71, 31 Pac. 501; *Von Windisch v. Klaus*, 46 Conn. 433; *Wheaton v. Ansley*, 71 Ga. 35; *Parker v. Enslow*, 102 Ill. 272, 40 Am. Rep. 588; *Deere v. Wolff*, 65 Iowa, 32, 21 N. W. 168; *Morgan v. Knox*, 15 La. Ann. 176; *Cass Co. Bank v. Bricker*, 34 Neb. 516, 33 Am. St. Rep. 649, 52 N. W. 575; *Sonhegan Bank v. Wallace*, 61 N. H. 24; *Brittin v. Chegary*, 20 N. J. L. 625; *City of Cohoes v. Cropsey*, 55 N. Y. 685; *Portner v. Kirschner*, 169 Pa. 472, 47 Am. St. Rep. 925, 32 Atl. 442; *Provident etc. Soc. v. Edwards*, 95 Tenn. 53, 31 S. W. 168; *Catlin v. Henton*, 9 Wis. 476.

3. **Contracts in Relation to the Prosecution of Civil Suits.**—Where public interests are involved in a private suit, it cannot be compromised, such as a controversy arising from the obstruction of a public street: *Amestoy v. Electric Rapid etc. Co.*, 95 Cal. 311, 30 Pac. 550. And an agreement cannot be made to withdraw a plea of usury: *Clark v. Spencer*, 14 Kan. 398, 19 Am. Rep. 96; *Mellon's Appeal* (Pa.), 7 Atl. 201. Likewise agreements to facilitate the procurement of a divorce are illegal: *Davis v. Hinman* (Neb.), 103 N. W. 668. And an agreement that a defendant in a divorce action shall make no defense is illegal: *Loveren v. Loveren*, 106 Cal. 509, 39 Pac. 801; *Smutzer v. Stimson*, 9 Colo. App. 326, 48 Pac. 314; *Hamilton v. Hamilton*, 80 Ill. 349; *Sayles v. Sayles*, 21 N. H. 312, 53 Am. Dec. 208; *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *Phillips v. Thorp*, 10 Or. 494; *Kilborn v. Field*, 78 Pa. 194. Likewise an agreement by a wife to pay an attorney for his services a percentage of what she may recover for her support and maintenance is not enforceable: *In re Brackett*, 114 App. Div. 257, 99 N. Y. Supp. 802.

The validity of contracts to furnish evidence was exhaustively considered in the recent note to *Wood v. Casserleigh*, 97 Am. St. Rep. 145.

A contract with an attorney whereby the client agrees not to make any settlement or compromise without the consent of the attorney is considered valid in some states: *Hoffman v. Vallejo*, 45 Cal. 564; *Ryan v. Martin*, 16 Wis. 57. But a contrary view obtains in other states: *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81, 49 S. W. 822, 45 L. R. A. 126; *North Chicago etc. R. Co. v. Ackley*, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177; *Boardman v. Thompson*, 25 Iowa, 487; *Lipscomb v. Adams*, 193 Mo. 530, 112 Am. St. Rep. 499, 91 S. W. 1046; *Weller v. Jersey City etc. Ry. Co.*, 68 N. J. Eq. 659, 61 Atl. 459; *Key v. Vattier*, 1 Ohio, 132.

An agreement to pay one of the owners of land sold under a decree in partition a further sum for her interest if she would not oppose its confirmation, the sale having been made for an inadequate consideration, is illegal: *Tappan v. Albany Brewing Co.*, 80 Cal. 570, 18 Am. St. Rep. 174, 22 Pac. 257, 5 L. R. A. 428. And an agreement

to aid in obtaining land sold by an administrator at less than its real value is void: *Smith v. Humphreys*, 88 Me. 345, 34 Atl. 166.

f. Contracts Tending to Restrain Trade or Competition.—In a general way it may be said that all agreements which are in restraint of trade or competition are illegal: *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621; *Goodman v. Henderson*, 58 Ga. 567; *Wiley v. Baumgardner*, 97 Ind. 66, 49 Am. Rep. 427; *Sutton v. Head*, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. 410; *Warfield v. Booth*, 33 Md. 63; *Bishop v. Palmer*, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299; *Peltz v. Eichele*, 62 Mo. 171; *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. 37; *Curtis v. Gokey*, 68 N. Y. 300; *Grasseilli v. Lowden*, 11 Ohio St. 349; *Smith's Appeal*, 113 Pa. 579, 6 Atl. 251; *Herreshoff v. Bontineau*, 17 R. I. 3, 33 Am. St. Rep. 850, 19 Atl. 712, 8 L. R. A. 469; *Berlin etc. Works v. Perry*, 71 Wis. 495, 5 Am. St. Rep. 236, 38 N. W. 82. The subject of such contracts was discussed in detail in the notes to *Angier v. Webber*, 92 Am. Dec. 751, and *Harding v. Am. Glucose Co.*, 74 Am. St. Rep. 235.

HURST v. ALTAMONT MANUFACTURING CO.

[73 Kan. 422, 85 Pac. 551.]

SALES—Delivery "f. o. b."—**Duty to Furnish Cars.**—When a dealer in merchandise agrees to sell twenty carloads thereof, to be delivered to the buyer "f. o. b. cars," it is his duty, not the duty of the buyer, to furnish the cars to receive the goods. (p. 530.)

SALES.—The Term "f. o. b. Cars" Means that the seller will, at his own expense, do all that is necessary to accomplish the loading and consignment of the goods to the buyer, including the procurement of cars. (p. 532.)

John H. Crain and V. McKinney, for the plaintiff in error.

Keene & Gates, for the defendant in error.

⁴²² **GRAVES, J.** A demurrer was sustained to the plaintiff's petition by the district court. The plaintiff excepted, and brings that question here for review. The demurrer contained two grounds: 1. That several causes of action were improperly joined; 2. That the petition did not state facts sufficient to constitute a cause of action. The demurrer was sustained generally. The record does not show whether the court considered the petition insufficient for both reasons or not. The case has been argued as though the second

⁴²³ ground of the demurrer was the only one involved, and we shall so assume.

The petition is of considerable length, and the points discussed by counsel can be sufficiently stated without giving a full copy of the pleading. After the proper formal and introductory averments the petition states, in substance, that the defendant offered to sell to the plaintiff certain goods, at a stated price, as shown by Exhibit "A"; that the plaintiff accepted the offer, as shown by Exhibit "B"; that the plaintiff afterward made an additional order, as shown by Exhibit "C"; that later the plaintiff, by letter, confirmed and renewed previous orders, which were accepted by the president of the defendant company, as shown by Exhibit "D"; that in pursuance thereof shipping orders were sent to, and received by, the defendant, as shown by Exhibit "E"; that defendant received all shipping orders sent by the plaintiff as aforesaid, but "neglected and refused to deliver said egg-cases as it agreed to do, and as ordered by this plaintiff"; that at the time the first shipment should have been made, and ever since, such egg-cases have been worth from one and a quarter to two cents more than the contract price; and that the plaintiff has been damaged one thousand dollars. Then follows a prayer for judgment. The exhibits are as follow:

"EXHIBIT 'A.'"

"Altamont, Ill., January 31, 1903.

"W. B. Hurst & Co., St. Louis, Mo.:

"Dear Sir—Yours of yesterday at hand ordering ten cars standard whitewood cottonwood-veneer egg-cases. We note that you speak of a one-piece end. The case we quoted you on has a two-piece dressed end, ready cleated. The price quoted you of nine cents, cars, factory, is at the Cairo, Ill., factory, and the rates as before named you are as follow: Eldorado, six cts. per 100; Marion, five cts. per 100; Mt. Vernon, seven cts. per 100.

"Terms are as you mentioned; two per cent off for cash ten days from date of invoice.

"These cases average seven and one-half pounds ⁴²⁴ each—possibly a little less. Hence it is no trouble to tell almost precisely what the case will cost you f. o. b. cars at the above-named stations. Cars are very scarce, and we would suggest that you place your order early; say at least twenty days

in advance of time you expect to use them. Awaiting your prompt reply, we are,

“Respectfully yours,
“ALTAMONT MANUFACTURING COMPANY.”

“EXHIBIT ‘B.’

“St. Louis, Mo., February 2, 1903.

“Altamont Manufacturing Company, Altamont, Ill.:

“Dear Sirs—Replying to your favor of the 31st, if ends are two piece and cleated, as you say they are, balance of case filling required dimensions, being a standard whitewood case (veneer), it is all right. We will take the ten cars. You may file our order now for shipment of one car to Fayetteville, Ark., and one car to our address, South Greenfield, Mo. Would be glad to have you get these off at as early a date as possible. Since we know that the cases are at Cairo, we have bought a great many there, and know what the freight rates are ourselves to our various stations.

“Yours truly,
“W. B. HURST & CO.”

“EXHIBIT ‘C.’

“St. Louis, Mo., February 5, 1903.

“Altamont Egg-case Company, Altamont, Ill.:

“Gentlemen—Confirming our conversation by telephone this morning, you can enter our order for ten more cars of cases to be same as last order of ten cars, at nine cents f. o. b. Cairo. We instruct you to order out, immediately, one car to Fredonia, Kan.; one car to Monett, Mo.; one car to Harrison, Ark.; one car to Springfield, Mo.; one car to Fort Scott, Kan. On the 3d we gave you order for one car for S. Greenfield, Mo., and one car to Fayetteville, Ark. Let these cars go forward first, the Fredonia car next, and then let the others go as they come.

“Now, relative to your pay: Do not worry about that. We supposed that Dun and Bradstreet had our rating. But you have our permission to address them, or to address the Citizens’ National Bank of Fort Scott, Kan., National Exchange Bank, Springfield, Mo., Bank of Commerce here, or any of the commercial agencies. It is our intention, however, to discount all these cases, as the old company did with you. We are ⁴²⁵agreeable to your passing draft if you desire, but make it subject to arrival of car, for we would not want to

pay the draft until cars arrived and were properly checked. Kindly let us hear from you promptly confirming above order, and oblige,

"Yours truly,

"W. B. HURST & CO."

"EXHIBIT 'D.'"

"St. Louis, Mo., 2-9-'03.

"Altamont Manufacturing Company, Altamont, Ill.:

"Gentlemen—This will confirm purchase from you of thirteen cars of veneer cases (in addition to the seven cars, orders for which have already been placed with you) at nine cents track, Cairo, Ill., the case to be standard veneer case, made of cottonwood.

"We will give you shipping instructions on these thirteen cars within the next few days.

"Yours very truly,

"W. B. HURST & CO."

"Accepted: Altamont Manufacturing Company—J. E. R."

"EXHIBIT 'E.'"

"February 18, 1903.

"Altamont Manufacturing Company, Altamont, Ill.:

"Dear Sirs—To conform with our contract entered into a few days ago, you will kindly book our orders on thirteen cars of cases, to be shipped as promptly as possible to the following points: Two cars to Springfield, Mo.; two cars to S. Greenfield, Mo.; one car to Fredonia, Kan.; one car to Parsons, Kan.; one car to Cuba, Mo.; three cars to Monett, Mo.; one car to Clinton, Mo.; one car to Fayetteville, Mo.

"We would like, if possible, for you to fill these cars in the following order, shipping the first two cars to Fayetteville, Ark., two cars to Springfield, Mo., two cars to South Greenfield, Mo., three cars to Monett, Mo., one car to Clinton, Mo., one car to Cuba, Mo., one car to Parsons, Kan., one car to Fredonia, Kan.

"All of these points are now ready to take the cars in as promptly as they are shipped; so kindly move them as promptly as you can.

"Our egg season is open, and we will need them all between now and March 1.

"Yours truly,

"W. B. HURST & CO."

The supposed weakness of this petition, as we understand from the discussion of counsel, lies in its want of an allegation that the plaintiff furnished the ⁴²⁶ necessary cars at the time when shipment was desired. On the other hand, it is contended that it was the duty of the defendant to obtain the cars from the carrier, load the goods therein, and consign them to the plaintiff. The real point in the controversy, therefore, seems to be this: Whose duty was it under the contract between these parties to cause the carrier to place cars in position to receive the goods to be shipped?

The exhibits attached to the petition constitute the contract. If concisely stated, it would be substantially as follows: Ship to us immediately, or as promptly as possible, twenty cars of egg-cases, distributed as hereinafter stated. We will pay therefor nine cents a case, f. o. b. cars at Cairo, Illinois, payment to be made when cars arrive at the point of destination. This order was accepted.

In construing this contract the difficulty centers in determining what the parties intended by the clause "f. o. b. cars, Cairo, Ill." It is conceded that the letters "f. o. b." are for brevity used instead of the words "free on board." The clause when expressed in words, therefore, stands thus: Free on board the cars at Cairo, Illinois. This language has been used in the transaction of commercial business many years, and has by general custom and usage among buyers, sellers and shippers acquired a definite and specific meaning, which is well understood and of common knowledge, and of which courts will take judicial notice. The significance of this language, when standing alone, is so well established that it has been generally held that proof in support of such signification is unnecessary and improper: *Sheffield Furnace Co. v. Hull Coal & Coke Co.*, 101 Ala. 446, 14 South. 672; *Capehart v. Furman Farm Improvement Co.*, 103 Ala. 671, 49 Am. St. Rep. 60, 16 South. 627; *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989, 100 N. W. 820, 67 L. R. A. 756; *Hunter v. Kramer*, 71 Kan. 468, 80 Pac. 963.

⁴²⁷ This, like any other language, may, however, be used in a sense different from that in which it is generally understood; and it may receive an interpretation from the acts of the parties using it different from what the words seem to indicate. It is important to bear this in mind, as in the decided cases where the words "free on board the cars" have been defined the decisions generally turn upon some modify-

ing circumstance, wholly outside of, and apart from, the language itself. The decisions are practically unanimous in holding that these words bind the seller to place the goods on board the cars free of expense to the buyer; also that the carrier is the bailee of the consignee, and that delivery to the carrier amounts to delivery to the buyer. We are asked to extend this meaning a step further.

It is apparent that the goods cannot be loaded until cars are in place to receive them. The duty to select the carrier and cause it to furnish the cars rests somewhere. The plaintiff in error insists that this duty belongs to the seller. At this point the authorities part company, and seem to be somewhat conflicting. A careful examination of the cases, however, shows this conflict to be more apparent than real. A few decisions, fairly recent in date, have held that this duty devolves upon the buyer. These cases, however, are limited to the particular facts presented, and in nearly every instance such facts furnish a reason for the meaning given to the contract under consideration. The most important of these cases are: Consolidated Coal Co. v. Schneider, 163 Ill. 393, 45 N. E. 126; Hocking v. Hamilton, 158 Pa. 107, 27 Atl. 836; Baltimore etc. Ry. Co. v. Steel Rail Supply Co., 123 Fed. 655, 49 C. C. A. 419; Evanston Elevator & Coal Co. v. Castner, 133 Fed. 409; Neimeyer Lumber Co. v. Burlington & M. R. R. Co., 54 Neb. 321, 326, 74 N. W. 670, 40 L. R. A. 534.

In the case of Consolidated Coal Co. v. Schneider, 163 Ill. 393, 45 N. E. 126, the coal company leased its mine to the plaintiff, ⁴²⁸ whereby the lessee was to furnish coal to the lessor, to be delivered at the mine, which was some distance from the railroad station. The lessor furnished cars for a time, and stated that it would continue to do so. Under these facts it was held to be the duty of the lessor to furnish the cars.

In the case of Hocking v. Hamilton, 158 Pa. 107, 27 Atl. 836, the commodity sold was coal, to be delivered at the tipple, and the buyer agreed to receive it there. This was not a contract to deliver at any railroad station, but at a different place, and because of this agreement it was held to be the duty of the buyer to furnish the cars.

In the case of Baltimore & L. Ry. Co. v. Steel Rail Supply Co., 123 Fed. 655, 49 C. C. A. 419, the plaintiff sold some old rails to the defendant, to be shipped upon orders stating

destination and name of consignee, and no such orders were given. It was held that as the shipper could not know when, where or to whom the shipment was to be made he was not bound to furnish the cars.

The case of *Evanston Elevator & Coal Co. v. Castner*, 133 Fed. 409, was also a case where coal was to be delivered at the mine. In that case the court referred to the foregoing and other cases, and, while apparently approving all of them, limited the decision to the facts of that case, and held it to be the duty of the buyer to furnish the cars, but did not decide what the phrase "f. o. b." means when standing alone.

The following cases hold that, under the prima facie meaning of the phrase "f. o. b.," it is the duty of the buyer to furnish the cars: *Kunkle v. Mitchell*, 56 Pa. 100; *Wackerbarth v. Masson*, 3 Camp. (Eng.) 270; *Dwight v. Eckert*, 117 Pa. 490, 12 Atl. 32; *Chicago Lumber Co. v. Comstock*, 71 Fed. 477, 18 C. C. A. 207; *Davis v. Alpha Portland Cement Co.*, 134 Fed. 274.

In the case of *Boyington v. Sweeney*, 77 Wis. 55, 45 N. W. 938, it was held that the duty of furnishing the cars rested upon the buyer. This decision ⁴²⁹ was practically overruled by the subsequent case of *John O'Brien Lumber Co. v. Wilkinson*, 117 Wis. 468, 94 N. W. 337, and the contrary rule was adopted. The latter case was followed in the later case of *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989, 100 N. W. 820, 67 L. R. A. 756, decided by the same court in September, 1904.

A noticeable feature of the cases here cited holding it to be the duty of the buyer to furnish the cars is that none of them involves an ordinary commercial transaction like, or similar to, the one here presented. On the contrary, each case had peculiar and exceptional conditions which clearly distinguish it from this case, and which furnished the reason for the decision given. We do not, therefore, regard these cases as in point on the question here involved.

This case can be disposed of, so far as the demurrer is concerned, without defining the meaning of the phrase "f. o. b. cars, Cairo, Ill.," when standing alone. We think the correspondence attached to the plaintiff's petition, when considered as a whole, contains language outside of this phrase which fairly indicates what was intended by it. It is not difficult to hold, aided by this language, that the formula "f. o. b. cars, Cairo, Ill.," was understood by both parties to

mean that the defendant would do all that was necessary to be done to accomplish the shipment of the goods to the plaintiff as directed, free of expense or further attention on the part of the latter.

Here this opinion might end. But the case must be returned for further proceedings, and as we cannot anticipate what facts will be developed when the issues are finally closed we deem it best to consider and decide the whole question discussed by the parties. It is our understanding that the phrase or formula "f. o. b. cars" has by long usage and custom acquired throughout the business circles of this country a definite and specific meaning, generally understood by all business people. When such phrase or formula is used ⁴³⁰ in a business contract, between a buyer and seller of ordinary commercial commodities, where the use of a common carrier is necessary, the parties intend thereby that the seller will, at his own expense, do all that may be necessary to accomplish the loading and consignment of the goods to the buyer, including the procuring of cars upon which to load the commodities sold; and when nothing appears to modify or limit this meaning courts should enforce the contract so as to effectuate this intent. This rule is reasonable; it harmonizes with existing business conditions, and is the universal practice among business people.

It is conceded that by this phrase the seller is bound to deliver the goods to the buyer by placing them on board the cars. How can he do this unless he secures the cars? Why say that this duty belongs to the buyer? The language of the contract is silent upon this question. By the letter of the agreement it may be said that neither party has agreed to perform this duty, but it may not be said that there was no understanding upon this subject. Without such an understanding the contract would be incomplete and unenforceable. What the parties intended upon this subject can only be ascertained by interpretation, and to do this the situation of the parties when the contract was made, the subject matter thereof, and all the attendant circumstances and conditions, must be considered.

It is within common knowledge that carriers are willing and even anxious to receive freight for transportation, and to invite business they furnish every reasonable facility and convenience to shippers. It is also well known that wholesale

houses and manufacturing establishments have special shipping arrangements with carriers, whereby their business is provided for and accommodated. The facilities of the latter for the procurement of cars are, for many reasons, superior to those of the buyer.

In large cities where many railroads center, having ⁴³¹ receiving stations more or less remote from each other, it might be a material advantage to a shipper to have the privilege of selecting the carrier to whom his goods should be delivered, which he might do if it was his duty to furnish the cars. The inconvenience which the seller would encounter in securing cars upon which to load the goods sold is merely nominal, while the difficulties to which the buyer would be subjected are such that it would be unreasonable to assume that he would undertake so to do. In view of the many serious objections in the way of such a contract it seems clear that, if the parties to the agreement under consideration had deemed it necessary to state specifically who should perform this duty, the seller would have been named. This manifest intention of the parties should be made effectual by giving to their contract the same legal effect which it would have if such agreement had been specifically written therein.

In the case of John O'Brien Lumber Co. v. Wilkinson, 117 Wis. 468, 94 N. W. 337, where the meaning of the phrase "f. o. b. cars" was the point discussed, it was said: "It would seem pretty obvious that one undertaking to load logs upon railroad cars ordinarily assumes the duty of obtaining the cars on which to load the logs, as much as any other implements with which to do the work": Page 471. It was also said: "We cannot avoid the conclusion that the written contracts, upon their face, by necessary implication imposed on the appellants the duty of obtaining the cars upon which they had agreed to load the logs": Page 474. This language was approved and followed in the case of Vogt v. Schienebeck, 122 Wis. 491, 106 Am. St. Rep. 989, 100 N. W. 820, 67 L. R. A. 756.

We conclude that the judgment of the district court should be reversed. It is, therefore, directed that such judgment be vacated; that the demurrer to the petition be overruled; and that the further proceedings had be in accordance with the views herein expressed.

All the justices concurring.

A Sale "f. o. b. Cars" Means that the subject of the sale is to be placed on cars for shipment without any expense or act on the part of the buyer: *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989. See, too, *Capehart v. Furman F. I. Co.*, 103 Ala. 671, 49 Am. St. Rep. 60; *Detroit Southern R. R. Co. v. Malcomson*, 144 Mich. 172, 115 Am. St. Rep. 390.

FOWLER v. WOOD.

[73 Kan. 511, 85 Pac. 763.]

NAVIGABLE STREAMS—Boundaries.—If a Change in the Position of a navigable river dividing the territory of two states is by gradual and imperceptible encroachment, or insensible recession, so that the process cannot be detected, the boundary follows the shifting thread of the stream; but if from a flood and ice gorge, or other violent natural cause, there is a sudden, visible irruption of the water, whereby the land upon one side is degraded or submerged, or a new channel is cut for the stream, the boundary remains stationary at its former location, and the boundaries of the riparian owners whose lands have been affected remain unchanged. (p. 543.)

NAVIGABLE STREAMS—Avulsion—Reappearance of Submerged Land.—If a navigable river suddenly encroaches upon adjoining private land, the title to the submerged portion remains in the former owner. When thereafter such land rises to the surface, whether by the deposit of alluvion or by a change in the channel of the stream, dominion reattaches thereto as if never suspended, and whatever accretions may have been added to the tract belong to its proprietor, as in ordinary cases. (p. 550.)

NAVIGABLE RIVERS—Avulsion—Reappearance of Submerged Land After Partition.—If a navigable river suddenly submerges a portion of a tract of land owned by tenants in common, and the remainder is then, by judicial proceedings, partitioned under the supposition that the submergence is permanent, the allottees whose shares border on the stream cannot, when the submerged land reappears, claim it to the exclusion of those whose shares do not touch water. The owners are entitled, on the equitable ground of mistake, to a partition of the reclaimed soil with its accretions, if excluded from the former partition. (pp. 555, 556.)

NAVIGABLE RIVERS—Boundaries.—When a Private Grantor bounds the land generally on a river, the presumption is that he does not intend to reserve any land between the upland and the stream and that the grant will carry title as far as he owns. The presumption is rebuttable, the question being purely one of intention; and when the intention is ascertainable from the face of the instrument or a record, other evidence is not admissible. (p. 556.)

NAVIGABLE RIVERS—Avulsion—Reappearance of Submerged Land After Conveyance.—If the owner of a tract of land, a part of which has suddenly been submerged by an adjoining navigable stream, conveys the upland only, the purchaser, upon the reap-

pearance of the submerged portion, can include it within his boundary only by the process of accretion or reliction. (p. 556.)

NAVIGABLE RIVER—Rights of Riparian Owners—Deflection of Stream.—The owner of land bounded by a navigable river has the right to secure his soil against inroads of the water, to secure accretions which form against his bank, and to erect improvements to promote commerce and other uses of the stream as navigable water, but he has no right to deflect the stream into a new channel by placing obstructions across the main current. (p. 559.)

NAVIGABLE RIVERS—Formation of Islands—Accretion.—New formations arising from the bed of a navigable river belong to the owner of the bed, and new formations added to the island or bar by the process of accretion or reliction belong to the owner of the bar or island, although by such growth it extends inward until it reaches the shore. (p. 564.)

NAVIGABLE RIVERS.—Formations by Accretion or reliction must be made to the contiguous land so as to change the portion of the water's margin or edge. (p. 565.)

NAVIGABLE RIVER—Accretion.—If the Space Between the Mainland and an Island is reduced to a slough which fills up in such a manner that the two bodies of land join, the respective owners are entitled to the accretions to their shores; and if the slough fills up from the bottom, and the accretions do not begin at the sides, the boundary is the center of the slough, as it was before the water left it. (p. 565.)

Miller, Buchan & Miller, C. F. Hutchings, S. D. Hutchings, Thomas J. White and H. M. Meriweather, for the plaintiffs in error.

Rossington, Smith & Histed, William B. Trembley, William L. Wood, J. I. Fife, Frank Hagerman and Edward P. Wright, for the defendants in error.

⁵¹³ BURCH, J. The action in the district court was one of ejectment and partition. In 1857, pursuant to treaty stipulations with the Wyandotte Indians, the United States patented to Silas Armstrong a tract of land, irregular in shape, lying in the fork of the Missouri and Kansas rivers north of Turkey creek, and containing some two hundred and seventy-four and seven-tenths acres. The land was low bottom-land, ⁵¹⁴ the peculiar formation which characterizes the valley of the Missouri river in this region, and subject to the vicissitudes which result from the conduct of that capricious stream. By purchase and descent various parties acquired undivided interests in the land. In some instances quantities in acres were conveyed, to be derived from the undivided holdings of the grantors. By the close of the year 1866 some twenty-five different parties claimed to be

tenants in common of the tract, and on January 23, 1867, a suit was brought in the district court of Wyandotte county to partition it. The petition designated the land as "all that parcel of land lying in the fork of the Missouri and Kansas rivers and between the Missouri state line and the Kansas river as lies north of Turkey creek." The area was estimated at "about two hundred and fifty acres, more or less."

On April 11, 1867, the court ordered that "for the purpose of ascertaining the quantity of land included in the boundaries mentioned in the petition of said plaintiffs a survey of the same be made, and it being represented that John Runk, Jr., is a competent person to make said survey, he is hereby empowered to make the same and report by Saturday morning next." On April 13, 1867, a decree of partition was entered, which describes the land as it is described in the petition, and which closes by ordering a writ in due form to be issued to the sheriff of Wyandotte county, commanding him by the oath of three judicious and disinterested freeholders named to cause "the same said land" to be set off and partitioned among the parties found by the court to be entitled to portions thereof.

On September 26, 1867, the partition commissioners made their report. Those who were entitled to acre quantities were given shares out of the undivided interests of their grantors. In the description of various allotments boundary lines are described as running "to the east bank of the Kansas river; thence down the same," etc.; and "to the west bank of the Missouri ⁵¹⁵ river; thence down the same," etc.; and on the plat accompanying the report a number of lots are extended from river to river. The commissioners' report concludes with the following statements:

"By a survey which was made of the lands during the April term of the first district court, A. D. 1867, they were found to contain 208.4 acres, upon which a division was based. . . . A careful survey, made during the month of July last, shows that owing to the waste by the washing away of the banks of the Missouri and Kansas rivers the quantity of the land has decreased to 200 acres.

"The allotments are proportional to this in quantity, and give an area to Thomas Ewing, Jr., of 18.63 acres; Calhoun

heirs, 16.84 acres; Graham, 8.28 acres; Armstrong heirs, 34.58 acres; James 54.42 acres; Wood, 20.94 acres; William Weer's heir, 25.13 acres; Swope, 9.06 acres; and the Union Pacific railway, E. D., 11.58 acres.

"The accompanying plat, hereto attached, represents the allotments, with the courses and distances marked on the lines, and the several areas in acres and hundredths of an acre."

The report of the commissioners was confirmed by the court on October 15, 1867, and no action having been taken to review the proceedings, they became final.

Subsequently to the partition suit the Missouri river continued to encroach upon those allotments of which it formed the boundary, and in order to prevent their lands from washing away the several owners entered into a contract with James F. Joy to deed him certain tracts bordering upon the stream, and extending back for quantity, in consideration of his riprapping the river bank. The agreement is dated in August, 1868, and the work was completed within a few months following. Deeds were duly delivered to Joy whereby he acquired the entire Missouri river frontage from the mouth of the Kansas river to the state line, except that opposite the land of two of the allottees in the partition suit, Swope and Ewing, who paid for their proportion ⁵¹⁶ of the work of riprapping in cash. The calls in the Joy deeds were to the bank of the Missouri river, and down and along the same. Later the title of these riparian owners passed either immediately or directly to the Armour Packing Company, the Hannibal & St. Joseph Railroad Company, the Fowler Land Association, the Metropolitan Water Company, and others.

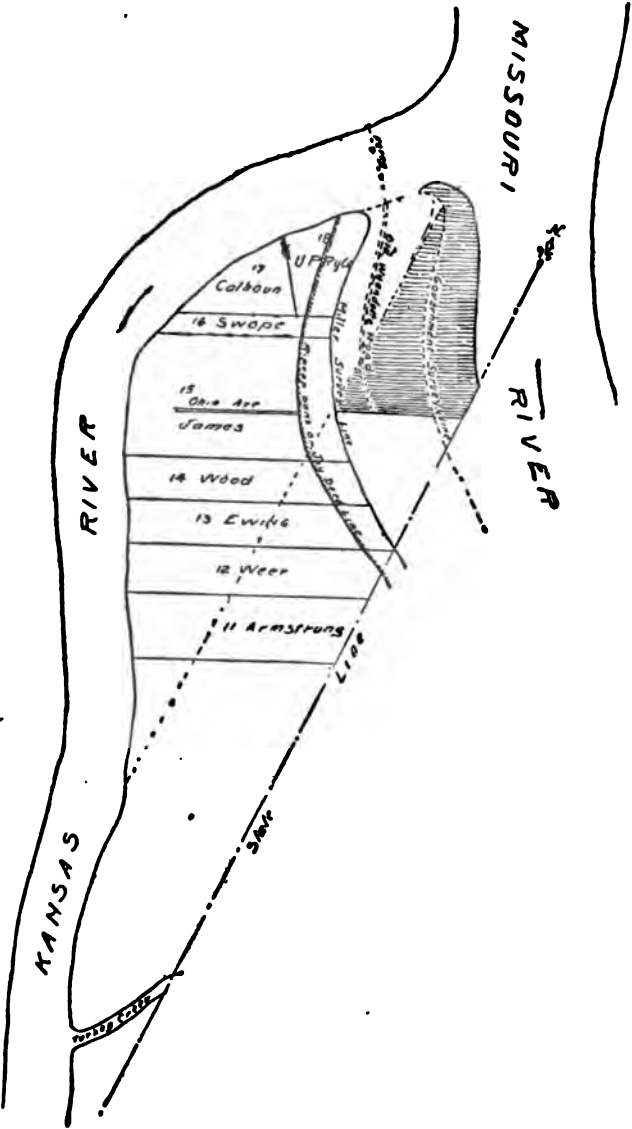
From the time of the partition down to the time when the bank was protected a considerable quantity of land along the channel of the river was carried away by erosion. The final survey under which partition was made is known as the Miller survey, and the riprap bank, or Joy deed line, lay south of the north line of the Miller survey, at distances

varying from two hundred to three hundred feet. The composite map following indicates crudely the position of the Missouri river bank at the time of the government survey, the Miller survey line, the riprap bank or Joy deed line, several of the allotments made by the commissioners in the partition suit, and affords some other information which may be useful in arriving at a comprehension of the case.

From 1868 until 1889 the deep-water channel of the Missouri river lay next to the riprap bank. Business enterprises requiring access to the river were established there. For a long time the Fowler Packing Company maintained a wharf upon its land (partition lot 16 and a segment of lot 15), from which steamboats loaded and discharged their cargoes, and all the commerce of the stream was carried upon the current which pressed against the bank. About the year 1889 the main current was diverted to the Missouri side of the stream. The old channel filled up, and at the commencement of this litigation the river was separated from the old riprap bank by a wide stretch of land many acres in extent.

This suit relates to land lying north of the Miller survey line and between that line and the river where it now runs. The plaintiffs are persons who have obtained ⁵¹⁸ title by purchase or descent from the allottees in the partition suit other than those who were given acre quantities, and for all purposes of the case may be termed tenants in common of the Armstrong grant. The defendants may be designated as purchasers of those portions of the Armstrong grant which are shown by the report of the commissioners in the partition suit to border upon the Missouri river. With them are joined some of the cotenants of the plaintiffs.

The plaintiffs claim that, following unusual rains, the ice in the Missouri and Kansas rivers broke up early in the year 1867, after the partition proceedings were begun, and formed a gorge near the confluence of the streams. A stage of extraordinary high water followed, and the Missouri river with great rapidity and violence cut a new channel through the tract described in the partition suit. The June rise succeeded, and the water continued high throughout the year. The April survey in the partition proceedings disclosed that but two hundred and eight of the two hundred and fifty acres



of land remained, and by the next July eight acres of that had washed away. Consequently two hundred acres, and no more, were partitioned, the allotments being made proportional to that quantity. Upon the subsidence of the flood in 1868 a portion of the Armstrong grant which had been submerged, and which had been cut off from the partitioned land by the new channel of the river, reappeared in the form of an island, upon both sides of which the water flowed, the great volume, however, passing through the channel and continuing to erode the bank until the Joy deed line was reached. The size of this island increased by accretions to it upon all sides. About the year 1889 some of the defendants placed obstructions out in the channel of the stream which, together with other artificial means, caused the main current to be deflected to the opposite shore. For some time the water lay in pools along the channel next to the riprap bank, but these at last disappeared and the island expanded to the mainland.

⁵¹⁹ The plaintiffs say they were not deprived of their land by the action of the river in the year 1867, or by the partition proceedings, or by any other means, and that all of such land with its accretions has been restored to them unpartitioned and in identifiable form.

The defendants dispute the facts furnishing the foundation of the plaintiffs' claim. They dispute some of the legal principles invoked in aid of such claim, and they deny the applicability of other principles essential to its support. Further than this, they assert that the plaintiffs are estopped from claiming that all the land of the Armstrong grant was not partitioned, and are estopped from denying that the partition allotments have followed the recession of their movable boundary—the river itself—to its present location.

Upon a trial by jury the plaintiffs and those defendants who are cotenants with them were awarded land indicated by the shaded portion of the map. The court rendered judgment upon the verdict, and reserved the matter of partition pending this proceeding in error. The jury returned answers to a large number of special questions covering practically all of the paramount facts. The special findings show that in 1856 the Armstrong grant contained two hundred

and seventy-four and seven-tenths acres. When the partition suit was commenced it contained two hundred and fifty acres, more or less. A new channel was cut through the land in controversy by the high waters of the Missouri river in 1867; the land in controversy was suddenly and perceptibly submerged by the violent rise of the river in that year; the ice-gorge of that year caused the river to cut a new channel and to wash away the bank; the cutting and the washing away of the bank between Kaw point (the point of land at the junction of the rivers) and the state line was not done in the usual manner of cutting along the banks of the Missouri river; the new channel varied from two hundred to three hundred feet in width, and after it was cut was the main channel of the river.

520 The jury further found that in 1865 or 1866 the Missouri river began to wash away the bank forming the border of the Armstrong grant, and in 1866 and 1867 the land caved into the river and washed away quite rapidly; but, as distinguished from this process, a portion of the land was cut off by the new channel of 1867 and left lying to the north of it in the form of an island. The land so cut off was from one hundred to two hundred feet wide and from eight hundred to one thousand feet long. It lay some six hundred or seven hundred feet out, measuring from the line the river reached when the south bank was ripped, and the south boundary of partition lot 18, if extended, would have about crossed its northwest point. No island was in existence between the mouth of the Kansas river and the state line when the partition suit was commenced. The one formed as described continued in existence at all times up to 1891 or 1892, when the water ceased to flow in the channel separating it from the mainland.

The findings also state that the high water continued during the entire season of 1867. During the flood the island referred to was entirely submerged. The top of it was scoured off and washed away. It did not reappear until the water had subsided the next year, and then it presented itself as a new formation of sand, or sand and soil, which afterward supported a growth of willows and weeds for some of the time. In later years it was frequently submerged, and

its configuration changed somewhat, but it remained visible at all times in low stages of water. (In answer to one of the numerous and pertinacious special questions upon this subject the jury used the expression "very low water.")

The jury further found that a portion of the land in controversy was formed by accretions to the island. Prior to 1889 an accretion of sand, or sand and soil, formed in front of partition lot 18, about one hundred feet wide at Kaw point. In that year what is known as the waterworks dike was constructed in the river by one of the defendants, the Metropolitan Water Company, ⁵²¹ commencing one hundred feet from the riprap bank. At the time the dike was built no deposits had begun to form in front of lots 12, 13, and 14. An accretion also formed in front of lots 15 and 16, but to the time of bringing suit it had extended only two hundred and fifty feet (less than the width of the channel between the mainland and the island). After the dike was constructed the river ran around the end of the island in a southeasterly direction, in a channel lying north of it. The Ohio Avenue sewer, of Kansas City, Kansas, was extended to this channel in 1889, but the river ceased to run there, and by 1892 it had entirely filled up, the river having receded beyond the government survey line of 1856.

These findings are conclusive upon the facts to which they relate, and require consideration in the light of the legal doctrines of avulsion, submergence and reappearance, and accretion and reliction, to determine the rights of the parties to the action. The verdict being a general one, the evidence favorable to the plaintiffs and consistent with the special findings controls in all matters not covered by the findings themselves.

In the year 1867 the Missouri river formed the boundary between the state of Missouri and the state of Kansas at the place in question. The stream was navigable, constituted a public highway between the two states, and under the legal policy of each title to its bed was vested in them, the dividing line being the center of the main channel.

The courses of rivers being determined by the operation of the elements according to natural laws, they are subject to changes of location. If the change in the position of a navi-

gable river dividing the territory of two states be by gradual and imperceptible encroachment, or insensible recession, so that the process cannot be detected while it is going on, the boundary follows the shifting thread of the stream. But if from storm or flood or other known violent natural cause there be a sudden, visible irruption of the water, whereby the ⁵²² lands upon one side are degraded or submerged or a new channel is cut for the stream, the boundary remains stationary at its former location, and the boundaries of riparian owners whose lands have been affected remain unchanged. These principles are elementary in the law. The books teem with learning upon the subject, and the collation of authorities would be a work of supererogation: *McBride v. Steinweden*, 72 Kan. 508, 83 Pac. 822.

It is argued, however, that because of its crooked course, the velocity of its current, the friable character of its banks and the quicksand substratum of the adjacent soil it is characteristic of the Missouri river that large pieces of upland should suddenly, visibly and perceptibly break off, plunge into the water, and be swept away; and from this fact it is concluded that the law of avulsion cannot be applied to the conduct of this stream, or at least that it governs only in "ox-bow" cases like *Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300, *Missouri v. Nebraska*, 196 U. S. 23, 25 Sup. Ct. Rep. 155, 49 L. ed. 372, and *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. Rep. 396, 36 L. ed. 186. If this river be distinguished from others by the violence and rapidity with which it invades the lands adjacent to its course, the findings of the jury are explicit upon the point that the *Armstrong* grant was not ravaged in the usual manner of cutting along its banks, and a clear distinction is made between the caving and washing away of marginal soil and the phenomena of this case. The ice-dam in the stream added an unusual and aggravating feature. Nothing short of the liberated energy of gorged water at flood-tide could have produced the tremendous results described in the testimony supporting the special findings. It is said that after the water gained headway it went through the land with a rush, tearing out the earth in massive blocks five, ten, twenty, twenty-five and thirty feet in width and sometimes forty, fifty and three

hundred feet long, felling forest trees and otherwise devastating ⁵²³ the tract, so that, upon an abatement of the inundation, in place of farm land a river channel one hundred yards wide separated a denuded island from the shore.

The argument for the limitation of the avulsion doctrine was made in favor of the abolition of the law of accretion from the valley of the Missouri river in the cases of *Missouri v. Nebraska*, 196 U. S. 23, 25 Sup. Ct. Rep. 155, 49 L. ed. 372, and *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. Rep. 396, 36 L. ed. 186. The court held, however, that, notwithstanding the greater rapidity of changes here than elsewhere, the fundamental principles of the law were not affected.

In the case of *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. Rep. 337, 34 L. ed. 941, the litigation arose out of circumstances much less extraordinary than those connected with the flood of 1867, but the rights of the parties were solved upon the theory of an avulsion. The facts were that the washing away of the banks of the Mississippi river opposite the city of St. Louis usually occurred at the time of the spring floods, which varied in duration but lasted from four to eight weeks. Each flood usually carried away a strip of land from off the river bank two hundred and fifty to three hundred feet in width, the loss of which could be perceived in its progress. As much as a city block would be cut off and washed away in a day or two, and masses of earth from ten to fifteen feet in width frequently caved off, fell into the river and were washed away at one time. The court said:

"By findings of fact 6 to 9 the sudden and perceptible loss of land on the premises conveyed to the plaintiff, which was visible in its progress, did not deprive Blumenthal, as riparian proprietor, of his fee in the submerged land, nor in any manner change the boundaries of the surveys on the river front, as they existed in 1865, when the land commenced to be washed away.

"It is contended by the defendant, not only that the plaintiff never had any title to the bed of the river, but that, when the dry land of which he was in possession was swept away by the river and ceased to exist, his ownership of that land also ceased to exist. It is laid down, however, by all the authorities, that, if the bed ⁵²⁴ of the stream changes im-

perceptibly by the gradual washing away of the banks, the line of the land bordering upon it changes with it; but that, if the change is by reason of a freshet, and occurs suddenly, the line remains as it was originally. This principle is recognized by the supreme court of Illinois, in *Butteruth v. St. Louis Bridge Co.*, 123 Ill. 535, 5 Am. St. Rep. 545, 17 N. E. 439, in these words: 'The law, as stated by law-writers, and in the adjudged cases, seems to be, that where a river is declared to be the boundary between states, although it may change imperceptibly, from natural causes, the river, as it runs, continues to be the boundary. But if the river should suddenly change its course, or desert the original channel, the rule of law is, the boundary remains in the middle of the deserted river-bed'": Page 245.

In the case of *City of Chicago v. Ward*, 169 Ill. 392, 61 Am. St. Rep. 185, 48 N. E. 927, 38 L. R. A. 349, the testimony disclosed that the building of certain piers in the city of Chicago had the effect of throwing a strong current of the Chicago river against the shore of Lake Michigan, which gradually undermined the bank. Upon the occasion of storms the bank would fall, sometimes five, ten and thirty feet in width at a time, and sometimes as much as one hundred feet would be washed away in a single storm. The court held that the boundaries of the land were not changed, quoting among other authorities *Hargrave's Law Tracts*, 36, 37, as follows:

" 'If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or, though the marks be defaced, yet if by situation and extent of quantity and bounding upon the firm land the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject does not lose his property; and accordingly it was held by *Cooke and Foster*, M. (7 Jac. C. B.), though the inundation continue forty years. . . . But if it be freely left again by the reflux and recess of the sea the owner may have his land as before, if he can make it out where and what it was, for he cannot lose his propriety of the soil, though it be for a time become part ⁵²⁵ of the sea and

within the admiral jurisdiction while it so continues'": 169 Ill. 407.

The conclusion of the court was expressed thus: "Under the authorities, and according to all reasonable deductions from legal principles, we must hold that the title to these lands submerged by the action of Lake Michigan was not lost, and that by their subsequent reclamation the city has completely reasserted its title thereto, as such title stood at the time of the dedication of the respective plats thereof": Page 408.

In volume 3 of Farnham on Waters and Water Rights, section 848, it is said: "In case the river shifts its position so as to submerge land on one shore, the question is one of boundary. As seen in the preceding section, if the change in the river channel is sudden, titles of the opposite proprietors are not changed, but if it is gradual and imperceptible, the middle thread of the river remains the boundary line. . . . It will be remembered that the rule that the thread of the stream remains the boundary regardless of changes is based on the fact that the law presumes that the river does not change. This presumption should not be permitted to overcome an obvious and well-established fact. Therefore, if the change does not come within the definition of gradual and imperceptible, but the land is rapidly washed away on one side and formed on the other, the fiction should give way to the fact, and the owner should not lose title to his property. The title to the land itself is of more importance than the riparian right of access to the water or convenience of having a natural, rather than a mathematical, boundary; and rules which were made for convenience should not be permitted to wrest the title to land from its true owner."

These authorities are sufficient to show that the events of 1867 are clearly comprehended within the meaning of the term "avulsion," and it is not necessary that time be spent refining upon the words "gradual" and "imperceptible," or in framing new definitions to fit the varying facts of different cases. ⁵²⁶ They further show that it is not necessary that the river should be "annihilated" in its old bed and "reproduced in its new bed"—borrowing an expression from Vattel.

If the earth where Doctor Wood's house stood had not been swept away by the torrent, if his fences had not gone

down the stream, if his cornfield had remained undisturbed, and that part of the Armstrong grant cut off by the new channel had not been stripped of its vegetation, there would be no contention now that a portion of the land had not been partitioned. The fact of its submergence and the formation of new land on the old site makes no difference in the rights of the parties.

"If the sea swallow land, if the bounds can be ascertained the owner may have them again if they are subsequently left to dry or are regained by him. And if the former extent of land can be known, it shall be returned to the owner": Hale's *De Jure Maris*, c. 4; 2 Rolle's Abridgment, 168.

"When the denudation of the soil by the water is sudden and perceptible, the title is not changed. . . . If navigable waters, owned by the crown or state suddenly encroach upon private lands adjoining, and there are marks by which their limits can be determined, the title to the soil thus covered remains in the former owner, and upon the recession of the water it is restored as his property. Though the overflow continues for forty years, yet if the water recedes the owner has his land again": Gould on Waters, 3d ed., sec. 158.

In volume 3 of Farnham on Waters and Water Rights, section 848, it is said: "When the title to the bed of the water is in the public, the sudden submergence of a parcel of land on the foreshore does not destroy the title of the private owner if within a reasonable time it can be reclaimed and the former boundaries established."

These texts are supported by the decisions of the courts, and undoubtedly express the true rule of law. The case of *Mulry v. Norton*, 100 N. Y. 424, ⁵²⁷ 53 Am. Rep. 206, 3 N. E. 581, is a leading one upon this subject. The syllabus reads:

"Land lost by submergence may be regained by reliction, unless the submergence has been followed by such a lapse of time as precludes the identity of the land from being established.

"If, after a submergence, the water disappears from the land either by its gradual retirement or the elevation of the land by natural or artificial means, the proprietorship returns to the original owner.

"No lapse of time during which the submergence has continued bars the right of the owner to enter upon the land re-

claimed and assert his proprietorship when the identity can be established by reasonable marks, or by situation, extent of quantity or boundary on the firm land.

"And so if an island forms upon the land submerged, it belongs to the original owner."

In the opinion it was said: "It is not, however, every disappearance of land by erosion or submergence that destroys the title of the true owner, or enables another to acquire it, for the erosion must be accompanied by a transportation of the land beyond the owner's boundary to effect that result, or the submergence followed by such a lapse of time as will preclude the identity of the property from being established upon its reliction. Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained. . . . A case quite in point is referred to by the respondent's counsel as arising in Delaware in 1815, decided by the court of common pleas upon a learned opinion by Judge Wilson, a copy of which is attached to the plaintiff's brief. The case does not seem to be elsewhere reported. It arose over the ownership of an island called 'Wilson's Bar,' which had been created by alluvion upon land formerly contained within the boundaries of an island called Little Tinnicum, but which at some time had been worn away by the ocean. The court say: 'The right to the new island and also to land gained by alluvion or dereliction, all of which are governed by the same principle, follows the right to the soil which is covered by the water. Though the surface of the lower part of Little Tinnicum was destroyed ⁵²⁸ by the force of the winds and the waves, and it was consequently overflowed by the water of the river, yet the owner did not lose the propriety of the remaining land covered by the water if it was regained either by natural or artificial means; it continued to belong to the original proprietor.' 'The earth deposited on it became his by the right of alluvion, and of course this island formed on it by such deposit became his. And though it probably has extended beyond the limits of the old island, the addition is plainly alluvion'": Pages 434, 435.

The Delaware decision referred to (*Morris v. Brooke*, Del. Com. Pl., July, 1815) has been printed in volume 53 of the *American Reports*, at page 215.

In the recent case of *Hughes v. Hairs of Birney*, 107 La. Ann. 664, 32 South. 30, the principle under consideration was applied to land uncovered by the recession of the waters of "Lake Centennial" from a portion of De Soto point, opposite Vicksburg. The so-called lake was an enlargement of the Mississippi river which was formed by a cut made through the tongue of land in 1876. The water was drawn off, and the lake gradually filled up, by the river making another cut to a point further down the stream in 1898. The opinion was based on the standard authorities, and the syllabus reads: "If, after submergence, the water disappears from the land, either by gradual retirement, or by the elevation of the land by natural or artificial means, and its identity can be established by reasonable marks, or by situation, extent, quantity, or boundary lines the proprietorship returns to the original owner."

In the case of *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. Rep. 337, 34 L. ed. 941, it was said: "It is laid down by all the authorities that, if an island or dry land forms upon that part of the bed of a river which is owned in fee by the riparian proprietor, the same is the property of such riparian proprietor. He retains the title to the land previously owned by him with the new deposits thereon": Page 245.

⁵²⁹ The same rule applies to titles held by the United States. "Island No. 42 in the Missouri river, within the present state of Missouri, was surveyed by the United States in 1820, and then contained about fifty acres. Subsequently during floods it was submerged, and a portion of the surface was washed away; but on the subsidence of the waters a portion of it reappeared, and at no time was it washed away to the level of the bed of the river, a channel remaining between the island and the west bank of the river. About 1880 the river cut a new channel, commencing above the island, and returning to the old channel below it, making a curve to the eastward, which inclosed about eleven hundred acres, and leaving the old channel and the island dry. Thereafter plaintiff entered the island as public land; and received a patent therefor according to the original survey. Under the law of Missouri the title of riparian owners on a navigable stream extends only to the water line. Held, that the title of the United States to the island was not lost by the erosion or submergence, and that, by its conveyance after it reap-

peared on the reliction of the waters, plaintiff took title thereto with the additions made by alluvion and accretion": *Widicombe v. Rosemiller*, 118 Fed. 295, syllabus.

It is suggested that the right to reclaim submerged land can be asserted only when the riparian proprietor owns to the thread of the stream, but no reason is offered in support of the suggestion, and none is apparent. If through some catastrophe the river make its bed upon private land the burden should fall as lightly upon the private owner as possible. It is sufficient for the state that control be retained over the stream for the preservation of its public highway character. More than this the state ought not to take. Whatever the riparian owner lost should not be withheld when the water recedes and the need of public supervision is at an end. Whether originally he had or had not some land already under water cannot affect his rights. The land when restored is his own because avulsion affects neither boundaries nor titles. Proprietorship ⁵³⁰ is not lost in the portion covered, and when it rises to the surface, whether by the deposit of alluvion or a change in the channel of the river, dominion reattaches as if it had never been suspended; and whatever accretions may have been added to the tract belong to its proprietor, as in ordinary cases. By a failure to discriminate between the effects of avulsion and ordinary erosion counsel for defendants have been led into an error respecting the prevalence of the doctrine of submergence and reappearance in the region through which the Missouri river flows. Nowhere has it been repudiated where the facts have required its application.

Such being the law and the facts, the avulsion of 1867 did not disturb the boundary between the state of Missouri and the state of Kansas, and the boundaries of the Armstrong grant as they existed when the partition suit was commenced were not changed. The land under the new channel of the river, the island and the shoals beyond the island still belonged to those who owned the soil before the flood. This land has been identifiable from the time the high water subsided, and the limits of the entire tract as they were known in 1867 have been proved in this action. The owners are entitled to reclaim it, and to have it partitioned, unless they have lost title to it in some manner or are debarred from asserting their rights upon some ground suggested by the defendants.

It is of course idle to assert that the partition proceedings conclusively prove the fact to be that the proprietors of the Armstrong grant had no more land in July, 1867, than the two hundred acres which were divided. There is fair ground to argue that the allottees are estopped to claim title to more, but the physical existence of a portion of the earth's surface cannot be annihilated by writing up a court record to that effect. It is plain that the surveyor measured a tract of land surrounded by three streams, two of them at least at ⁵³¹ flood stage, and found two hundred acres of land out of water. The partition commissioners believed that the two rivers had permanently appropriated the remainder of the tract described in the petition, and in effect so reported. The retirement of the waters of the Missouri river and the restoration to its owners of a large body of land not included in the report were not contemplated. The court and the parties acted upon the circumstances as they then appeared, and closed the case before the river went down. Ordinary sagacity is to be imputed to them. They were mistaken, and the report, false in fact because based upon conditions erroneously believed to be perpetual, does not stand in the way of the truth.

It is the law that courts will not allow one cotenant to vex those having estates in common with him with a multiplicity of suits for partition, and ordinarily all the joint property must be included in one suit. But if they own two tracts, they may voluntarily divide one of them, or they may ask the court to divide one of them, without depriving themselves of the right or the court of jurisdiction subsequently to apportion the other. Nor will relief be denied them if acting in good faith they should overlook a tract.

"It is true that a petition for a partition of a part of an estate held by tenants in common will not be entertained against the objection of any person interested. Ordinarily, a petition of this kind should include the entire estate held in common; but it does not follow, if by mistake, or by the consent of all the tenants, a partition has been made of a portion of their estate, whether by order of the court or otherwise, that the court is powerless to divide the remainder on a petition of one or more of the tenants in common. It would be a harsh rule that, after a division of a part of an estate, partition of the remainder could never be ordered by the court. When parties have acted innocently and fairly in making or obtaining a division which does not cover all their

estate, there is no reason why the law should not aid them when they ask for a division of the remainder": *Barnes v. Boardman*, 157 Mass. 479, 32 N. E. 670. ⁵³² See, also, *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712; *Richardson v. Buddy*, 10 Idaho, 151, 77 Pac. 972.

Likewise if parties have acted innocently and fairly, and a portion of the estate described in the petition and ordered to be partitioned has been omitted from the report of the commissioners under a mistake as to the facts, there is no reason why, upon discovery of the true state of affairs, they should not have the right to bring suit in equity to enforce the decree as to the remainder as the exigencies of the case and the interests of the parties require (*National Bank v. Kingman*, 62 Kan. 571, 64 Pac. 65, and authorities there cited; *Wadhams v. Gay*, 73 Ill. 415), or else be permitted to avail themselves of the more direct remedy of an ordinary suit for partition of the omitted part, in which the equitable right to relief may, under the practice in this state, be fully investigated. The enforcement of any other rule would breed deserved contempt for the formalism of the law, and prove it to be a tyrant over the fortunes of men rather than a servant in the accomplishment of their just and blameless desires. Conceding to the partition proceedings that for which the defendants argue—the effect of mutual deeds—still if parties are mistaken as to the quantity of land they actually own, and the disparity is great enough to challenge the attention of a court of conscience, relief may be granted.

"Where plaintiff and his two cotenants attempted to partition their land under a mutual mistake that it only consisted of seventeen acres, when in fact they owned fifty-two acres, and one of them refused to execute deeds, and thereafter defendant purchased the land except plaintiff's interest, claiming ownership of the entire fifty-two acres except the five and two-thirds acres first deeded to plaintiff, there was such disparity between the quantity of land believed by all the parties to exist and that which they actually owned that plaintiff was entitled to relief on the ground of mutual mistake, and hence a judgment in partition awarding plaintiff an equal one-third of the remainder of the land was proper": *Cartmell v. Chambers* (Tex. Civ. App.), 54 S. W. 362, syllabus.

⁵³³ The principle upon which this decision is based is fundamental in the law of contracts.

"In cases of mutual mistake going to the essence of the contract it is by no means necessary that there should be any presumption of fraud. On the contrary equity will often relieve, however innocent the parties may be. Thus if one person should sell a message to another, which was at the time swept away by a flood or destroyed by an earthquake without any knowledge of the fact by either party, a court of equity would relieve the purchaser upon the ground that both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of their contract": 1 Story's Equity Jurisprudence, 13th ed., sec. 142.

The same principle should govern if the conditions were reversed and the parties innocently but erroneously believed the message had washed away. The headnotes to the report of the case of *Ross v. Armstrong*, 25 Tex Supp. 354, in volume 78 of the American Decisions, page 574, give the gist of the decision as follows:

"Under joint adventure between holder of headright certificate and locator to secure patent to government land, and to divide the land when acquired, if, after securing the grant and dividing the land, it is discovered that part of the land which the government has thus granted had been previously appropriated by older title, the partition is one upon a mistake of facts from which equity will relieve.

"It is a general rule in equity that an act done or contract made under mistake or ignorance of material fact is voidable and relievable against in equity, when such mistake or ignorance constitutes a material ingredient in the contract, or the motive of the act done by the parties, and disappoints their intention by a mutual error."

The obligation to abide a judgment and refrain from a second suit is affected by the same considerations:

"There is no doubt respecting the general correctness of the proposition expressed in the maxim, '*Nemo debet bis vexari pro una et eadem causa.*'"

"This rule, however, is not of universal application. ⁵³⁴ The origin and object of the rule were the prevention of the vexations incident to a multiplicity of suits, which the law, equally as much as equity, abhors.

"The principle above asserted finds more familiar expression in the statement that a party shall not split his cause of action.

"Now, it is quite obvious that such prohibition presupposes knowledge of the constituent elements of the cause of action sought to be unwarrantably divided. If this be true, and it be true also that the law does not require what is impossible, then it must needs follow that a party should not be precluded in consequence of a former action, if such action were brought in unavoidable ignorance of the full extent of the wrongs received or injuries done. Any other conclusion would be reached only through sanctioning the rankest injustice.

"In *Farrington v. Payne*, 15 Johns. 432, the question is asked: 'Suppose a trespass, or a conversion of a thousand barrels of flour, would it not be outrageous to allow a separate action for each barrel?' Undoubtedly it would. But in such a case, where the owner is ignorant of the extent of his loss, would it not be far more outrageous to allow a recovery of one barrel to prevent the recovery of the remaining nine hundred and ninety-nine?

"This question will meet with an affirmative response in every honest heart": *Moran v. Plankinton*, 64 Mo. 337. See, also, *Alexander v. Bridgeford*, 59 Ark. 195, 27 S. W. 69; *Gedney v. Gedney*, 160 N. Y. 471, 55 N. E. 1.

A mistake in a division line in a decree of partition originating in the report of the referees which was confirmed without objection will be corrected in equity: *Smith v. Butler*, 11 Or. 46, 4 Pac. 517. Equity will likewise take jurisdiction to correct a decree of foreclosure from which a lot has been omitted by mistake: *Snyder v. Ives*, 42 Iowa, 157. And the fact that the cause in which a mistake occurs has been taken to the supreme court and the judgment affirmed will not defeat the exercise of such power: *Partridge v. Harrow*, 27 Iowa, 96, 99 Am. Dec. 643.

It is true that the partition proceedings are conclusive ⁵³⁵ in reference to the nature and extent of the titles of the respective parties. The decree that they are tenants in common cannot be impeached to show that one or more of them owned in severalty. Nor can any of them take advantage of a second proceeding to make a claim for compensation for improvements which should have been asserted in the first instance: *Forder v. Davis*, 38 Mo. 107; *Bobb v. Graham*, 89 Mo. 200, 1 S. W. 90; *Spitts v. Wells*, 18 Mo. 468; *Burger v. Beste*, 98 Mich. 156, 57 N. W. 99; *Kane v. Rock River Canal Co.*, 15 Wis. 179; *Janes v. Brown*, 48 Iowa, 568. So, if the commis-

sioners had established a right of way to some of the allotments another could not now be claimed, and if a strip of land had been left undivided for the purpose of furnishing to some of the allottees free access to their premises the fact could not now be disputed: *Carey v. Rae*, 58 Cal. 159; *Miller v. City of Indianapolis*, 123 Ind. 196, 24 N. E. 228; *Turpin v. Dennis*, 139 Ill. 274, 28 N. E. 1065.

In the case of *Miller v. City of Indianapolis*, 123 Ind. 116, 24 N. E. 228, it was said: "In their report to the court the commissioners reported that they had divided the land intended for partition into lots, blocks, streets, and alleys, and in their report of partition they informed the court that they had assigned to each of the parties interested in said land his or her share in the same in severalty. No person examining these proceedings would be led to believe that any portion of the land described therein was left undivided, but, on the contrary, when examining the plat in connection with the report of the commissioners in partition, and the judgment of the court thereon, would be led to the belief that the strip in controversy was intended as a sixty-foot street, furnishing an outlet for the blocks abutting thereon. . . . The property adjoining this strip has passed into the hands of third parties. . . . To permit the appellant to say now that this strip was left by the commissioners as undivided land, and was not intended as a street, would be obviously unjust to those who purchased the property on the faith of the plat ⁵³⁶ and the partition proceedings. We do not think the court erred in refusing to admit this offered testimony": Pages 206, 207.

None of these cases, however, which are referred to because cited by counsel for defendants, reaches to the marrow of this controversy, which relates not to what the commissioners' report includes but to what it disregarded. The report shows that two hundred acres, and no more, of the land described in the petition were partitioned. A flood prevented the division of the remainder. The commissioners led the court and the parties to believe that the omitted territory had washed away. It was under water at the time, and remained so until the next year. The parties were not at fault in relying upon the statement of the commissioners as true. They were all, however, mistaken. The mistake involved the existence of a large portion of the subject matter of the suit. Belief in its nonexistence led them to take no further account of it. Therefore,

under the ancient and well-established principles of equity jurisprudence, the plaintiffs are entitled to relief unless the defendants will be deprived of some right to the land; and under the liberal rules of procedure prevailing in this state the question may be determined in an action for the possession and partition of the tract excluded from the former report.

The defendants cite the leading authorities to the effect that when a private individual grants property belonging to him, and bounds it generally upon a stream, the presumption is he does not intend to reserve any land between the upland and the stream, and if his property extend beyond the water line the presumption is the grant will carry title as far as he owns. The subject is discussed in volume 3 of Farnham on Waters and Water Rights, section 852. As stated by the author just referred to (section 855), the presumption ordinarily indulged is rebuttable, the question being purely one of intention. When the intention is ascertainable from the face of an instrument ⁵³⁷ or a record, other evidence is not admissible, and under the well-understood rule the court must make the interpretation and not the jury.

The full intention of the court and the parties to the partition proceeding is clearly expressed. No land whatever north of the Miller survey line was partitioned or conveyed, for the stated reason that none remained. It had washed away. The meaning is as clear as if the line had been established at a granite escarpment instead of a navigable river. In the theory of the law one form of earth sculpture is as enduring as another. The bank of a river is a monument the same as the face of a cliff. The presumption is that it does not change, and dominion may be limited as conclusively by a river bank as by any other natural object. The allotments were intentionally made proportional to a residue of two hundred acres, and the proposition that the design was that the six allottees whose proportional shares touched the river should, because of that fact, receive some fifty acres more of unpartitioned common land is not worthy of discussion. No land was reserved between the partitioned land and the river. Lot 18 was first conveyed by a description limited as follows: "As set apart to the Union Pacific Railway Company, Eastern Division, by the judgment and decree of court in the case of Thomas Ewing, Jr., et al. v. William Weer et al., at the April term, 1867, of the first judicial district in and for the county of Wyandott, Kansas, numbered on the appearance docket of

said court 911, as remains of record and on plat in cause numbered 18."

Lot 16 was first conveyed as "the same land designated as lot 16, as shown on the plat in case No. 911, Thomas Ewing, Jr., et al. v. William Weer et al., in the first judicial district court, Wyandotte county, Kansas, and set apart to said Swope in said suit, the papers and records in which case are here referred to for description of said lot 16." Lot 15 was first conveyed ⁵³⁸ by deeds which limited the grant to a part of lot 15 in the plat in the partition suit of Thomas Ewing, Jr., et al. v. William Weer et al., such plat being on file in the clerk's office of the first judicial district of Kansas, in Wyandotte county. A further reference in these deeds to a plat of the city across the Kansas river, which by its own outlines and by the certificates of the surveyor and the dedicating party excludes this land, added no certainty to the specific description already given; and to say that the decorative sketch upon this plat—no doubt satisfactory to the artistic taste of the draftsman—was seized upon by the grantor as the indisputable mark by which he could evince a determination to give to James F. Joy land which Joy was trying to keep covered by the water of a navigable river involves a flight of fancy which the court hesitates to attempt. Other primary conveyances of partition allotments are equally conclusive. No purpose to deed undivided interests in other land owned by numerous tenants in common can be interpolated.

Some of the defendants make no point that their deeds carried with them title to undescribed land by implication, and the position of the others is quite inconsistent with the very substantial and meritorious claim that they were purchasers of tracts bordering upon a navigable river whose bed belonged to the state, and hence that they took title only to its margin: *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330; *Penker v. Canter*, 62 Kan. 363, 63 Pac. 617.

It is entirely clear that several of the defendants made their purchases from a desire to secure a location upon the main navigable channel of the Missouri river. Believing they had secured a permanent frontage of that character, they have expended fortunes in the improvement of their estates. To be cut off from the river is an incalculable hardship, and the plaintiffs will not be allowed to interfere in any wrongful way ⁵³⁹ with the riparian rights of the defendants. What, then, are the riparian rights of the defendants? Manifestly those

In volume 1 of the third edition of Wood on Nuisances, section 494, the text reads: "Every proprietor of land exposed to the inroads of the sea may erect on his own land groins, or other reasonable defenses, for the protection of his land from the inroads of the sea. . . . But a man has no right to do more than is necessary for his defense, and to make improvements at the expense of his neighbor."

In the cases of *Tatum v. City of St. Louis*, 125 Mo. 647, 28 S. W. 1002, and *Whyte v. St. Louis*, 153 Mo. 80, 54 S. W. 478, the trustee of a riparian owner, and later the assignee of the rights of such owner, sought to recover from the city itself accretions formed by the acts of the city and by a railroad company over which the plaintiff had no control, and declarations of law in favor of the plaintiff were made. In the case of *Steers v. City of Brooklyn*, 101 N. Y. 51, 4 N. E. 7, a wrongful structure was given to ⁵⁴⁹ the riparian owner, in front of whose land it had been erected, as an accretion. The court said: "The wrongdoer should gain nothing by his wrong, and justice cannot be done to the upland owner except by awarding to him, as against the wrongdoer, the accretion attached to his soil as an extension thereof: *Ledyard v. Ten Eyck*, 36 Barb. 102, 125; *Langdon v. Mayor etc.*, 93 N. Y. 129; *Mulry v. Norton*, 100 N. Y. 424, 53 Am. Rep. 206, 3 N. E. 581; *Gould on Waters*, secs. 123, 124, 128, 148, 158; *Angell on Tide Waters*, 249."

It is equally clear that the defendants other than the water company cannot keep for their own use accretions to plaintiffs' land. Peter may not be plundered to recompense Paul. Especially is this true since the other defendants had a right to redress against the water company. In the case of *Fulmer v. Williams*, 122 Pa. 191, 9 Am. St. Rep. 88, 15 Atl. 726, 1 L. R. A. 603, a riparian owner filled up the channel of a river running between an island and the land of an opposite proprietor. The party wronged was awarded damages for the injury special to himself, the court holding the maxim, *Sic utere tuo ut alienum non laedas*, to be clearly applicable. Upon a subsequent appeal of the same case the court said:

"The diversion of the stream was an injury to his land that was direct, peculiar, and not shared with the general public. It was as clearly actionable as the diversion of a stream passing over his land. Whoever brought about such diversion so as to deprive him of the advantages of his location, whatever they were, inflicted a pecuniary wrong upon

him. The manner in which the diversion is brought about is not important. It might be accomplished by means of elaborate works arranged to carry the stream elsewhere, or it might be effected by filling up the channel so as to compel it to seek another. The result accomplished and the injury inflicted would be the same. The lower riparian owner would be deprived of the natural advantages which ownership of the land at that point gave him, by the unlawful act of another; and he would have a right to call upon the wrongdoer to repair the wrong done him by restoring the stream to its channel or making compensation ⁵⁴³ for its loss": *Williams v. Fulmer*, 151 Pa. 405, 31 Am. St. Rep. 767, 25 Atl. 103.

In the case of *City of Georgetown v. Alexandria Canal Co.*, 37 U. S. 91, 9 L. ed. 1012, the syllabus reads: "The Potomac river is a navigable stream, or part of the *jus publicum*; and any obstruction to its navigation would, upon the most established principles, be a public nuisance. A public nuisance being the subject of criminal jurisdiction, the ordinary and regular proceeding at law is by indictment or information, by which the nuisance may be abated, and the person who caused it may be punished. A court of equity may take jurisdiction in cases of public nuisance, by an information filed by the attorney general. If any particular individual shall have sustained special damage from the erection of it, he may maintain a private action for such special damage; because, to that extent, he has suffered beyond his portion of injury, in common with the community at large."

Citations of authority to the same effect might be multiplied. Therefore the fact that the navigable channel of the river has been diverted from alongside the defendants' land by the means described gives them no right to appropriate the plaintiffs' premises in order to preserve their riparian privileges. They must acquire title to the coveted tract in some manner recognized by law.

Upon their own theory of the case, the defendants' purchases being bounded upon a navigable river, they took no title beyond the bank, the bed of the river belonging to the state. If so they could obtain title to no part of the bed of the stream, nor to any land formations upon the bed of the stream, except by grant, which they did not receive, or by the processes of accretion and reliction. It is a matter of no concern to the defendants who may own that which is not theirs; and since the title of the plaintiffs was not taken

away by the catastrophe of 1867, the defendants are limited⁵⁴⁴ to precisely the same methods of acquisition as if the bed of the river belonged to the state.

Accretions must consist of deposits formed against, and added to, the bank. In Lord Hale's treatise, "*De Jure Maris et Brachiorum Ejusdem*," it is said: "Let us now come to the *maritima incrementa*, viz.: *Alluvio maris*; *recessus maris*; *et insula maris*. (1) For the *jus alluvionis*, which is in an increase of the land adjoining by the projection of the sea casting up and adding sand and slubb to the adjoining land, whereby it is increased, and for the most part by insensible degrees."

Chapters 5 and 6 of this valuable tract, from which the quotation is made, are reprinted in volume 16 of the American Reports, at page 54 et seq. The definition of Mr. Justice Gantt, given in *Lammers v. Nissen*, 4 Neb. 245, notes this characteristic: "An accretion to land is the imperceptible increase thereto on the bank of a river by alluvion, occasioned by the washing up of sand or earth, or by dereliction as when the river shrinks back below the usual watermark; and land so formed by addition belongs to the owner of the land immediately behind it." (Syllabus.)

In the case of *Wallace v. Driver*, 61 Ark. 429, 33 S. W. 641, 31 L. R. A. 317, it was said: "According to the cases we have cited, the high-water mark, as thus defined, being the boundary line of the riparian owner in this state, is the point at which the formation of all lands acquired by him by accretion must begin. A formation of alluvion beginning at any other point would belong to the state or other party": Page 435.

In the case of *Holman v. Hodges*, 112 Iowa, 714, 84 Am. St. Rep. 367, 84 N. W. 950, 58 L. R. A. 673, a bar formed on the bed of the Missouri river, which increased in size until it became fit for agriculture and finally joined the shore. The opinion reads: "Without setting out the evidence in detail, it is enough to say that the formation of the bar or island has been entirely distinct from any accretion to the⁵⁴⁵ shore. It arose near the middle of the river, though probably east of the thread of the then main current, without any connection with the Iowa shore, and was gradually added to by accretion or reliction until an island of the proportions mentioned was formed. Not only is this true, but the conclusion seems inevitable from the circumstance shown

that the additions to plaintiffs' land, whether from accretion thereto or the receding of the waters, have resulted from the formation of the island. Its existence undoubtedly changed the main current of the river, and by its growth to the northeast gradually cut off the stream formerly flowing between it and the shore. Whether this be true, however, need not now be determined. It is enough for the purposes of this case that the land beyond the channel last mentioned was formed independently of plaintiffs' land. It then never became part of their lots through the process of accretion or reliction. . . . It is said that, even though it [the state] may have owned the island when surrounded by water, that title moved from beneath it as the river receded, and the land became plaintiffs' as soon as connected with shore. It is conceded that no authorities have been found announcing such a doctrine, and we have been unable to discover any case awarding a riparian owner land because connected to his own, save when this has occurred through the imperceptible accretion or the reliction thereof by the gradual receding of the waters": Pages 715, 716.

In the case of *Linthicum v. Coan*, 64 Md. 439, 54 Am. Rep. 775, 2 Atl. 826, it was said: "If the land in question was formed by gradual accessions extending from the shore into the river, it would belong to the riparian proprietor; and this would be the case notwithstanding the fact that by the influence of floods and freshets large deposits of mud may have been made in the bed of the river. These deposits would, of course, materially contribute to the formation of land, and would hasten the time when it would appear above the surface of the water. But the leading characteristic of alluvion is the gradual extension of the land from the shore into the water; and when this is the case, it is irrelevant to consider the causes which, operating beneath the surface of the stream, have brought about the result. On the other ⁵⁴⁶ hand, if land was formed in the river, and extended inward toward the shore, it would be the property of the plaintiff, with all its accretions": Page 454.

The decisions in *Posey v. James*, 7 Lea (Tenn.), 98, and *Hammond v. Shepard*, 186 Ill. 235, 78 Am. St. Rep. 274, 57 N. E. 867, were based upon the same propositions. In the case of *Glassell v. Hansen*, 135 Cal. 547, 67 Pac. 964, the court had under consideration the rights of parties to an island which sprang up in the Sacramento river, originally

a wide expanse of navigable water, and by its own accretions finally closed one of the channels that separated it from the shore. The patentees of the shore claimed it. In the opinion it was said: "The accretions were to the island, and not to the lands described in plaintiffs' patent. It is a familiar doctrine of the common law that the owner of land bounded by a river, being exposed to the danger of loss from its floods, is entitled to the increment which, from the same cause, may be gradually annexed to it. . . . It is also elementary that if an island springs up in a navigable stream, it belongs to the sovereign, and not to the owner of the land on either of the banks of the stream. So in this case the principle is the same, whether the island existed at the time of the confirmation of the Mexican grant, or was afterward formed in the river. If the accretions had been to plaintiffs' land, and had gradually extended to the island, the plaintiffs would have been the fortunate ones, and the accretions so added to theirs would have been theirs in law": Page 550.

In *King v. Young*, 76 Me. 76, 49 Am. Rep. 596, holding that a mussel-bed over which the water flows at every tide cannot properly be called an island but should be denominated flats, under a colonial ordinance, it was said:

"It seems to be settled both in England and in this country that the land of a riparian proprietor may be increased by accretion. This is not denied by the defendant's counsel. But he contends that the increase must be gradual, and from the shore outward; that if ⁵⁴⁷ an island forms at a distance from the shore, and then, by its own growth, extends inward till it reaches the shore, such new-made land will not become the property of the owner of the shore; and in this we think he is correct. He then contends that a mussel-bed is an island, if it first commences to form at a distance from the shore, and there first shows itself above the surface of the water at ebb tide, leaving sufficient water between it and the shore for boats to pass, although by its continued growth it subsequently extends to and connects with the shore, so as to leave no water between it and the shore at ebb tide. In this we think he is wrong. We think a mussel-bed over which the water flows at every tide cannot properly be called an island. We think such formations constitute what are called flats, and, by virtue of the ordinance of 1641-47 belong to the owner of the adjoining land, if within a hundred rods of high-water mark and so connected with the shore

that no water flows between them and the shore when the tide is out": Page 79.

The principle under consideration holds in the case of reliction. "The formation by accretion or reliction must be imperceptible, and must be made to the contiguous land so as to change the position of the water's margin or edge": *Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300, syllabus. See, also, *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450, 31 S. W. 592.

If the space between the mainland and an island be reduced to a slough, which fills up in such a manner that the two bodies of land join, the respective owners will be entitled to the accretions to their shores. If the slough fills up from the bottom, and the accretions do not begin at the sides, the boundary is the center of the slough, as it was before the water left it: *Buse v. Russell*, 86 Mo. 209; *Minton v. Steele*, 125 Mo. 181, 28 S. W. 746. If an island be separated from the mainland by the channel of a river which becomes dry the same rule obtains.

"It will be noted that refused instructions 4 and 5 announce the proposition that if the land in controversy ⁵⁴⁸ was originally formed in the Missouri river as an island or sand-bar with a channel between it and the mainland belonging to plaintiff, and that by accretions to said bar or island on the south side it finally extended to plaintiff's land on the south bank, or if by the recession of the river from this intervening channel after the formation of the bar or island the bar and the mainland became connected, then plaintiff became the owner thereof as an accretion. This instruction was clearly erroneous in that it ignores the fundamental idea upon which the title to accretions is based, namely, that they must be the imperceptible or gradual accretions to the plaintiff's lands, or the gradual receding of the river therefrom. If the accretions were to the island on the south side, and to the mainland on its north side, and by a change of the river they were thus brought together, such a union of the two tracts did not make the island an accretion to the mainland": *Hahn v. Dawson*, 134 Mo. 581, 36 S. W. 233.

"Suppose the channel of the river between an island and the mainland is left dry by the water, and entirely filled up with deposits of mud, and the island and mainland are at last one continuous tract of land, could the owner of either claim the entire tract? Certainly the newly formed land

would belong to the United States, or it would be divided between the opposite owners, upon the common-law principle, applicable to non-navigable streams, of each going to the thread of the channel, as it was before it was deserted by the water. In the event supposed, the river might be regarded as ceasing to be a navigable one, *pro hac vice*, or rather as being converted, at the slough between the island and the shore, into a non-navigable one. In any event the owner of the shore could not claim both the alluvion and the island, nor, vice versa, could the owner of the island claim the tract on the bank, with its accessions by alluvion": *Benson v. Morrow*, 61 Mo. 345.

If the plaintiffs' land had not been devastated by a violent and convulsive process whose operation was manifest to all who desired to gaze upon it, and its original banks had been worn away by ordinary erosion to the Joy deed line, the defendants could acquire title to it only in the manner described in *Peuker v. Canter*, 62 Kan. 363, 63 Pac. 617; that is, by the outward expansion ⁵⁴⁹ of their shore line across it. These principles hold whether the channel separating the plaintiffs' land from that of the defendants' filled on account of the waterworks dike or from some other cause.

The defendants argue that the so-called island was a mere sand-bar; that an island, to be worthy of the name, must have become elevated above the bed of the stream far enough to make it fit for agricultural purposes; and that the riparian right of accretion can attach to nothing less dignified. It is not necessary to give a formation on the bed of a river a specific name in order that proprietary rights may attach to it. In many states lands totally or partially submerged are made the subject of grant by the sovereign, in order that they may be reclaimed for useful purposes. Islands that arise from the beds of streams usually first present themselves as bars: *Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300; *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450, 31 S. W. 592; *Perkins v. Adams*, 132 Mo. 131, 33 S. W. 778; *Hahn v. Dawson*, 134 Mo. 581, 36 S. W. 233; *Moore v. Farmer*, 156 Mo. 33, 79 Am. St. Rep. 504, 56 S. W. 493; *Glassell v. Hansen*, 135 Cal. 547, 67 Pac. 964; *Holman v. Hodges*, 112 Iowa, 714, 84 Am. St. Rep. 367, 84 N. W. 950, 58 L. R. A. 673.

Before it will support vegetation of any kind a bar may become valuable for fishing, for hunting, as a shooting park,

for the harvest of ice, for pumping sand, and for many other well-recognized objects of human interest and industry. If further deposits of alluvion upon its borders would make it more valuable, no reason is apparent why the law of accretion should not apply. It is not before the court to say what primitive formation will carry the right to accretions, but the ability to support crops certainly is not the single test. In any event the rights of the parties to this litigation are to be determined as of the time the formation in the river and that against the shore came ⁵⁵⁰ together. Before then the defendants could not claim title. At that time there is no doubt such formations, whether sand-bar, island, restored land, or something else, were as properly the subject of dominion by the plaintiffs as by the defendants who seized them.

The supreme court of the state of Missouri, within whose jurisdiction the lower course of this river lies, has been called upon to deal with almost every phase of this subject. Its opinions are in full accord with the principles of law elsewhere recognized. Three brief quotations are quite pertinent:

"If the island was washed away, in whole or in part, after it was surveyed and then reformed on the same bed, the owner of it, as it was before it was so washed, would be entitled to it, but if it was washed away and the land sought to be recovered was made by deposits to and against the survey of the mainland, then such deposits became the property of the owner of the survey": *Buse v. Russell*, 86 Mo. 209, syllabus.

"The sole issue made by the pleadings is whether the lands sued for were accretions to plaintiff's shore land. If they were and are, he is entitled to them without reference to whether they now extend beyond what was once the center line of the main channel. If they were not formed to his land on the bank of the river by gradual accretion of land thereto or by a gradual reliction of the adjoining bed of the river by the receding of the waters, then he is not entitled to recover, whether the lands be called an island or a sand-bar or by any other designation": *Perkins v. Adams*, 132 Mo. 131, 33 S. W. 778.

"In view of all this evidence it is plain that whether island 45 remained substantially as originally surveyed, or whether it was washed away and afterward reformed on its original

site, it is too plain for discussion that what is termed 'the island' now is not an accretion to section 21 or section 16. The doctrine of accretion will scarcely admit of jumping a slough forty to sixty yards wide. In a word, there is nothing saltatory about accretion": *Crandall v. Smith*, 134 Mo. 633, 640, 36 S. W. 612.

Of course, the plaintiffs were obliged to recover upon ⁵⁵¹ the strength of their own title. This they did by connecting themselves with the allottees of the Armstrong grant under the partition proceedings of 1867. The views of the law herein expressed were substantially given to the jury by well-drawn instructions. The period of time within which an owner may reclaim land after it has been submerged is not a question for determination in this action. The plaintiffs show a title good against the defendants. The state has not intervened, and whether it has any rights is immaterial to the present decision. If it really holds the paramount title the defendants cannot take advantage of the fact: *McBride v. Steinweden*, 72 Kan. 508, 83 Pac. 822.

One hundred and ninety-eight special questions were answered by the jury. The court has considered them all, and finds them to be harmonizable with each other and with the general verdict. Many pitfalls were prepared for the jury by using the terms "washing away" and "washed away," but they made themselves entirely clear with reference to the precise effect of the action of the water upon the plaintiffs' land. The argument that there was not sufficient land remaining when the partition suit was commenced from which an island could be cut off and leave two hundred and eight acres was doubtless submitted to the jury, the proper tribunal to determine the fact.

Eighty-eight instructions were given to the jury, and numbers of requests for instructions were refused. The instructions given and those refused have been examined, and no error prejudicial to the defendants is discovered. In view of the findings of fact several matters argued relating to instructions become immaterial. Defenses were fairly submitted. The jury evidently gave the water company full benefit of its special defense that the accretion in front of its lot abutted upon the Kansas and not upon the Missouri river bank. Unwarranted assumptions of fact were ⁵⁵² not made in the instructions. It was the duty of the court, and not of the jury, to interpret the partition proceedings.

The petition names a large number of persons as plaintiffs, and describes them as cotenants of the tract sued for. The verdict was in favor of all these parties. The petition further names a number of persons as defendants who are described as cotenants with the plaintiffs. The verdict was also in favor of "those defendants who are tenants in common with the plaintiffs," evidently meaning those named in the petition. The right to the possession of the land described was a matter of common interest to many persons. One tenant in common may recover the entire estate from a trespasser for the benefit of all. Any fractional interest in land is sufficient upon which to base a judgment of ouster against a trespasser. This being true, the plaintiffs in error suffered no material injury because the jury did not catalogue the names of the prevailing defendants and specify the precise proportional share of each plaintiff and prevailing defendant. The plaintiffs in error are not at all solicitous because the names of some five or six persons appear to have been written in the judgment whose right to recover may not be supported by the record, but they seek to overturn the entire judgment because the verdict is in the form described. This they cannot do. Some of the plaintiffs below may be injured. The plaintiffs in error cannot be.

Those who were given acre quantities in the original partition suit had no interest in the unpartitioned common lands when their demands for specific measures were satisfied. Therefore they and their successors have no interest in the litigation. The land recovered is sufficiently described in the verdict.

The one hundred and seventy assignments of error in the briefs have been duly considered, and none of them requires the case to be tried again. The foregoing observations, which ⁵⁵³ already transcend the proper limits of a written opinion, express the views of the court with reference to those which are of greatest importance.

The judgment of the district court is affirmed.

All the justices concurring.

The Law of Accretion and Reliction is discussed in the notes to *Coulthard v. Stevens*, 35 Am. St. Rep. 307; *Bellfontaine Imp. Co. v. Niedringhaus*, 72 Am. St. Rep. 280. If one's land is bounded by a navigable river, it remains his boundary no matter how far it shifts, subject to be again shifted by accretion or recession: *Frank v. Goddin*, 193 Mo. 390, 112 Am. St. Rep. 493. To give a littoral proprietor title

to land by accretion, the increase must be in imperceptible degrees: *Saunders v. New York etc. R. R. Co.*, 144 N. Y. 75, 43 Am. St. Rep. 729; *Freeland v. Pennsylvania R. R. Co.*, 197 Pa. 529, 80 Am. St. Rep. 550.

An Island Which Springs up in a Navigable Stream does not belong to the owners of contiguous lands; and if by accretion it finally joins the main land, the title to the whole of the soil thus formed belongs to the state: *Holman v. Hodges*, 112 Iowa, 714, 84 Am. St. Rep. 367; *Moore v. Farmer*, 156 Mo. 23, 79 Am. St. Rep. 504. And if the shore line is washed away and the space thus created becomes a river bed on which new land forms, such new land does not necessarily belong to the owner whose lands were washed away. If added to his shore by accretion or reliction, it will belong to him; but if, on the other hand, a nucleolus appears in the channel off the shore, which swells to a nucleus, and thereafter, by accretion, reaches the dignity of an island, it does not inure to the riparian owner: *Frank v. Goddin*, 193 Mo. 390, 112 Am. St. Rep. 493.

A Riparian Owner Whose Land is Submerged does not lose his property therein if he afterward reclaims it, either by natural or artificial means: *Chicago v. Ward*, 169 Ill. 392, 61 Am. St. Rep. 203; although it has been said that where a part of a tract of land bordering on a navigable river is submerged or washed away, the owner cannot regain it except by accretion beginning at the water's edge: *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450.

CASES
IN THE
SUPREME COURT
OF
KENTUCKY.

GARTH v. DAVIS.

[120 Ky. 106, 85 S. W. 692.]

STATUTE OF FRAUDS—Verbal Agreement to Form Partnership—Enforcement of Contract of Purchase.—If two persons make a verbal agreement to form a partnership and each to buy in his own name certain town lots, both thereafter to pay for and own them as copartners, such agreement constitutes a partnership and is not within the statute of frauds, and if after they make such purchase at auction sale, the owner of the lots tenders them a joint deed thereto and demands a compliance with the terms of the sale, which is refused, he is entitled to enforce a specific performance of the contract in a joint action against them. (p. 572.)

STATUTE OF FRAUDS.—Auctioneer's Memorandum.—signed by him, describing the lots sold and stating the terms of the sale, is sufficient to bind both the seller and the purchaser, and is a compliance with the statute of frauds. (p. 572.)

STATUTE OF FRAUDS—Real Estate Partnership.—An agreement to become partners in dealing in real estate is neither a contract to buy nor a contract to sell real estate, as between the parties to it, and is not within the statute of frauds, and need not be in writing if it is to be begun and may end within a year, although as a fact it may not be terminated for more than a year. (p. 573.)

STATUTE OF FRAUDS—Partnership.—If a partnership is formed, though by parol, and the status of the copartners has become thereby fixed, the firm's transactions as between it and others concerning lands are subject to the same terms under the statute of frauds as individuals are. The firm, if it proposes to buy or sell land, will be bound or not in the transaction as an individual would be under the same circumstances. (p. 574.)

W. E. Garth, for the appellant.

S. D. Hines, for the appellee.

¹⁰⁸ O'REAR, J. Appellant owned a tract of land in the city of Bowling Green, Kentucky, which he caused to be divided into town lots. A plat was recorded. He advertised the lots by descriptions as indicated in the recorded plats for sale at public auction. The advertisements were printed, and stated the terms of the sale, which were, that part of the purchase price was to be cash and balance in notes due at stated intervals. At the sale appellee John D. Davis became the purchaser of some of the lots, being the highest bidder, and appellee Henry J. Johnson became the purchaser of others of the lots. The auctioneer at the time entered a memorandum of each of the sales upon his book, and signed it. Appellant tendered a joint deed to appellees, conveying to them jointly all the lots bought by them respectively, and demanded a compliance on their part with the terms of the sale. They refused to accept the deed tendered. This suit against them is for the specific execution of the contract of sale. The petition avers that appellees Davis and Johnson, by parol agreement between themselves, entered into a co-partnership, to buy, own, and use all the lots bought by them respectively; that it was part of the agreement between them that each was to buy in his own name for the partnership certain of the lots, which they each did buy and that both were thereafter to pay for and own all of them as co-partners. A demurrer was sustained to the petition, and it was dismissed because the circuit court conceived that the transaction and agreement were within the statute of frauds and perjuries, and were therefore void. There was not a tender of ¹⁰⁹ deeds to each of the appellees for the several lots bid in by each. So, unless the alleged parol agreement to enter into a partnership to buy the lots, and to hold them for the joint account of the partners, is enforceable, the judgment will have to be affirmed.

The auctioneer's memorandum, signed by him, describing the lots sold, and stating the terms of the sale, is sufficient to bind both seller and buyer, and is a compliance with the statute: *McBrayer v. Cohen*, 92 Ky. 479, 13 Ky. Law Rep. 667, 18 S. W. 123; *Gill v. Hewett*, 7 Bush, 10. The question is, Who was the buyer? Nominally, Davis bought certain lots, and Johnson certain others. So far as the auctioneer's memorandum goes, none of the lots were sold to both Davis and Johnson. However, if, as a matter of fact, they were

purchased by each of them in their individual names for the partnership, they became partnership assets, liable for the debts of the firm, and to be treated as other partnership assets; for it cannot be material how the title appears if it in fact belongs to the partnership. An agreement to become partners in trafficking in real estate is not within the statute of fraud and perjuries. That statute, as re-enacted in this state, reads: "No action shall be brought to charge any person . . . upon any contract for the sale of real estate, or any lease thereof, for longer term than one year, . . . unless the . . . contract, . . . or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or by his authorized agent": Ky. Stats. 1903, sec. 470. An agreement to become partners in dealing in real estate is neither a contract to buy nor a contract to sell real estate as between the parties to it. So far as the formation of the copartnership is concerned, the title to real estate is no wise affected by the making of the agreement. The terms¹¹⁰ of the agreement, the mutual undertakings by the partners as between themselves as to what each will contribute, and the interests of each in the profits of their undertaking, are matters not necessarily affected by the statute. The most numerous, and what seems to us the best-reasoned, authorities hold that such contract need not be in writing if to be begun and may end within a year, although as a fact it may not be terminated for more than a year. We cite the following among many cases holding these views: Browne on the Statute of Frauds, secs. 364-367; Meagher v. Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455; Dale v. Hamilton, 5 Hare, 369; Jones v. Davies, 60 Kan. 309, 72 Am. St. Rep. 354, 56 Pac. 484; Bates v. Babcock, 95 Cal. 479, 29 Am. St. Rep. 133, 30 Pac. 605, 16 L. R. A. 745; Holmes v. McCray, 51 Ind. 358, 19 Am. Rep. 735; Richards v. Grinnell, 63 Iowa, 44, 50 Am. Rep. 727, 18 N. W. 668; Chester v. Dickerson, 52 Barb. (N. Y.) 349, 54 N. Y. 1, 13 Am. Rep. 550. In this state the doctrine prevails that partnership real estate is deemed personality for the purposes of the partnership (Spalding v. Wilson, 80 Ky. 589, 4 Ky. Law Rep. 575; Casky v. Casky, 5 Ky. Law Rep. 775; Flanagan v. Shuck, 82 Ky. 617, 6 Ky. Law Rep. 699), which is sometimes given as one of the reasons for the rule that agreements to become partners in dealing in lands is not within the statute: Flower v. Barnekoff, 20 Or. 132,

25 Pac. 370, 11 L. R. A. 149. When the partnership is formed, though by parol, and the status of the copartners has become thereby fixed, the firm's transactions as between it and others concerning lands are subject to the same terms under the statutes as any individuals are. The firm, if it proposes to buy or sell land, will be bound or not in the transaction, precisely as an individual would be under the same circumstances: *Duncan v. Duncan*, 93 Ky. 37, 13 Ky. ¹¹¹ Law Rep. 917, 40 Am. St. Rep. 159, 18 S. W. 1022. It may buy or sell by its agent, whose authority need not be in writing: *Tewksbury v. Howard*, 138 Ind. 103, 37 N. E. 355; *Brown v. Eaton*, 21 Minn. 409. The memorandum or contract, though signed by the agent alone, his principals not being named, is sufficient under the statute to charge the principals: *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.). 446, 14 L. ed. 463. As copartners are deemed agents for each other in the transactions of the firm (*Ferguson v. Sims*, 3 Ky. Law Rep. 684; *Davis v. Wiley*, 3 Ky. Law Rep. 315, 755; *Scott v. Colmesnil*, 7 J. J. Marsh. 416), a memorandum signed by a partner, or authorized by him and in his name, but made for the firm, will bind the partners.

The case of *Parker's Heirs v. Bodley*, 4 Bibb. 102, cannot be deemed in conflict with what is herein adjudged. That case ought to turn upon the fact that the agreement between Bodley and Parker to become copartners in the purchase of the Byers estate was not consummated until after Parker had bought the land. It was then held that his agreement, subsequently entered into, to sell a part of it to Bodley in the way of partnership enterprise, was within the statutes of frauds. But if the opinion be not susceptible of this construction, it is not in harmony with the later decisions of this court, nor with the trend of the decisions on this subject generally.

It follows that, if either of the appellees was in fact acting for his firm in buying the lots bid in by him at the sale, and was acting in pursuance to the partnership agreement alleged, his act in that matter was the firm's act. He had the power to bind his firm by employing an agent to act for it in signing a sufficient memorandum to comply with the statute. So that the signature of the auctioneer to his memorandum became ¹¹² the binding act of the firm in that transaction. As the sale was to appellees as partners, which

gave them joint interests in the lots, and made them jointly liable therefor (assuming the allegations of the petition to be true), the tender of one deed to them conveying the lots to them jointly was a full compliance with appellant's obligation under the terms of the sale to convey the title as a condition precedent to demanding the money and the execution of the notes. In our opinion, the petition stated a cause of action, and the court erred in sustaining the demurrer to it.

Judgment reversed, and cause remanded for proceedings consistent herewith.

Authorities upon the Question involved in the principal case will be found in the note to McCoy v. McCoy, 102 Am. St. Rep. 230, on what amounts to a contract for the sale of land within the meaning of the statute of frauds.

PARKER v. CATRON.

[120 Ky. 145, 85 S. W. 740.]

TRUSTS—Judicial Sales—Statute of Frauds.—If one, pursuant to an oral agreement with another, purchases land for the latter at judicial sale while the latter is in possession of, and has an interest in, such land, a constructive trust arises in his favor, which is not affected by the statute of frauds. (p. 576.)

TRUSTS—Judicial Sales—Payment of Consideration.—If one, pursuant to an oral agreement with another, purchases land for the latter at judicial sale while the latter is in possession of and has an interest in such land, a constructive trust arises in favor of the latter, and the fact that such purchaser paid the consideration himself does not destroy the trust, when the one for whom it was really purchased offers to pay such consideration and is kept from paying it by the act of the purchaser, who refuses to accept it, and takes a deed to himself. (p. 577.)

CONSTRUCTIVE TRUSTS Arise whenever the legal title to property is obtained by a person in violation, express or implied, of some duty owed to one who is equitably entitled to such title and when the property thus obtained is held in hostility to his beneficial rights of ownership. (pp. 577, 578.)

CONSTRUCTIVE TRUSTS are not within the statute of frauds. (p. 578.)

CONSTRUCTIVE TRUSTS rest on the doctrine of estoppel, the operation of which is never affected by the statute of frauds. (p. 578.)

WITNESSES—Competency—Interest.—A witness cannot testify for himself as to matters occurring with his brother since dead, and thus make evidence for his benefit. (p. 579.)

J. S. Hays and J. M. Hays, for the appellant.

J. H. Wilson, P. D. Black and J. D. Black, for the appellee.

¹⁴⁷ HOBSON, C. J. The father of appellee, John H. Catron, conveyed to him and his brother, Isaac Catron, a tract of land in Knox county. Thereafter a creditor of the father levied an execution upon the land for a debt due him from the father, and the land was sold under the execution. John and Isaac Catron, the two sons, got appellant, William Parker, to bid in the land for them at the execution sale. The amount of the debt was between five hundred dollars and six hundred dollars. John H. Catron afterward redeemed the land from Parker, and subsequently Isaac Catron died, with the title in this condition. Suit was filed to settle the estate of Isaac Catron, and his half was ordered sold in that suit for the payment of his debts. John Catron procured Parker again to buy in the land for him, which Parker did in his own name, at the price of twenty-five dollars. The equity of redemption was then sold, and Parker bought this for five dollars. The land was not redeemed, and at the end of the year Parker, over Catron's objection, caused a deed to be made to himself for the land; that is, Isaac Catron's half of the tract. John Catron then filed this suit in equity against Parker, setting up the facts, and alleging that Parker held the title in trust for him, and praying that he be required to convey the land to him, he having been all the time in the actual possession of it. The court decreed him the relief sought, and the defendant appeals.

Parker denied that he bought the land for John Catron, and denied that Catron made any arrangement with him by which he was to buy it for him, but the weight of the evidence sustains the chancellor's ¹⁴⁸ conclusion. Parker was a relative as well as a near neighbor and close friend. Catron had some trouble with his wife, and was living at home alone, boarding with Parker. Parker had gone his bond in a suit which his wife had brought against him. Parker allowed Catron after the sale to treat the land as his own. He sold timber from the place. He made an oil lease, Parker telling the lessee that Catron's title was all right; and he told several persons that he had bought the land for John, and was going to stand by him. Catron was not apprised of Parker's

change of mind until after or about the time the year had expired in which the land might be redeemed. Parker then declined to receive from Catron the thirty dollars which he had paid. On the question of fact, while the evidence is somewhat conflicting, we cannot disturb the chancellor's finding.

It is earnestly maintained that the agreement of Catron, being in parol, is within the statute of frauds. In *Stark's Heirs v. Cannaday*, 3 Litt. 399, 14 Am. Dec. 76, it was held that where an agent verbally employed to purchase land for his principal does so with the money of the principal, but makes the contract in his own name, a trust for the principal will result by implication, which is not affected by the statute of frauds. The reason given by the court for its conclusion is as follows: "For the statute only forbids the enforcement of a trust or equity created by contract, and not such as results from the nature of the transaction by implication of law." The doctrine of this case was followed in *Lisle v. Lisle's Administrator*, 4 Ky. Law Rep. 990, where the purchase was made at a judicial sale by one for another who paid the consideration. Appellant insists that these cases are not in point, because here appellee did not pay the consideration. Still, he offered to pay it, and was kept from paying¹⁴⁹ it by the act of appellee, who refused to accept it, and insisted on having the deed made to himself. The payment of the consideration by the principal is not the only state of case in which the rule applies. The rule rests upon the idea that the purchaser holds the land in trust for his principal. It is the constructive trust which underlies the rule. In *Pomeroy's Equity*, section 1030, it is said: "All trusts by operation of law consist, therefore, in a separation of the legal and equitable estates; one person holding the legal title for the benefit of the equitable owner, who is regarded by equity as the real owner, and who is entitled to be clothed with the legal title by a conveyance. Certain instances of this class are trusts sub modo. They are termed 'trusts' because the beneficial owner is entitled to the same remedies against the holder of the legal title which are given to the beneficiary under a true trust. All trusts which arise by operation of law are, as the name indicates, excepted from the requirements of the statute of frauds." Again, in section 1044, it is said: "Constructive trusts include all those

instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal, declaration of the trust. They arise when the legal title to the property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility of his beneficial rights of ownership. As the trusts of this class are imposed by equity, contrary to the trustee's intention and will, upon property in his hands, they are often termed 'trusts in ¹⁶⁰ invitum'; and this phrase furnishes a criterion generally accurate and sufficient for determining what trusts are truly 'constructive.' " Constructive trusts are held not within the statute because they rest in the end on the doctrine of estoppel, and the operation of an estoppel is never affected by the statute of frauds: *Morris v. Shannon*, 75 Ky. 89. If Parker had not misled Catron, he might have gotten some one else to buy in the land for him; and if Parker had not let him deal with the land as his own, and held himself out as having bought it in for him, he might still have protected himself. To permit Parker to shield himself behind the statute of frauds, and keep the land, would be to sanction a fraud and deny effect to familiar principles of estoppel. In *Martin v. Martin*, 55 Ky. 8, Draffin bought in Martin's land at a commissioner's sale for him under a verbal agreement to this effect, when there was no right of redemption at such sales. It was held that Draffin held the land in trust for Martin, and that the trust was not affected by the statute of frauds. The same conclusion was reached in *Miller's Heirs v. Antle*, 65 Ky. 407, 92 Am. Dec. 495, and *Green v. Ball*, 67 Ky. 586. It is insisted that these cases are not in point, for the reason that Catron here did not own the land. But he had it in possession and was living upon it. He had a lien on it for the money which he had paid to redeem it from the execution sale. The arrangement with Parker was made to protect his interest, and created no less a constructive trust when his interest in the land was equitable than if he had held the legal title. It would be no less a fraud on Catron to permit Parker to keep the land in the one case than the other. The estoppel arises equally in either case. An agency to

sell land may be created by parol: Talbot v. Bowen, 8 Ky. 437, 10 Am. Dec. 747; Isaacs v. ¹⁵¹ Gearheart, 51 Ky. 231. A verbal partnership to buy land is also not within the statute: Garth v. Davis, 120 Ky. 106, ante, p. 571, 27 Ky. Law Rep. 505, 85 S. W. 692.

Catron was allowed to testify to certain transactions with his brother Isaac, who was dead, and to prove in his own behalf statements made by him not in the presence of Parker. This was error. He could not testify for himself as to matters occurring with his dead brother, nor could he make evidence for himself. But if we eliminate all this, and regard only the testimony admittedly competent, the clear weight of the evidence sustains the chancellor's conclusion. So the error in the admission of evidence was harmless.

Judgment affirmed.

The Creation of Trusts in Land by Parol is the subject of a recent note to Insurance Co. v. Waller, 115 Am. St. Rep. 774.

What Amounts to a Contract for the Sale of Land within the meaning of the statute of frauds is discussed in the note to McCoy v. McCoy, 102 Am. St. Rep. 230.

McDONALD v. McDONALD.

[120 Ky. 211, 85 S. W. 1084.]

WILLS—Testamentary Capacity—Aversion to Children.—Although a testator has sufficient mind to know all about his estate and the nature and value of it, but has a fixed purpose to give his children as little interest in it as possible, and his aversion to them is such that he does not know the natural obligation he is under to them he has not sufficient testamentary capacity to make a valid will. (p. 581.)

WILLS—Testamentary Capacity.—It is necessary in order to have testamentary capacity for one to have such sensibilities as will enable him to know the obligation he owes to the natural objects of his bounty, as it is for him to have the capacity to know the nature and value of his estate and a fixed purpose to dispose of it. (p. 581.)

W. O. Davis and F. McLeod, for the appellants.

H. O. Schoberth, T. L. Edelen and D. T. Edmunds, for the appellees.

²¹⁵ PAYNTER, J. This appeal results from a contest over the will of John McDonald. He left six children—three

sons and three daughters—and the children of Mrs. Davis, a deceased daughter. His will provides for the distribution of his estate into seven parts. Each of his children takes one part, and the children of the deceased daughter one part. The children were not given fee simple titles to the interest devised to them, but only a life estate. They were given no more freedom in the use of the life estates than that afforded by law. Some of those taking life estates had children, and some did ²¹⁶ not have; and, if any died without children, the parts devised went back to the estate. A trial resulted in a verdict for the contestants. A reversal is asked upon the following grounds: 1. That there was no evidence tending to show a want of testamentary capacity; 2. That the verdict of the jury was flagrantly against the weight of the evidence; 3. That the instruction given was erroneous and misleading.

The testimony is voluminous, and we will therefore only state in brief some of the evidence introduced by the contestants which tended to show a lack of testamentary capacity: The testator accumulated a large estate. Early in life he developed a great desire to make and save money. He was grasping and miserly, and evidently cared more for money than he did for his family. If the testimony of the contestants is to be believed, he had no genuine affection for his family, and not the proper conception of his duty to them. There is evidence tending to show that he did not want his wife and children to have any of his estate—as he expressed it, he did not want them to have a “damn dollar”; that he would like to leave it in debt, so that it would take the rents of the land thirty or forty years to pay it; that, if he knew the day he was going to die, he would buy land so it would take that period of time for the rents to pay for it; that he wanted to leave it in such a way that the children would have to work like dogs to get a living out of it. While he seemed to express a pride in the good looks of one of his daughters, yet he only allowed her seventy dollars to clothe her and to pay the other expenses incident to her social position. His daughter, Mrs. Davis, married contrary to his wishes. She lived away from home. Sometimes she would return home with her children, and he would tell her to take her children out of his sight and return home with them. He lived in a comfortable ²¹⁷ house, and on one occasion when one of his sons returned home sick, he put him

in a cabin on his place, which had been occupied as a residence by negroes. When one of his married daughters visited his house upon one occasion, her mother had to slip coal to the daughter's room to make it comfortable. When his daughter, Mrs. Davis, died in Lexington, he refused to go where her body was, though he went to the funeral and sat in the back part of the church. One witness testified that he said concerning his deceased daughter, Mrs. Davis, "She is dead now, and, I hope, in hell." One of Mrs. Davis' sons was ill, and an operation was necessary to save his life. A doctor offered to perform the operation free, if the testator would pay the hospital fee. He said he had nothing to do with it; "Damn him! let him die." He said on one occasion that, if he could take his property with him, he would die happy. In speaking of one of his sons, he said that he was "a thieving son of a b——," and was robbing him of his wheat. There was much testimony offered by the contestants tending to show that the testator did not know the obligations he owed to his children. He unquestionably had the mind to know his estate, and the nature and value of it. He seems to have had a fixed purpose as to the disposition of his estate, and that purpose was to give his children as little interest in it as possible. The contest was waged upon the ground that his aversion to his children was such that he did not know the obligations he was under to them. It is as necessary, in order to have testamentary capacity, for one to have such sensibilities as will enable him to know the obligations he owes to the natural objects of his bounty, as it is for him to have the capacity to know the nature and value of his estate, and a fixed purpose to dispose of it: *Murphy's Exr. v. Murphy*, 23 Ky. Law Rep. 218 1460, 65 S. W. 165; *Wise v. Foote*, 81 Ky. 10, 4 Ky. Law Rep. 643; *Woodford v. Buckner*, 111 Ky. 241, 23 Ky. Law Rep. 627, 63 S. W. 617. We are of the opinion that there was abundant evidence tending to show a lack of testamentary capacity to justify the court in submitting the case to the jury. We do not think the verdict of the jury is flagrantly against the weight of the evidence.

The instruction defining "testamentary capacity" is substantially the same as was given in the case of *Woodford v. Buckner*, 111 Ky. 241, 23 Ky. Law Rep. 627, 63 S. W. 617, and, in our opinion, was a proper definition of "testamentary capacity."

The judgment is affirmed.

AVERSION TO RELATIVES AS AFFECTING MENTAL CAPACITY TO MAKE VALID WILL.

It may be safely stated that as a general rule the right of a testator to dispose of his estate as he likes depends neither on the justice of his prejudice nor the soundness of his reasoning. He may do what he will with his own; and, as to his relatives, all that is required of him at the time of making his will is that he shall possess ability to comprehend those who appear as the natural objects of his bounty and appreciate the duty which recommends them to consideration. In determining whether certain relatives are such objects, he must possess ability to reach a rational conclusion, however erroneous or unjust, with reference to them: *Smith v. Smith*, 48 N. J. Eq. 566. Hence, ordinarily capricious and arbitrary likes and dislikes of his relatives who are the objects of his bounty, or should be, are not evidence of insanity or a want of mental capacity to make a will, on the part of a testator who entertains such likes or dislikes: *Estate of Spencer*, 96 Cal. 448, 31 Pac. 453; *Pelamourges v. Clark*, 9 Iowa, 1; *Sherley v. Sherley*, 81 Ky. 240; *Barnes v. Barnes*, 66 Me. 286; *Trumbull v. Gibbons*, 22 N. J. L. 117; *Coit v. Patchen*, 77 N. Y. 533; *Matter of Will of White*, 121 N. Y. 406; *Chaney v. Bryan*, 16 Lea, 63; *Will of Code*, 49 Wis. 179. People may hate their relatives for bad reasons, and not be deprived of testamentary capacity: *Carpenter v. Carpenter*, 94 Cal. 406. Prejudice, hatred, ill-will and the exhibition of violent passions on the part of one formerly affable do not prove a want of mental capacity to make a will: *Sherley v. Sherley*, 81 Ky. 240. And resentment of a testator against his son not amounting to a delusion, will not vitiate a will prejudicial to such son, made in accordance with previously declared intentions: *Lucas v. Parsons*, 24 Ga. 640, 71 Am. Dec. 147.

Or the fact that a testator gave his daughter a comparatively small portion of his property, after there had been an estrangement and quarrel between them, cannot be considered as of any weight on the question of his mental capacity to dispose of his property by will: *Meeker v. Meeker*, 75 Ill. 260. That a man became prejudiced against some of his children without sufficient cause, and made unjust remarks against them not warranted by the facts does not show that he has insane delusions, or was devoid of testamentary capacity, because an owner of property who has capacity to attend to ordinary business has the right to dispose of it by will as he may choose, and if he is capable of acting rationally in the ordinary affairs of life so that he may comprehend what disposition he may wish to make of his property, and be able to select the objects of his bounty, he is capable of making a valid will: *Schneider v. Manning*, 121 Ill. 376.

A testator may have his preferences, dislikes, and animosities toward his heirs, and may be guided by them in the disposition of his estate by will, yet if he is competent in mind and makes his will

freely and voluntarily, these conditions of mind will not per se destroy his will for want of testamentary capacity, and though such prejudice may be unfounded, still if they are not used to coerce and control his will or impose a fraud upon him, they will not avoid his will: *Carter v. Dixon*, 69 Ga. 82. Or the fact that the provisions of a will are unjust or are the result of passion toward children, or of unworthy or unjustifiable sentiments or of false information toward them, is not sufficient to invalidate the will: *Buchanan v. Belsey*, 65 App. Div. (N. Y.) 58. If it appears that the testatrix, who had formerly entertained trustful and kind feelings for the contestant, suddenly conceived for her an unexplained dislike, which caused the testatrix to discriminate against contestant in her will, but the evidence fails to show that such change of feeling was based upon the supposed existence of facts which never existed, and which no rational person, in the absence of evidence, would have believed to exist, or that there was such a condition of things surrounding the whole case which would not only be consistent with the theory of delusion, but from which the existence of the delusion might reasonably be inferred it cannot be said that such testator had not mental capacity to make a valid will: *Estate of McGovern*, 185 Pa. 203.

An unjust belief by a testatrix that her brother, the contestant of her will, had obtained more than a fair share of the property left by their father to her detriment, and which caused her to have an intense dislike for such brother, is simply a mistake of judgment and is not ground for rejecting the will on the ground of mental incapacity: *Matter of Lang*, 15 Misc. Rep. (N. Y.) 521.

As a person has the right to dispose of his property by will as he sees proper, the fact that he disinherits what was once his favorite child, but for whom he afterward formed an aversion is no evidence in itself that he is insane or entertains a delusion in relation to such child, which affects his mental capacity to make a valid will: *Bungardner v. Andrews*, 55 Iowa, 638, 8 N. W. 481.

If the devisees under a will are not the relatives of the deceased, while the contestants are his brothers and sisters, and it appears that the testator disliked the latter and had motives for disinheriting the latter, the will cannot be refused probate simply from the fact of such disinheritance: *Smith v. James*, 72 Iowa, 515, 34 N. W. 309.

Evidence that the testator had expressed the opinion that some of his children, contestants, had mistreated him and that he disliked them, and the denial of such facts by such children, is too intangible to justify an instruction that if the testator was influenced in framing his will by such belief, and that it was a delusion, that fact would justify a verdict for the contestants: *Shorb v. Brubaker*, 94 Ind. 165; *Hite v. Sims*, 94 Ind. 333.

The fact that a sincere believer in Christian Science left her home and her sisters and lived apart from them because she believed that they persecuted her for her peculiar views, which they ridiculed and to which they were strongly opposed, does not necessarily show, even though she may have exaggerated their conduct, that she was subject to an insane delusion in the matter, nor can a will, subsequently made by her and by which she revoked a former will and gave the bulk of her estate to the Christian Science church, be set aside for that reason: *Matter of Brush*, 35 Misc. Rep. (N. Y.) 689. In *Collins v. Brazill*, 63 Iowa, 432, 19 N. W. 338, the court said: "The disposition of her property to a stranger by the testatrix, to the exclusion of her brother and sister, cannot be regarded as evidence of incapacity to execute the will. There was a want of harmony between her and these relatives growing out of the disposition and settlement of their father's estate. She believed that she had not obtained the share which she ought to have received. This incident rather supports the conclusion that she retained her memory, than the opposite, that it was impaired." These decisions strengthen a conviction we entertained before examining them, that the decision in the principal case was not in harmony with the pre-existing authorities on the subject, though we confess a desire, but not an expectation, that it may be a pioneer in pointing out a new pathway that others will follow.

In some cases where the aversion of the testator for his child is so unreasonable and unnatural as to be deemed an insane delusion, and where such child has been disinherited because of such delusion, the will has been set aside on the ground of mental incapacity on the part of the testator. Thus, where the testator, who had previously had great regard for his daughters, who had advanced to middle life and were of high standing in the community in which they lived, with nothing in their conduct, either in their private or public life, to indicate that they were not women of the severest virtue, suddenly conceived the idea that women generally were unchaste, and that his daughters were so in particular, and on one occasion stated to them that the neighboring women who visited them were immoral and that their visits were for immoral purposes, and he absolutely disinherited his daughters, such facts are sufficient to indicate that his will was the result of insane delusions: *Hardenburgh v. Hardenburgh* (Iowa), 109 N. W. 1014.

In another case, speaking of a testatrix the court said: "She certainly seems to have lost all affection for her daughter and her daughter's family, in consequence, probably, of having taken up this utterly groundless notion that her daughter was trying to poison her. She carried her dislike to that extent that she did not wish her daughter to see her while alive. In view of these incontestable facts, we must consider her insane, and incapable of making a will not-

withstanding she may have been of sound mind in other respects." It may be added that in this same case the testatrix had such an aversion to her daughter that she refused to see her in her last illness: *Ballentine v. Proudfoot*, 62 Wis. 216, 221.

On the other hand, evidence that friendly relations existed between the deceased testator and his relatives, all of whom were disinherited by the will, is admissible as bearing on the issue of the mental capacity of the testator: *Cheney v. Golby*, 225 Ill. 394, 80 N. E. 289; *In re Burns' Will*, 121 N. C. 336, 28 S. E. 519. The unnatural exclusion by a testator of his only daughter with whom he has had no difficulty, and to whom he had never given more than a trifling pittance, and who was in need of aid from him, from a just and equal share of his estate, is a strong circumstance to show either mental incapacity or undue influence: *Reynolds v. Root*, 62 Barb. 250.

TRAVELERS' INSURANCE COMPANY v. HENDERSON COTTON MILLS.

[120 Ky. 218, 85 S. W. 1090.]

INSURANCE—Indemnity—Pleading.—In suing on a policy of employes' indemnity insurance, providing that the employé shall be over twelve years of age, it is not essential that the complaint allege that the injured person was over twelve years of age. (p. 587.)

INSURANCE—Indemnity—Void Conditions.—A condition in an employes' indemnity insurance policy that no action shall be maintained thereon unless brought within thirty days after payment of loss by the insured is opposed to public policy and void. (p. 588.)

AGE—Evidence of.—The age of a son may be shown by the declarations of his father since deceased. (p. 589.)

INTEREST.—Under Prayer for General Relief interest may be allowed on a claim from the time of the filing of the suit, although such interest is not specifically prayed for in the petition. (p. 589.)

COSTS—Liability for.—If an indemnity insurance company does not defend the suit of the insured and he has to defend it, the insurance company is liable for the costs upon its policy of indemnity. (p. 590.)

J. A. Dean and J. F. Lockett, for the appellant.

M. Merritt, for the appellee.

221 *HOBSON*, C. J. On February 22, 1901, John Warren, an employé of the Henderson Cotton Mills, was killed; suit was brought by his administrator against it, and a judgment

was recovered for two thousand nine hundred and forty-four dollars and forty cents and costs, which was affirmed by this court: *Henderson Cotton Mills v. Warren's Admr.*, 24 Ky. Law Rep. 1030, 70 S. W. 658. The Henderson Cotton Mills paid the judgment, and then instituted this suit against the Travelers' Insurance Company on a policy issued to it on the 4th of April, 1900, and indemnifying it for the period of one year against such losses. The policy reads as follows:

"In consideration of the warranties in the application ²²² for this policy, a copy of which is hereto attached and which is made a part of this contract, and of two hundred and ten dollars (\$210.00) premium, the Travelers' Insurance Company, of Hartford, Connecticut (hereinafter called 'The Company'), does hereby agree to indemnify Henderson Cotton Mills of Henderson, county of Henderson, state of Kentucky (hereinafter called 'The Assured'), for the period of twelve months beginning on the fourth day of April, 1900, at noon, and ending on the fourth day of April, 1901, at noon, standard time, at the place where this policy has been countersigned, against loss from common law or statutory liability for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered within the period of this policy, by an employé or employés of the assured while on duty within the factory, shop or yards mentioned in said application, or upon the ways immediately adjacent thereto provided for the use of such employés or the public, in and during the operation of the trade or business described in the said application; subject to the following agreements, which are to be construed as conditions."

Here follow sixteen conditions, the first, ninth, tenth, eleventh and fourteenth of which are as follows:

"1. The company's liability for an accident resulting in injuries to, or in the death of, one person is limited to fifteen hundred dollars (\$1,500), and subject to the same limit for each person, the total liability for any one accident resulting in injuries to, or in the death of, several persons is limited to ten thousand dollars (\$10,000.00.)"

"9. If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the home office of the company every summons or other process as soon as the same ²²³ shall have been served on

him, and the company will at its own cost defend against such proceeding, in the name and on behalf of the assured, or settle the same unless it shall elect to pay to the assured the indemnity provided for in clause '1' of the foregoing provisions, as limited therein.

"10. The assured shall not settle any claim, except at his own cost, nor incur any expense, nor interfere in any negotiation for settlement or in any legal proceeding without the consent of the company previously given in writing, but he may provide at the time of the accident such immediate surgical relief as is imperative. The assured, when requested by the company, shall aid in securing information, evidence, and the attendance of witnesses, and in effecting settlements, and in prosecuting appeals.

"11. This policy does not cover loss from liability for injuries to, or caused wholly or in part by, any child employed by the assured contrary to law, nor to, or caused wholly or in part by, any child employed under twelve years of age where no statute restricts the age of employment."

"14. No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue. No such action shall lie unless brought within the period within which a claimant might sue the assured for damages unless at the expiry of such period there is an action pending against the assured, in which case an action may be brought against the company by the assured within thirty days after final judgment has been rendered and satisfied as above. The company does not prejudice by this clause any defenses to such action which it may be entitled to make under this policy."

²²⁴ The plaintiff did not allege in its petition that John Warren, the person injured, was over twelve years of age, and the defendant demurred to the petition on this ground. The court overruled the demurrer, holding this matter of defense to be pleaded by the defendant. In this ruling we concur. To require the plaintiff to set out all sixteen conditions of the policy, and to negative the existence of all the exceptions therein contained, would be to require too great prolixity of pleading, and would be in conflict with the rule that where exceptions are stated in separate clauses of an

instrument, and not in the promising or contracting clause, the plaintiff may, in his petition, set up only so much of the contract as he relies on: *Aetna Ins. Co. v. Glasgow etc. Power Co.*, 21 Ky. Law Rep. 726, 52 S. W. 975; *Gardner v. Continental Ins. Co.*, 25 Ky. Law Rep. 426, 75 S. W. 283.

The action was not brought within thirty days after the plaintiff paid the judgment in favor of Warren's administrator, but was brought on the thirty-first day thereafter. The provisions of the fourteenth clause above quoted are relied on to defeat the action. The validity of such clauses was recently considered by this court in *Union Central Life Ins. Co. v. Spinks*, 26 Ky. Law Rep. 1205, 83 S. W. 615, 69 L. R. A. 264, and it was there held that contract limitations of the time in which an action may be brought are contrary to public policy and void. The previous cases are collected in that opinion, which is conclusive of the question.

The defendant pleaded that John Warren was under twelve years of age. This was denied by the reply. The defendant introduced the mother of John Warren, and two of his brothers, who testified that he was born on September 3, 1889, and was about eleven years and five months old at the time of his death, on February 2, 1901. The mother testified that she kept a record in ²²⁵ her family Bible of the ages of her children, but that the Bible was lost when they moved to Kentucky several years before John's death. She also said that her son Paschal was two years and seven months older than John. Paschal also stated the same. On the other hand, the plaintiff proved that John Warren was as large as Paschal, and they looked so alike as to appear to be twins; that John said at different times that he was thirteen, and going on fourteen; that the father of John, who was also dead, declared on different occasions that this was John's age. This evidence was objected to by the defendant, and it is insisted that the objection should have been sustained. The testimony of the mother was only based on her recollection of the date of John's birth. The testimony of her children seems to have been based on the information they had received in the family. John had the same means of knowledge as they, and the father had the same means of knowledge as the mother. But they spoke under oath, while the declarations of John and his father were not made under oath. The rule excluding hearsay evidence does not apply to pedigree,

and, in stating what this exception means, in 1 Greenleaf on Evidence, section 104, the learned author says: "The term 'pedigree,' however, embraces not only descent and relationship, but also the facts of birth, marriage and death, and the times when these events happened. These facts, therefore, may be proved in the manner above mentioned, in all cases where they occur incidentally and in relation to pedigree. Thus, an entry by a deceased parent or other relative, made in a Bible, family missal, or any other book; or in any document or paper, stating the fact and date of the births, marriage or death of a child or other relative, is regarded as a declaration of such parent or relative in a matter of pedigree." It will be observed from this ²²⁶ that an entry in a family Bible is not admitted on the ground that it was made at the time of the transaction, but as the declaration of the deceased parent or relative in a matter of pedigree. In *Swink v. French*, 11 Lea, 78, 47 Am. Rep. 277, the question was whether Olivia Swink was twenty-one years of age at the time the contract relied on was made. Her husband, she being dead, was allowed to state that she had told him that she was born on July 17, 1850, although it was shown in that case there was a record of her birth in a family Bible, which was in the possession of another member of the family in another county than the one in which the trial was had. To same effect are *Copes v. Pearce*, 7 Gill (Md.), 247; *Clements v. Hunt*, 46 N. C. 400. A person may testify to his own age, although his information is based entirely on hearsay from members of the family: *Cheever v. Congdon*, 34 Mich. 296; *Hill v. Eldridge*, 126 Mass. 234; *Cherry v. State*, 68 Ala. 29; *Central Ry. Co. v. Coggin*, 73 Ga. 689. The declarations of the father and John Warren were not self-serving, but were made in the usual course of things. The recollections of the father and the boy himself are as much to be trusted as the recollection of the physician, the midwife, the nurse, or the neighbor, and, therefore, their admission did not infringe the rule that the best evidence must be produced.

The verdict is not against the weight of the evidence. The jury were warranted in finding interest from the bringing of the suit under the prayer of the petition for all proper relief, although such interest was not specifically prayed in the petition.

As the insurance company did not defend the suit, and the cotton mills company had to defend it and could not make a settlement, the court properly held ²²⁷ the insurance company liable for the cost of the action upon its policy of indemnity.

Judgment affirmed.

Fidelity Insurance is the subject of a note to *First Nat. Bank v. Fidelity etc. Co.*, 100 Am. St. Rep. 774.

Proof of the Age of Persons is the subject of a note to *Grand Lodge v. Bartes*, 111 Am. St. Rep. 583. A person may testify of his own age, although his information has been derived solely from his mother, who is in the county of the trial: *McCollum v. State*, 119 Ga. 308, 100 Am. St. Rep. 171.

BRIGHT v. COMMONWEALTH.

[120 Ky. 298, 86 S. W. 527.]

EVIDENCE—Dying Declarations of Husband—Proof of by Widow.—On the trial of one for homicide the dying declarations of the deceased, made under a sense of impending death, may be proved by his widow. (p. 591.)

WITNESSES—Infants—Competency.—An intelligent boy, twelve years of age, though not able to define the legal obligation of an oath, but who does know that by being sworn he is required to tell the truth and will be punished for it if he does not, is competent as a witness in a criminal prosecution. (p. 592.)

WITNESSES—Competency—Religious Belief.—Whether a person's religious training has been so developed that he comprehends his responsibility to God for lying does not affect his competency as a witness. The question is one of credibility and not of competency. (p. 592.)

B. Spaulding, W. H. Sweeney and S. Russell, for the appellant.

N. B. Hays, attorney general, and C. H. Morris, for the appellee.

²⁰⁰ O'REAR, J. Appellant appeals from a judgment upon a verdict convicting him of manslaughter. There were no objections to the instructions of the court to the jury, nor do they appear to us to have been objectionable from appellant's point of interest. The instructions offered by appellant, and rejected by the court, except one to the jury to peremptorily find him not guilty, were embodied in those actually given. There was evidence of appellant's guilt, and it would there-

fore have been improper to have given the peremptory instruction.

There are but two questions presented in the brief for appellant, which seem to be the only two relied upon in the grounds for a new trial that are reviewable by this court on the state of the record. These are questions of evidence. The first is an objection to the testimony of Mrs. Stayton, the widow of the murdered man. No eye-witness testified in the case ³⁰⁰ except appellant. Stayton, whom appellant killed, was stabbed mortally by appellant, and died within a few minutes thereafter. Before his death he stated to his wife that he was dying, and that appellant and his son had killed him. The statement was not admitted as part of the *res gestae*, as seems to be assumed in argument, but as proof of a dying declaration. That the wounded man was then under a sense of his impending death is evident, as well as that he made the statement to his wife of the manner in which he had received his fatal wounds, in contemplation of that immediate event. We held in the case of *Arnett v. Commonwealth*, 114 Ky. 593, 24 Ky. Law Rep. 1440, 71 S. W. 635, that the wife of a declarant was a competent witness to prove his dying declaration under such circumstances.

The other question is as to the competency of the witness, Tommy Ewing, a lad twelve years of age. The point is made that he was too immature to know the binding obligation of an oath, and that consequently he was incompetent as a witness. By the Civil Code, every person is competent to testify for himself or another, subject to certain exceptions not material in this inquiry, unless he be found by the court incapable of understanding the facts concerning which his testimony is offered. The Criminal Code contains no such provision. Indeed, it is silent on this point, which leaves in force in this state as to criminal prosecutions the common law, as it affects the competency of witnesses. On the subject of interest, and the like, the legislature has made certain changes in this respect as to such competency, but these changes do not touch upon the question of understanding or religious or moral comprehension of the witness. In *Greenleaf on Evidence*, section 367, it is said that if a child offered as a witness appears ³⁰¹ to have sufficient natural intelligence, and to have been so instructed as to comprehend the nature and effect of an oath, he is admitted to testify, whatever his age may be. The witness stated that he realized that it was wrong to tell

a lie; that, while he did not understand what an oath meant, yet he knew that by being sworn he was required to tell the truth; and that if he did not do so he would be punished for it, but he did not know how, nor by whom. As to a future punishment, he naively said that "the bad man would get him if he told a lie." His evidence was clear, and showed mental capacity, understanding, and memory sufficient to qualify him. It appears that he was conscious that the oath bound him to speak the truth, and he knew the difference between telling the truth and telling a lie. It did not disqualify him as a witness that he was not able to define the legal obligation of an oath. Whether his religious training had been so developed that he comprehended his responsibility to God for lying was not made clear, nor was it material as affecting his competency. In *Bush v. Commonwealth*, 80 Ky. 244, 3 Ky. Law Rep. 740, it was held that, under the constitution of this state, the civil capacity belonging to or enjoyed by citizens generally shall not be taken from or denied to any citizen on account of his opinions in regard to religious matters. Otherwise the constitutional guaranty that "the civil rights, privileges or capacities of any citizen shall in nowise be diminished or enlarged on account of his religion" would be violated when one class of citizens is held to have civil capacity to testify in a court of justice because they entertained a certain opinion in regard to religion, while another class is denied to possess that capacity because they do not conform to a prescribed belief. "Free governments deal with the acts ³⁰² of the citizen, and not with his thoughts." If disbelief in Deity does not disqualify one from being a witness here, unbelief could not do so. The question becomes one of credibility and not of competency.

We perceive no error in the record, and the judgment is therefore affirmed.

The Admissibility in Evidence of Dying Declarations is the subject of a note to *State v. Meyer*, 86 Am. St. Rep. 637. At page 641 of this note it will be seen the dying declarations of a wife are admissible on his trial for her murder, and that the dying declarations of a husband are admissible against his wife to prove her guilt.

There is No Fixed Age When Infants Become Competent to testify as witnesses. Children seven or eight years of age have been permitted to testify on the trial of grave crimes. The substantial test of the competency of an infant witness is his intelligence and his comprehension of an obligation to tell the truth: *Commonwealth v. Furman*, 211 Pa. 549, 107 Am. St. Rep. 594; *McGuff v. State*, 88 Ala. 147, 16 Am. St. Rep. 25, and cases cited in the cross-reference note thereto.

COVINGTON SAWMILL AND MANUFACTURING COMPANY v. DREXILIUS.

[120 Ky. 493, 87 S. W. 266.]

NUISANCE—Private Sewer Across Public Street—Liability of Constructor.—If a sewer constructed in a public alley without the consent of the city, by the owner of a lot adjoining such alley for his own convenience, is by him allowed to become in such a defective condition as to constitute a nuisance, he, and not the city, is liable for an injury to a child caused by her jumping from a pile of lumber and breaking into such sewer. In such case it is the duty of the constructor of the sewer or his successor in interest to keep it in a safe condition for those who are entitled to use the alleyway. (p. 594.)

STREETS—Rights of Children—Negligence.—The fact that a child was playing in a public alleyway when injured through the negligence of another is no defense to an action to recover for the injury. (pp. 595, 596.)

NEGLIGENCE—Gross—Punitive Damages.—Instructions to find punitive damages if the jury believe from the evidence that the injury complained of was the result of gross negligence is reversible error if there is no evidence whatever of such negligence. (p. 597.)

S. D. Rouse and J. B. Frankel, for the appellant.

R. C. Simmons, for the appellee.

497 O'REAR, J. Appellant was operating a lumber plant on a lot adjoining one of the public alleyways of the city of Covington. To divert a flow of surface water from the lot for its own convenience, it constructed and maintained a blind ditch or sewer, made of oak planks, across this alleyway and along the side of its lot, which was covered with dirt, hiding the location of the sewer. The ditch or sewer was not kept in repair, so that the planks became rotten. Appellee, a child of eleven or twelve years of age, while playing on the lumber piles and in the alley, jumped from one of these lumber piles to the ground in the alleyway, when the covering to this ditch gave way under her weight, her foot was caught in the hole thus made, and her leg broken. In her suit against appellant she was awarded a verdict of two thousand five hundred dollars in damages. This appeal presents the following matters which are alleged as errors at the trial, and for which a reversal is sought.

It is first complained that appellant was not liable for the condition of the street; that, when the ditch was dug and the box sewer put in, it was made reasonably safe for its purpose,

and to keep it in repair was not the duty of appellant. The alleyway was a public highway which had been dedicated to the public use and accepted by the city many years before the accident sued for, and was so used at the time of the accident. The act of appellant in digging and maintaining the ditch across the alleyway without the direction ⁴⁹⁸ or permission, and, for that matter, without the knowledge, of the municipality, being for appellant's personal convenience, could not impose the duty on the municipality to keep it in repair. It was appellant's duty to maintain the ditch or sewer in such reasonably safe condition as would not interfere with the public's superior right to use the alleyway for any purpose for which it might have been properly used. Its failure to keep the ditch in such repair constituted it a nuisance.

In *Woodring v. Forks Township*, 28 Pa. 265, 70 Am. Dec. 134, it was said: "A man who owns the soil on which the public have a highway has a right to enjoy his property in every way that may promote his interest or convenience so that he takes care not to injure the public easement. . . . He may cut a passage across the road for the purpose of draining his land or leading water to his mill, because the land is his own, and he may use it for all legitimate purposes. But as he has no right to injure the public easement, he is bound, in order to preserve that right, not only to construct bridges over the ditches, where they cross the highways, but also to keep them in repair. The duty of keeping such bridges in repair is as imperative as the original obligation to construct them."

It further appeared in that case that the ditch had not been cut by the appellant charged with the liability for not keeping it in repair, but was cut by a preceding owner. The court held, however, that when appellant continued to use the watercourse across the highway for the use of his mill, thereby rendering a continuance of the bridge necessary, he was liable for the repairs of the bridge. From those facts, and the further fact that the bridge had been kept in repair by the former owner of the mill, an ⁴⁹⁹ agreement to keep it in repair was implied. To the same effect in *Phoenixville v. Phoenix Iron Co.*, 45 Pa. 135.

In *Dygert v. Schenck*, 23 Wend. 446, 35 Am. Dec. 575, a case was presented to the supreme court of New York where the owner of premises adjacent to a highway dug a raceway

across the public road to conduct water to his mill, and built a bridge across it. Plaintiff's mare fell through the bridge in consequence of the plank flooring being loose, and received injury. The bridge, when built, was a substantial structure, and continued so for a number of years. In the end, however, the bridge was suffered to get out of repair. The court wrote: "In suffering this, the defendant came short of his obligation to the public. Any act of an individual done to a highway, though performed on his own soil, if it detract from the safety of travelers, is a nuisance. . . . Special damage arising from it, therefore, furnishes ground for a private action, without regard to the question of negligence in him who digs it. . . . The moment a plank became liable to slide from the bridge, or any other serious difference arose against its safety, as compared with the original unbroken ground the ditch took the character of a nuisance."

In *Perley v. Chandler*, 6 Mass. 454, 4 Am. Dec. 159, it was likewise held: "If a highway be located over watercourses, either natural or artificial, the public cannot shut up these courses, but may make the road over them by the aid of bridges. But when a way has been located over private land, if the owner should afterward open a watercourse across the way, it will be his duty, at his own expense, to make and keep in repair a way over the watercourse for the convenience of the public, and, if he should neglect to do it, he may be indicted for the nuisance."

⁵⁰⁰ Judge Dillon, in his *Municipal Corporations*, section 1032, lays it down, upon authorities cited, that no person, not even the adjoining owner, whether the fee in the street be in himself or in the public, has the right to do any act which renders the use of the street hazardous, or less secure than it was left by the municipal authorities; and that, if the adjoining owner undermines the street by placing unauthorized obstructions therein which make the use of the street unsafe or less secure, he is guilty of a nuisance, and is liable to any person who, using due care, sustains any special injury therefrom. He declares: "The ultimate liability in such cases is upon the author or continuer of the nuisance." To the same effect is *Stephani v. Brown*, 40 Ill. 428; *Matheny v. Wolffs*, 2 Duvall, 137.

The next proposition asserted by appellant is that appellee was injured while she was playing in the street, and cannot

recover for injuries received while so engaged. The great weight of authority, as well as the common sense of the matter, is that children may use the public streets of a city for pleasure as well as grown persons may. If an adult were walking along a street idly, or merely in the pursuit of pleasure, or were driving along a street for a similar purpose, and was injured by a negligent defect in a street, it could scarcely be maintained that he could not recover for his injuries. So long as such use does not impinge upon the rights of others to use them, such users are equally within the protection of the law, and hence equally entitled to have them in as reasonably safe condition as those who are using them as travelers or in pursuit of business. Indeed, we know of no rule of law that gives precedence to those engaged upon business over those in pursuit of pleasure, in the rightful use of the public ⁵⁰¹ highway. In crowded cities the use of the public streets and alleys for purposes of recreation and pleasure by children and others may be regarded as public necessities. We fail to perceive why, if a horse, being used on a public street for the purpose of pleasure, may be recovered for if injured because of the defective condition of the street, a child playing upon the street may not recover for injuries to itself from the same cause: *McGuire v. Spence*, 91 N. Y. 303, 43 Am. Rep. 668; *Chicago v. Keefe*, 114 Ill. 222, 55 Am. Rep. 860, 2 N. E. 267; *Indianapolis v. Emmelman*, 108 Ind. 530, 9 N. E. 155.

In *Gibson v. Huntington*, 38 W. Va. 177, 45 Am. St. Rep. 853, 18 S. E. 447, 22 L. R. A. 561, the court expressed the idea in this language: "Poor parents are unable to provide a place of healthful exercise and play for their children, for it requires all their earnings to clothe, feed and shelter them. The law prohibits them, under the penalty of being trespassers, from entering on the lands of others; and now to forbid them to use the road to its utmost boundary for the purpose of play, when not interfering in any manner with the traveling public, would savor too much of the Dark Ages of barbarism, when children were subject to inhuman diabolical punishments, and their lives were at the mercy of those having charge over them. The roads are the only commons children now have, and to confine them in the narrow limits of their tenement houses would be cruel, unjust and oppressive, blight their young lives, and render their bodies weak, sickly, scrofulous and vile."

In *Reed v. City of Madison*, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733, a seven year old child was injured while rolling a hoop on the sidewalk. The court regarded that this was not per se negligence, ⁵⁰² and used this language: "It is natural for a child to play, early and late, at home and abroad, going and coming, and everywhere. Because it plays on its travels on the sidewalk, it should not be declared an outlaw, or excluded from the usual remedies of the law." A similar recovery was allowed for the death of a nine year old boy while at play on a street, in the case of *Louisville v. Snow's Admr.*, 107 Ky. 536, 21 Ky. Law Rep. 1268, 54 S. W. 860.

The instructions to the jury are complained of, but they submitted the case under principles set forth above, except that the court told the jury that they could find punitive damages against appellant if the jury should believe from the evidence that the injury was the result of the gross negligence of the defendant. There was no evidence whatever of gross negligence, and that instruction should not have been given. Appellee contends that the amount of the verdict is no more than reasonable compensation, and that a new trial should not be awarded, because the error is harmless. This court has always been reluctant to interfere with the province of the jury in saying what is reasonable compensation for injuries of this kind. Where mental and physical suffering are elements of damages, there is no certain standard by which they may be measured. The common experience, observation, and judgment of a jury of average intelligence are peculiarly adopted to determine such matters. While we might be of opinion that the verdict was no more than would compensate one for the pain endured, and the impairment of his capacity for laboring and earning money, as the result of such an injury, manifestly to do so would be to usurp in a measure the province of the jury in this respect. They may have thought otherwise, and the appellant is entitled to their verdict, and not our judgment instead, ⁵⁰³ upon this subject. If the jury should have found that a less sum was fair compensation, it would not have been within our province to have increased it. We do not feel warranted in this case to say that some part of the verdict returned was not punitive damages. The court submitted that item to the jury. Their verdict was not unanimous. It may have been that some of the jury, or, for that matter, all who did agree to the verdict, may have given some part of it by way of punishment. At any rate,

appellant was entitled to have his real case tried by the jury under unobjectionable instructions as to the measure of damages. There are a few instances where the verdict was so unmistakably compensatory only that the court has not reversed for erroneous instructions allowing punitive damages. But where it ceases to be a certainty, and is a doubt whether their verdict was regarded by the jury as merely compensation, we have not allowed our conjecture to supply the jury's function. The court endeavors to keep clear of trenching in any sense upon the jury's proper province. The trial court evidently inadvertently failed to define negligence to the jury in the instructions, although it did define ordinary care, the absence of which is negligence. Maybe the jury was not misled by this fact, but upon a retrial this omission should be cured. We will add that the instruction defining ordinary care would have been less open to objection if it had omitted the last clause, "for his own safety."

Therefore the judgment is reversed, and cause remanded for a new trial under proceedings not inconsistent herewith.

Negligence in Dealing with Children is discussed generally in the note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 406. The fact that children are playing in a public street when they are injured by reason of the defective condition of the highway does not bar a recovery for their injuries: *Gibson v. Huntington*, 38 W. Va. 177, 45 Am. St. Rep. 853. Thus, there may be a recovery against a city for the death of a child caused by a defect in a sidewalk, although he was rolling a hoop at the time: *Chicago v. Keefe*, 114 Ill. 222, 55 Am. Rep. 860.

If the Owner of Land Over Which a Highway Passes takes advantage of the road for purposes of drainage, he owes the duty to the public to preserve the highway as good and safe for travel as before: See the note to Wright v. Austin, 101 Am. St. Rep. 115.

HACKETT v. BROOKSVILLE GRADED SCHOOL DISTRICT.

[120 Ky. 608, 87 S. W. 792.]

SCHOOLS—Prayer—Sectarianism.—A prayer offered at the opening of a public school imploring the aid and presence of God in the day's work, and asking for wisdom, strength and patience to teach the children properly, and that teacher and pupil have mutual love and respect, and for a heavenly reunion after death, all of which is asked in Christ's name, is not sectarian in its nature, nor does it make the school a sectarian school within a constitutional provision prohibiting the appropriation of educational funds in aid of sectarian schools. (p. 601.)

SCHOOLS—Prayer—Religious Worship.—A public school opened with prayer, during which pupils are not required to attend, is not a place of worship, nor are its teachers ministers of religion, within the meaning of a constitutional provision that no person shall be compelled to attend any place of worship or contribute to the support of a minister of religion. (pp. 601, 602.)

SECTARIAN BOOKS—Bibles.—The King James translation or any other edition of the Bible, though adopted by one or more denominations as authentic, or by them asserted to be inspired, is not a sectarian book. (p. 603.)

BOOKS—Sectarian.—A book, to be sectarian, must show that it teaches the peculiar dogmas of a sect as such, and not alone that it is so comprehensive as to include them by the partial interpretation of its adherents, nor is a book sectarian merely because it is edited or compiled by those of a particular sect. It is not the authorship, nor mechanical composition of the book, nor the use of it, but its contents, that give it its character. (p. 603.)

SCHOOLS—Sectarian Books—Bibles.—Any edition of the Bible is not of itself a sectarian book, and, when used merely for reading, in the common schools, without note or comment by teachers, is not sectarian instruction, nor does such use of the Bible make the schoolhouse a house of religious worship, within the meaning of a statute providing that no books of a sectarian nature shall be used in any common school, nor shall any sectarian doctrine be taught therein. (p. 613.)

W. A. Byrne, for the appellant.

E. L. Worthington, for the appellees.

⁶¹² O'REAR, J. Appellant, who resides in the town of Brooksville, and has children attending the Brooksville graded common school, brought this suit against the trustees and teachers of the school, seeking an injunction against the use of the English translation of the Bible, known as the "King James" or "authorized edition," and to prevent the teachers from opening the school with prayers or songs alleged to be

of a denominational character. On full hearing the injunction was denied, and the petition dismissed.

To get at the exact question presented for decision on this appeal, we will eliminate the allegation concerning ⁶¹³ worship of God by singing of sectarian songs. There was no proof whatever that any songs of any kind had been sung during the school year in which the suit was brought, nor was it either required or permitted. Whether it was permissible to have sung the songs complained of is not, therefore, a matter considered by the court.

Appellant invokes section 189 of the constitution of Kentucky and section 4368, Kentucky Statutes of 1903, which read as follows: "No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of any church, sectarian or denominational school": Const., sec. 189.

"No books or other publications of a sectarian, infidel or immoral character, shall be used or distributed in any common school; nor shall any sectarian, infidel or immoral doctrine be taught therein": Ky. Stats. 1903, sec. 4368.

The Brooksville graded common school is maintained by the state by the imposition of taxes. It is open alike to all white children within certain ages who or whose parents are residents of the district. It is in no sense a sectarian church or denominational school. Section 189 of the constitution was aimed not to regulate the curriculum of the common schools of the state, but to prevent the appropriation of public money to aid schools maintained by any church or sect of religionists. If the constitution deals directly with the question of compulsory worship, it is in section 5, which reads as follows: "No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, ⁶¹⁴ to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in any wise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma, or teaching. No human authority shall, in any case what-

ever, control or interfere with the rights of conscience." If, under the guise of public instruction, children should be required to attend schools where worship of God was compulsory, it would seem to be within the prohibition of that section. We find from the evidence in this case that, while chapters or passages from the Bible (King James' translation) were read, and prayers were offered by the teachers at the opening of the school each morning, appellant's children, who are members of the Roman Catholic Church, were not required to attend during those exercises, nor were they or others who were conscientiously opposed to doing so required to participate in them.

Two questions are presented by the record for decision: (1) Does the offering of prayer to God in opening a school such as was offered in the Brooksville school, make that school a "sectarian school," within the meaning of section 189 of the constitution? (2) Is the King James translation of the Bible a "sectarian book," within the meaning of section 4368 of the Kentucky Statutes?

The prayer that was offered, and which it is urged converted the school into a sectarian school, is as follows: "Our Father who art in Heaven, we ask Thy aid in our day's work. Be with us in all we do and say. Give us wisdom and strength and patience to teach these children as they should be taught. May ^{our} teacher and pupil have mutual love and respect. Watch over these children, both in school-room and on the playground. Keep them from being hurt in any way, and at last, when we come to die, may none of our number be missing around Thy Throne. These things we ask for Christ's sake. Amen." It has not been pointed out to us wherein the prayer quoted is sectarian in its construction. The Reverend Father James A. Cusack, a witness for appellant, asseverates that, in his opinion, it is sectarian. But he admits that there is nothing in it repugnant to the doctrines of his religious belief (Roman Catholic). Nor does he claim that it is promulgated, authorized, or used by any sect of religionists whatever. As neither the form nor substance of the prayer complained of seem to represent any peculiar view or dogma of any sect or denomination, or to teach them, or to detract from those of any other, it is not sectarian, in the sense that the word is commonly used and understood, and as it was evidently intended in the section quoted. The constitutional convention in framing the

organic law for all the people of the state, must be presumed to have used ordinary words, not according to the peculiar views of a few, but as generally used. The word "sectarian," from the connection in which it is used, cannot be given the construction contended for by appellant, which seems to be that any form of prayer not authorized by a particular church is sectarian.

Though it be conceded that any prayer is worship, and that public prayer is public worship, still appellant's children were not compelled to attend the place where the worshipping was done during the prayer. The school was not "a place of worship," nor are its teachers "ministers of religion," within the contemplation of section 5 of the constitution, although a prayer may be offered incidentally at the opening of ^{the} school by a teacher. Meetings of the General Assembly are opened by prayer, and other state institutions authorize the worship of God. They have never been regarded as fostering sectarian teachings. The complaint in this case goes only to the sectarian feature of the exercises, not because they were religious. It is not contended that it was the purpose of the constitution to prevent worship, nor to prevent teachers in the public schools from assuming worshipful relations. The great aim was to keep church and state forever separate as distinct institutions; to prevent the government of one from assuming rightful control of the government of the other. Nor is it clear that it was intended to keep religion out of the school, though it is apparent that one aim, at least, was to keep the "church" out. The question is not presented, and is not, therefore, decided, whether any exercise which partakes incidentally of worship is prohibited.

The main question, we conceive to be, is the King James translation of the Bible, or, for that matter, any edition of the Bible, a sectarian book? There is, perhaps, no book that is so widely used and so highly respected as the Bible; no other that has been translated into as many tongues; no other that has had such marked influence upon the habits and life of the world. It is not the least of its marvelous attributes that it is so catholic that every seeming phase of belief finds comfort in its comprehensive precepts. Many translations of it, and of parts of it, have been made from time to time, since two or three centuries before the beginning of the Christian era. And since the discovery of the

art of printing and the manufacture of paper in the sixteenth century, a great many editions of it have been printed. There is controversy over the authenticity of some parts of some of the ⁶¹⁷ editions. And there are some people who do not believe that any of it is the inspired or revealed word of God. Yet it remains that civilized mankind generally accord to it a reverential regard, while all who study its sublime sentiments and consider its great moral influence must admit that it is, from any point of view, one of the most important of books. That it has drawn to its careful study and research into its history and translations so many profound scholars of history is not to be wondered at. The result has been that, while many editions of the several translations have been made, those based upon the revision compiled under the reign of King James I, 1607-1611, and very generally used by Protestants, and the one compiled at Douay some time previous, and which was later adopted by the Roman Catholic Church as the only authentic version, are the most commonly used in this country. That the Bible, or any particular edition, has been adopted by one or more denominations as authentic, or by them asserted to be inspired, cannot make it a sectarian book. The book itself, to be sectarian, must show that it teaches the peculiar dogmas of a sect as such, and not alone that it is so comprehensive as to include them by the partial interpretation of its adherents. Nor is a book sectarian merely because it was edited or compiled by those of a particular sect. It is not the authorship nor mechanical composition of the book, nor the use of it, but its contents, that give it its character. Appellant's view seems to be that the church is the custodian and interpreter of the Bible as God's word. From that it is supposed that any Bible not put forth by authority of a church claiming that prerogative is sectarian. The question is not whether the version used is canonical or apocryphal. That question does not at all enter into the matter. Otherwise it would inevitably ⁶¹⁸ lead to the state that any book not favored by some church authority, or which may be supposed by it to be hostile to its teachings, would be sectarian. In that way the authority of a church could largely control the course of study in the public schools by issuing its bull against certain scientific or moral treatises as being atheistic or heretic. The very mischief aimed at by the framers of the constitution, and by the people adopting it, would

thus be accomplished, viz., the interference in matters of state by the church.

If the legislature or the constitutional convention had intended that the Bible should be proscribed, they would simply have said so. The word "Bible" is shorter and better understood than the word "sectarian." It is not conceivable that, if it had been intended to exclude the Bible from public schools, that purpose would have been obscured within a controversial word. Nor can we conceive that under the American system of providing thorough education of all the youth, to fit them for good citizenship in every sense, the legislature or the constitutional convention could have intended to exclude from their course of instruction any consideration of such a work, whose historical and literary value aside from its theological aspects, would seem to entitle it to a high place in any well-ordered course of general instruction. The history of a religion, including its teachings and claim of authority—as, for example, the writings of Confucius or Mahomet—might be profitably studied. Why may not also the wisdom of Solomon and the life of Christ? If the same things were in any other book than the Bible, it would not be doubted that it was within the discretion of the school boards and teachers whether it was expedient to include them in the common school course of study without violating the impartiality of the law concerning ⁶¹⁹ religious beliefs. The objection does not appear to be to the matter. It is to the publication.

A learned witness for appellant, who gives it as a matter of religious belief and teaching, says that the church is the interpreter of the Bible, but that the Protestants teach on the contrary that every one is his own interpreter. The constitution may be said to teach, too, that every one is his own interpreter, for it guarantees that every one may worship God (which is supposed to include the study of His revealed word) according to the dictates of his own conscience. Children are taught the constitution in the common schools. May it not be said then with equal force that to teach the constitution, which itself teaches the right to perfect freedom in the worship of God, is sectarian, because some sect might deny that it was right to teach the children to worship God in any way except according to the teachings of that particular sect? Milton, Newton, Galileo, as well as Wickliffe, Whittingham, and Tyndale, came under the bans of the church. The phil-

osophy and the writings of these great thinkers, wherein they do not teach sectarianism, may be used in the public schools, and in some part are so used, in spite of the fact that at one time they were believed to be hostile to God's revelations as interpreted by the church. This same question, in one form or another, has come before the courts of the country a number of times. It has not been so free from doubt that the conclusions of the judges have always been harmonious. This has been in part owing to the differing expressions of the constitutions and statutes being interpreted. While allowing that because of these differences in language the opinions may not appear to be precisely in point, yet they reflect the drift of judicial opinion in this country, so far as it has been expressed, concerning ⁶²⁰ the main idea—whether the Bible is a sectarian book. Likewise whether it may be read in the public schools at all. While some of the constitutions construed in terms prohibit the use of sectarian books in the public schools, yet, independent of those provisions, it seems to be generally conceded that to teach sectarianism in a public school would be violative of religious freedom, which is guaranteed by every constitution. With this explanation we will briefly review the decisions bearing on the subject.

One of the earliest cases, celebrated for the great learning displayed, as well as by the distinguished ability of the judge who wrote the opinion, is *Vidal v. Girard's Exr.*, 2 How. (U. S.) 127, 11 L. ed. 205, opinion by Mr. Justice Story. The question for decision, so far as it bears on this case, was whether a charitable bequest of the late Stephen Girard, establishing a college, prohibited the teaching of Christianity to its pupils. The will contained this restrictive clause: "I enjoin and require that no ecclesiastic, missionary, or minister of any sect whatever, shall ever hold or exercise any station or duty whatever in said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college." The intention of the testator, so far as it was not unlawful, was as the law of the case. The question was, Did he intend to exclude the teachings of Christianity, or its being taught by the clergy? The testator himself furnished this key to his thought (page 133 of 2 How., 11 L. ed. 205): "In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever; but as there is such a multitude of sects, and such a diversity of opinion amongst them,

I desire to keep the tender minds of the orphans, who are to derive advantage ⁶²¹ from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce; my desire is that all the instructors and teachers in the college shall take pains to instill into the minds of the scholars the purest principles of morality, so that, in their entrance into active life, they may, from inclination and habit, evince benevolence toward their fellow-creatures, and a love of truth, sobriety and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer."

It would be difficult to express a more fitting description of the underlying principles of our government in its treatment of the subject of public education. In construing those provisions of the will which we have quoted as bearing particularly on the subject whether the Bible and its teachings might be employed in the college by lay teachers, the court said: "Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college; its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidences of Christianity, from being read and taught in the college by lay teachers? Certainly there is nothing in the will that proscribes such studies. Above all, the testator positively enjoins 'that all the instructors and teachers in the college shall take pains to instill into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence toward their fellow-creatures, and a love of truth, sobriety and industry, adopting at the same time such religious tenets as their matured reason may enable them to ⁶²² prefer.' Now, it may well be asked, what is there in all this, which is positively enjoined, inconsistent with the spirit or truths of Christianity? Are not these truths all taught by Christianity, although it teaches much more? Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament? Where are benevolence, the love of truth, sobriety and industry, so powerfully and irresistibly inculcated as in the sacred volume? The testator has not said how these great principles are to be taught, or by whom, except it be by laymen, nor what books are to be used to explain or en-

force them. All that we can gather from his language is that he desired to exclude sectarians and sectarianism from the college, leaving the instructors and officers free to teach the purest morality, the love of truth, sobriety and industry, by all appropriate means; and, of course, including the best, the surest and the most impressive." Two points are emphasized by the reasoning of the learned judge: (1) That it was sectarianism that was prohibited, and (2) that the Bible is not a sectarian book—which are the two points most prominent in this case.

Donahoe v. Richards, 38 Me. 379, 61 Am. Dec. 256, was an action against a school board for expelling a pupil who refused to read the English version of the Bible, that book having been adopted by the board as one to be used by the pupils in the course of the school work. We note that counsel for appellee contends that this case ought not to be regarded as authority, because there was neither statute nor constitutional prohibition on the subject of sectarian teaching. Yet the court held that: "The common schools are not for the purpose of instruction in the theological doctrines of any religion or of any sect. The state regards no sect as superior to any other, . . . ⁶²³ and, if the tenet of any particular sect were so taught, it would furnish a well-grounded cause of complaint on the part of those who entertained different or opposite religious sentiments." The court held that the King James translation of the Bible was not a sectarian book. It was said: "The Bible was used merely as a book in which instruction in reading was given. But reading the Bible is no more an interference with religious belief than would reading the mythology of Greece or Rome be regarded as interfering with religious belief or an affirmance of the pagan creeds."

In Spiller v. Inhabitants of Woburn, 12 Allen (Mass.), 127, it was held that the public school committee did not exceed their authority in passing an order that the Bible should be read at the opening of the schools on the morning of each day. "No more appropriate method could be adopted," said the court, "of keeping in mind of both teachers and scholars that one of the chief objects of education, as declared by the statutes of this commonwealth, and which teachers are especially enjoined to carry into effect, is to impress on the minds of children and youth committed to

their care and instruction the principles of piety and justice, and a sacred regard for truth."

It is not deemed necessary in this state to define by statute now the purposes of public education. They are at least as broad as the broadest under any similar system in use in any of the states.

Pfeiffer v. Board of Education of Detroit, 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536, was an application to the court to compel the board of education to discontinue the use of a certain book known as "Readings from the Bible" in the public schools of Detroit. The constitution and laws of Michigan ⁶²⁴ on the subject of religious freedom are substantially as are ours, save there was no express inhibition of sectarian instruction in public schools. The question decided by the court was that "Readings from the Bible," though it was used as a text-book in the school, did not violate constitutional provisions guaranteeing to every one the right to worship Almighty God according to the dictates of his own conscience; nor was it a compulsion of any person to attend or support any place of religious worship, or to pay taxes to any minister of the gospel or teacher of religion; nor was it an appropriation of the public money for the benefit of any religious sect or society; nor was it a diminution of the civil rights of any person on account of his religious belief. One judge dissented from the opinion of the court.

In *Moore v. Monroe*, 64 Iowa, 367, 20 N. W. 475, 52 Am. Rep. 444, it was shown that the teachers of the school were accustomed to occupy a few minutes each morning in reading selections from the Bible, in repeating the Lord's prayer, and singing religious songs. The plaintiff had two children in the school, but they were not required to be present during the time thus occupied. A statute of that state provided: "The Bible shall not be excluded from any school or institution in this state, nor shall any pupil be required to read it contrary to the wishes of his parent or guardian." The constitution of the state prohibited the legislature from passing any law interfering with the free exercise of religious worship, or compelling any person to pay taxes to support any religion, or for building any place of worship, or the maintenance of any ministry. The plaintiff's contention was that by the use of the schoolhouse as a place for reading the Bible, repeating the Lord's prayer, and singing religious songs it ⁶²⁵ was made a place of worship; that his children

were compelled to attend a place of worship, and he as a taxpayer was compelled to aid in building and repairing a place of worship. The court held that the statute did not have any of the effects claimed by the plaintiff. In the absence of such a statute, a rule of the school board to the same effect could not, of course, violate the same constitutional principles, if the statute would not have done so.

The supreme court of Illinois, in *McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163, held that a rule of the directors of a public school requiring the reading of a King James edition of the Bible for fifteen minutes each morning, at which, however, no one was required to be present or to participate in, was not unconstitutional as interfering with the religious conviction of the plaintiff and his father, who were patrons of the school, and Roman Catholics.

In none of the states from which the foregoing opinions have been cited was there an express prohibition of the use of sectarian books. Still in all of them there was the familiar and fundamental constitutional provision guaranteeing religious freedom, which would have been violated, as was held in every instance, either in terms or by necessary implication, by the teaching of sectarian doctrines. That such would have been the result of such teaching seems to us to be perfectly obvious. In the very learned and exhaustive note by Judge Freeman to *County of Cook v. Industrial School*, 8 Am. St. Rep. 386 (case reported in 125 Ill. 540, 18 N. E. 183, 1 L. R. A. 437), it is shown that the constitutions of twenty-four states contain provisions prohibiting the payment of moneys or any appropriation or grant for the support, benefit or in aid of sectarian schools. The editor, commenting ⁶²⁶ on the constitutional provisions mentioned, and others where they are silent upon the matter of sectarianism, says: "In view of the above decisions and constitutional provisions, we conclude that the words used in the several constitutions in point, where the language does not expressly so indicate, must have been intended by the people who ratified them to provide against the promulgation or teaching of the distinctive doctrines, creeds, or tenets of any particular Christian or other religious sect in schools or institutions where such instruction was to be paid for out of the public funds, or aided by such funds or by public grants, and that a school or institution is sectarian when the doctrines or tenets of some particular faith, sect, or religion are taught

to the exclusion of others; and especially so where a school or institution has a distinctive or strict denominational name descriptive or indicative of the fundamental doctrines of the sect to which it belongs; or where a school or institution is under the exclusive control of a sect having such name, and by a course of instruction excluding all others, seeks to inculcate its tenets alone, it is then sectarian; and it makes no difference that pupils of all sects, denominations, and religious beliefs, or those of no belief, are permitted the advantages of such school or institution. It is what is taught that is the determining factor."

This brings us to the consideration of the authorities relied on by appellant.

State v. District Board, 76 Wis. 177, 20 Am. St. Rep. 41, 44 N. W. 967, 7 L. R. A. 330, is the principal case cited. The questions there presented were whether the reading of selected portions of the King James translation of the Bible during school hours violated the rights of conscience, compelled complainants to ⁶²⁷ aid in support of a place of religious worship, and was sectarian instruction. All three propositions were decided in the affirmative. The decision is apparently against the weight of authority. The court seemed to realize as much, if they should be regarded as all bearing on the same principle. Speaking of them, but not discussing them in detail, the court said: "A number of cases in different states, supposed to have a bearing upon the main question here considered and determined (to wit, whether the King James version of the Bible is a sectarian book), have been cited, and quotations made therefrom at considerable length by the respective counsel and by the circuit judge overruling the demurrer to the answer. None of the states in which those decisions were made seem to have in their constitution a direct prohibition of sectarian instruction in the public schools. It is believed that this state was the first which expressly embodied the prohibition in its fundamental law, and we are not aware of any direct adjudication of the question under consideration."

The court seems to turn the case upon the fact that the King James version, "the whole of it," was used as a reading book in the school. The opinion admits that text-books founded upon or containing extracts from the Bible might be properly used. It was even said: "The constitutional

prohibition of sectarian instruction does not include them, even though they may contain passages from which some inferences of sectarian doctrine might possibly be drawn. Furthermore, there is much in the Bible which cannot justly be characterized as sectarian. There can be no valid objection to the use of such matter in the secular instruction of the pupils. Much of it has great historical and literary value, which may be thus utilized without violating the constitutional prohibition. It ⁶²⁸ may also be used to inculcate good morals—that is, our duty to each other—which may and ought to be inculcated by the district schools. No more complete code of morals exists than is contained in the New Testament, which reaffirms and emphasizes the moral obligations laid down in the Ten Commandments.” With profound respect to the supreme court of Wisconsin, we are nevertheless unable to see how its position can be maintained logically. For it takes no notice of the conscientious conviction of the Jews, or nonbelievers, any of whom may have as valid objection to the use of any part of the New Testament as Roman Catholic citizens have to the King James version. It seems to narrow the question down to matter of canonical approval of the printed volumes. The court does not attempt to argue, nor do we see how it could be maintained, that that fact alone could make a book sectarian which in its matter was not inherently so.

The next case is *State v. Schere*, 65 Neb. 853, 91 N. W. 846, 93 N. W. 169, 59 L. R. A. 927. The constitution of Nebraska provides: “No sectarian instruction shall be allowed in any school or institution supported in whole or in part, by the public funds set apart for educational purposes.” The action complained of was the reading of selections and extracts from the “King James version or translation of the Bible,” and the singing of certain religious and sectarian songs, and the offering of prayer to the Deity. The court said: “We do not think it wise or necessary to prolong a discussion of what appears to us an almost self-evident fact—that exercises such as are complained of by the relator in this case both constitute religious worship and are sectarian in their character, within the meaning of the constitution. Nor do we feel inclined to make what ⁶²⁹ might be looked upon as a spurious exhibition of learning by quoting at length from the many judicial decisions and utter-

ances of eminent men in this country concerning the subject. Perhaps the case most nearly in point, because of similarity both of facts involved and constitutional enactments construed to the case at bar, is *State v. District Board*, 76 Wis. 177, 20 Am. St. Rep. 41, 44 N. W. 967, 7 L. R. A. 330."

It is undeniably the peculiar province of the supreme courts of the states to place final authoritative construction upon the constitutions of their respective states in matters involving solely their internal policy. Whether the reasons given by the court are sound or not is not material as affecting the binding force of the construction upon citizens and others whose actions come up for consideration by the government of that state. But where the opinion is cited abroad as persuasive argument why its conclusions should be elsewhere adopted, it is of the first importance that its reasoning should be sound. That similar provisions, or the same principle of law, have frequently come before other high courts of last resort, and been by them decided in a certain way, is a fact that cannot safely be ignored. It is more than likely that general concurrence of judicial opinion on the same subject is apt to be right. Due deference to the enlightened judgment of the learned profession of the law, and to all concerned, leaves no alternative but to consider all that has been said by courts of equal rank upon a subject of such universal importance as to have been incorporated in some form in every constitution of the states of America. Two of the judges of the supreme court of Nebraska confined their concurrence to the point of "sectarian instruction." On petition for rehearing the chief justice ^{also} filed a response on behalf of the court. The only case admitted to have a direct bearing on the question opposing the court's conclusions was the Michigan case cited above. But we observe what appears to us to be a modification of the original opinion in parts of the response. After pointing out that there are admittedly verbal differences between the King James and the Douay translations of the Bible, which some sectarians regard as material, the court said: "But the fact that the King James translation may be used to inculcate sectarian doctrines affords no presumption that it will be so used. The law does not forbid the use of the Bible in either version in the public schools. It is not proscribed either

by the constitution or the statutes, and the courts have no right to declare its use to be unlawful because it is possible or probable that those who are privileged to use it will misuse the privilege by attempting to propagate their own peculiar theological or ecclesiastical views and opinions. The point where the courts may rightfully intervene, and where they should intervene without hesitation, is where legitimate use has degenerated into abuse—where a teacher employed to give secular instruction has violated the constitution by becoming a sectarian propagandist. . . . The section of the constitution which provides that 'no sectarian instruction shall be allowed in any school or institution supported, in whole or in part, by the public funds set apart for educational purposes,' cannot, under any canon of construction with which we are acquainted, be held to mean that neither the Bible nor any part of it, from Genesis to Revelation, may be read in the educational institutions fostered by the state."

The court also wisely noted that sectarian instruction might occur from frequent reading, even without ⁶³¹ note or comment, of "judiciously selected passages," and observed that whether such practices existed as amounted to sectarian instruction must be determined upon the facts of each particular case. We find ourselves in entire accord with the views quoted above from the response of the Nebraska supreme court.

In *Board of Education v. Minor*, 23 Ohio St. 211, 13 Am. Rep. 233, the only question presented or decided was whether the school board might not prohibit the reading of the Bible in the public schools. It was held that they could; that nothing in the laws of that state made it compulsory upon the boards or teachers to use the Bible as a text-book.

We believe the reason and weight of the authorities support the view that the Bible is not of itself a sectarian book, and, when used merely for reading in the common schools, without note or comment by teachers, is not sectarian instruction; nor does such use of the Bible make the school-house a house of religious worship.

The judgment of the circuit judge, having been in accord herewith, is affirmed.

Judge Cantrill, absent.

Petition for rehearing by appellant overruled.

A Teacher who, to Quiet the Pupils and Prepare them for their work, repeats the Lord's prayer and the Twenty-third Psalm as a morning exercise, without response, comment or remark, the only demand on the pupils being that they should demean themselves in an orderly manner, does not conduct a form of religious worship or teach sectarian or religious doctrine: *Billard v. Board of Education*, 69 Kan. 53, 105 Am. St. Rep. 148, and see the note thereto on religious and sectarian teaching in the public schools.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

SMITH v. HOCKENBERRY.

[146 Mich. 7, 109 N. W. 23.]

CRIMINAL CONVERSATION—Trial—Instructions.—If, in an action for criminal conversation, the charge of the court makes the whole case turn upon the sole question of whether the defendant was guilty of the act of intercourse alleged, and the defendant disclaimed any theory of conspiracy, and the jury finds for the plaintiff, a refusal to charge that collusion cannot be inferred from certain facts appearing in the case is not prejudicial to the plaintiff. (p. 616.)

CRIMINAL CONVERSATION—Condonation—Mitigation of Damages.—In an action to recover for criminal conversation, the fact that the plaintiff has continued to live and cohabit with his wife after learning of the wrong may be considered in mitigation of damages. (pp. 616, 617.)

CRIMINAL CONVERSATION—Evidence of Character of Wife—Mitigation of Damages.—In an action to recover for criminal conversation, evidence tending to show the criminal intimacy of plaintiff's wife with other men, her association with women of bad repute, and of her general reputation for chastity, is admissible in mitigation of damages. (p. 617.)

CRIMINAL CONVERSATION—Evidence of Character of Wife—Mitigation of Damages.—In an action for criminal conversation, evidence that plaintiff's wife consulted counsel in regard to bringing suit before plaintiff did, offered solely for the purpose of showing the depravity of plaintiff's wife and as tending to show that the alleged criminal conversation was brought about by her under circumstances indicating that discovery was expected, is admissible in mitigation of damages. (p. 618.)

CRIMINAL CONVERSATION—Evidence.—In an action for criminal conversation a female witness having testified to seeing the defendant and plaintiff's wife in a compromising situation, it may be shown that such witness had stated that there was an understanding between herself and plaintiff's wife to get money out of the defendant. This is not collateral matter, but bears directly upon the truthfulness of the witness, and tends to show a conspiracy. (p. 618.)

Q. A. Smith, O. J. Hood and G. Huggett, for the appellant.

L. H. McCall, F. A. Dean and G. C. Fox, for the appellee.

* MONTGOMERY, J. This is an action for criminal conversation. The case was before the court at the October term of 1904, and is reported in 138 Mich. 129, where a sufficient statement of the main features of the case is given. It was there held that on the record as there made there was no proof to sustain defendant's claim that the plaintiff connived at his wife's criminal intimacy with the defendant, and that the wife's alleged statements to witnesses that her husband knew of her intimacy with other men were incompetent. It was also held that testimony relative to the criminal intimacy of plaintiff's wife with other men before the act in question was competent, but that testimony as to her after-conduct was not. The case has been tried anew, and a verdict of twenty-five dollars for plaintiff rendered. The plaintiff brings error.

The record contains forty-one assignments of error. Error is assigned on a refusal of a request which in substance directed the jury that collusion could not be inferred from certain facts appearing in the case. As the charge of the court made the case to turn upon the sole question of whether the defendant was guilty of the act of intercourse as alleged, and as the defendant disclaimed any theory of conspiracy, and, what is more conclusive, as the jury found for the plaintiff, it is altogether clear that the refusal of this request should not now be complained of.

The plaintiff requested the court to charge that: * "The fact that the husband, after learning of the wrong that he had suffered, did not break up his home or drive his wife therefrom or apply for a divorce, but condoned her offense, is no bar to his action against the defendant for any wrong committed by him."

This was given with the addition of these words: "It may lessen the damages, but does not take away the right of action, and the damages, if any, are for you to find, if you reach that branch of the case."

It will be seen that the question is thus presented whether the condonation of the wife's offense by the husband may be considered in mitigation of damages. Plaintiff's counsel cite, in support of the claim that such testimony is not to be received in mitigation, *Heermance v. James*, 47 Barb. 120, which was a case in no wise like the present. The question in that

case was whether the act of defendant, in influencing the plaintiff's wife to refuse to recognize or receive the plaintiff as her husband or to live with him as his wife, was actionable. The holding of the court was that an action would lie for this wrong, even though the wife continued to live in the house with her husband. It was with reference to this situation that the language used in the brief of counsel was employed, viz: "Her remaining with him under the circumstances would rather add the provocation of insult to the keenness of suffering. It would continue before him a present, living, irritating, aggravating, if not consuming, source of grief, which even her absence might, in a measure, relieve."

It is obvious at a glance that the court was not there dealing with the question here involved. The authorities bearing directly upon this question are not numerous. Some English cases are said to hold condonation a bar: 3 Encyclopedia of Evidence, p. 795. The current of authority is not so. On principle, however, we hold that the fact that the plaintiff has continued to live and cohabit with the wife is a circumstance to be considered in mitigation. ¹⁰ The declaration in such case usually, as in the present, contains a charge of loss of the society, fellowship, and assistance of the wife. Why should it not be competent to show that this was not the case for any considerable time? *Morning v. Long*, 109 Iowa, 288, 80 N. W. 390; *Ball v. Marquis*, 122 Iowa, 665, 98 N. W. 496. We think the instructions of the court fair in all respects.

The court permitted evidence of the conduct of Mrs. Smith prior to the act charged, including testimony tending to show criminal intimacy with other men, and also tending to show association with women of bad repute. This latter testimony is claimed to have been incompetent on the ground that plaintiff, while he might be expected to meet testimony of reputation of his wife, could not be prepared to meet attacks upon the character of his wife's associates. We think the testimony was admissible. Not only is it competent to show the previous reputation of the wife, but distinct acts of immorality may also be given in evidence: 3 Encyclopedia of Evidence, 796. This was so decided when this case was here before. Testimony of intimate association with lewd women clearly bears upon the question of her chastity. The testimony of the previous acquaintance and intimacy of the witness Stevens and plaintiff's wife was competent for the like purpose. The question asked of the witness Mary Boyer as to

whether she saw Mrs. Smith at Stevens' place of business several times since the last suit was not objected to.

Testimony was received tending to show that Mrs. Smith, plaintiff's wife, saw the attorney employed in the case before plaintiff did. A letter written by plaintiff's counsel to the defendant was then received under objection. Defendant's counsel disclaimed any purpose of showing connivance or conspiracy, but say that this letter was offered to show the depravity of plaintiff's wife, and also as tending to show that the alleged acts of criminal intercourse were brought about by plaintiff's wife herself, and under circumstances indicating that discovery was expected. We think the testimony along this line ¹¹ was competent for this purpose. It had a decided bearing upon the question of the character of the plaintiff's wife at the very time the acts of intercourse are claimed to have occurred, and in this way affects the question of damages.

One Mrs. McAllister was a witness for the plaintiff, and testified that she discovered plaintiff's wife and defendant in a compromising position. The foundation having been laid on cross-examination, the defendant was permitted to show statements of this witness, made to another, the tendency of which was to show an understanding between Mrs. Smith and herself to get money out of defendant. Complaint is made of this on the ground that it was a collateral matter, and that the cross-examiner was bound by the answer. We do not think this was collateral matter within this rule. The testimony bore directly upon the truthfulness of this witness. It tended to show an interest, and that her testimony was given in pursuance of a conspiracy between Mrs. Smith and herself, although the plaintiff was not a party to it.

The other questions discussed have had full consideration. We discover no damaging error.

Judgment affirmed.

Hooker and Moore, JJ., concurred with Montgomery, J.

OSTRANDER, J. I concur in affirming the judgment. The undisputed testimony shows that the wife of the plaintiff saw the attorney, later employed by plaintiff, about this matter, before her husband, the plaintiff, saw him, and that soon thereafter, at the direction of the plaintiff, this suit was begun. The jury might have inferred, from these facts and

from other evidence in the case, a conspiracy between plaintiff and his wife. That such an inference might be drawn would not require the evidence to be excluded if it also tended, fairly, to prove, or furnished reasonable ground for inference concerning, the character of the wife as to chastity, at the ¹² time the alleged wrong was committed, and a desire and expectation on her part that her conduct with defendant would be discovered. It cannot be said that this evidence, in connection with other evidence properly in the case, had no such tendency.

As to the letter in question, while its admission is made the ground of an assignment of error, the record discloses that, after the letter had been marked and identified by the writer, the following took place:

"Mr. Fox: I will read Exhibit 1.

"The Court: Read it.

"Mr. Smith: Exception."

The reasons which in this court are urged for and against the right to admit it in evidence are not therefore considered. Neither the purpose of counsel in offering it nor the grounds of objection to it were stated. I find no motion to strike it out, no requests to charge, and no part of the charge given referring to it.

Blair, J., concurred with Ostrander, J.

The Right of a Husband to Recover against the seducer of his wife is not barred by his continuing to live with her after knowledge of her infidelity: *Sikes v. Tippens*, 85 Ga. 231, 11 S. E. 662; *Verholf v. Van Houwenlengen*, 21 Iowa, 429. As to what evidence is admissible in mitigation of damages in actions for criminal conversation, see *Cross v. Grant*, 62 N. H. 675, 13 Am. St. Rep. 607; *Rea v. Tucker*, 51 Ill. 110.

STRINGER v. STEVENS' ESTATE.

[146 Mich. 181, 109 N. W. 269.]

LIMITATION OF ACTIONS—Annuity—Charge upon Land.—If land is devised subject to an annuity, a claim against the estate of the devisee for unpaid installments of such annuity, upon the implied contract arising from the acceptance of the devise, is barred by the statute of limitations relating to implied contracts. (p. 621.)

LIMITATION OF ACTIONS.—The Form of Action, and not the cause thereof, must determine whether it is barred by the statute of limitations. (p. 623.)

ANNUITIES—Unpaid Installments.—Interest is Collectible upon unpaid installments of an annuity charged upon land for the support of the testator's widow. (p. 624.)

J. H. Lynch, for the appellant.

T. A. Conlan, for the appellee.

¹⁸² McALVAY, J. The appellee, Marshall L. Stringer, administrator de bonis non of the estate of Fanny Stevens, presented a claim against the estate of Thomas Stevens to recover the sum of money bequeathed to said Fanny Stevens by her husband, Willis Stevens. Willis Stevens died testate June 7, 1887, and by the second paragraph of his will made the following provision for his wife:

"Second. I give, devise and bequeath to my beloved son Thomas Stephens, the following described real estate, to wit: [giving description] in Milford, Oakland county, State of Michigan, to him, his heirs and assigns forever, together with all the personal property left by me upon said farm, upon this express condition, that he furnish my beloved wife, Fanny Stevens, all her necessary firewood, prepared for the stove, together with all such products of said farm, including flour, meats, fruits, vegetables, butter and eggs that she shall require for her comfortable support, all to be delivered to her home in Milford, together with the sum of one hundred dollars in money yearly, so long as she may live, all the above to be and remain a lien upon said described farm, as long as my said wife shall live."

This claim was for the money provided by this clause. The delivery of the produce was conceded. Thomas Stevens, the son, took possession of the land so devised to him under the conditions expressed, and continued to occupy them during his lifetime. Fanny Stevens continued to live at the home in Milford, and died there February 28, 1897, intestate.

Her daughter, Mary J. Crippen, was appointed administratrix in May, 1897. On January 16, 1899, her final account was filed, and the estate on hand was distributed among the heirs. Thomas Stevens received his share. Thomas Stevens died intestate April 9, 1903. The appellee in the case at bar was appointed administrator de bonis non of the estate of Fanny Stevens, deceased, August 3, 1903, and as such filed this claim against the estate of Thomas Stevens, deceased. A judgment was rendered upon a verdict directed by the court in favor of said Marshall L. Stringer, administrator, in the circuit court for Oakland county, ¹⁸³ against the estate of Thomas Stevens, for the full amount of the claim, with interest. The administrator of said estate requests this court to reverse said judgment, upon the ground that the trial court erred in directing a verdict in favor of plaintiff for the sum of fifteen hundred and fifty-four dollars and thirteen cents.

Appellant contends: 1. That this entire claim is barred by the statute of limitations; 2. That if the statute of limitations is not a bar, claimant plaintiff was not entitled to interest upon the annual payments, and the verdict is excessive, and should have been for nine hundred dollars.

We must determine from the context of that part of the will under consideration the conditions of the devise and bequest accepted by Thomas Stevens. Provision is made for the comfortable support and maintenance of the widow during her natural life by furnishing fuel for household purposes, food to eat, and money annually. The evident intent of the testator was to make certain, by specific statement, the character and extent of the provision made for the widow, and to secure the performance of that expressed intention by making all the above provision a charge upon the premises devised. It is admitted that, where the devisee accepts property charged with the payment of an annuity, he becomes liable for the payment of such annuity, and an action can be maintained for the same: 2 Am. & Eng. Ency. of Law, 2d ed., p. 399; Gridley v. Gridley, 24 N. Y. 130; Fuller v. McEwen, 17 Ohio St. 288.

In this case it is not sought to enforce the lien against the land, but the claim is presented against the estate of the devisee as a personal obligation against him. Therefore, it is not necessary to determine or discuss the question as to the extent to which the property made a security for this annuity

was chargeable with it, and construe the last clause of this paragraph of the will, "all the above to be and remain a lien upon said described farm as long as my said wife shall live." The authorities ¹⁸⁴ cited by counsel appear to hold that the personal responsibility of the devisee arises on account of an implied promise to pay the annuity, having accepted the devise on that condition. The question of the statute of limitations in this case must then be considered as being applied to a case of an ordinary action upon an implied contract, unless there appears, upon reason or authority, or both, ground for holding otherwise, because this is an annuity created by the provisions of a will. If claimant in a proper forum was seeking to enforce the lien upon the land, we have no hesitancy in declaring that the rule of limitations applying to mortgages would control.

Although the annuity granted may be said to have been in lieu of dower, and was made a charge upon the real estate devised, the representative of the estate of the widow in this case is proceeding upon the theory that this is a personal demand against the estate of the son, arising upon an implied contract, and makes claim for it as such, not against a fund arising from a sale, but against the body of the estate. The authorities recognize a distinction between an action founded upon and created by a will or other specialty and one which, although incident to a specialty, yet rests upon an express or implied promise. In the former instance the statute invoked does not apply, while in the latter it does: Wood on Limitations, 3d ed., sec. 35, and notes.

The many cases cited and relied upon by claimant in support of the contention that this statute of limitations does not apply are cases brought to enforce the charge upon the real estate devised or granted, or against a fund arising from a sale of land, or where an express trust has been created, or upon a specialty, or by some proceeding other than an action upon an implied promise to pay. Attention is again directed to the fact that this claim is based upon the implied promise of Thomas Stevens, and therefore is distinguishable from the cases relied upon by claimant.

We think the case at bar may be said to be analogous ¹⁸⁵ to a case where a promissory note is given, secured by a mortgage on real estate. If suit is brought on such note, the statute of limitations applying to promissory notes may be pleaded in bar of such action; but the fact that the statute has

run against such a note does not destroy the lien of the mortgage, and if the party had elected his remedy by proceedings to foreclose his mortgage to satisfy the amount of indebtedness represented by the same note, he could have enforced his lien at any time within the limitations of the statute applying to mortgages: *Michigan Ins. Co. v. Brown*, 11 Mich. 265, and cases cited.

While it is true that the widow during her lifetime did not waive her lien upon the land charged with her annuity, yet she might have done so, and brought suit in assumpsit against her son, upon his implied promise, for each installment as it fell due, if not paid. Therefore her representative, beginning such suit upon the implied promise, and not claiming anything by reason of the lien, cannot claim any greater rights than his decedent would have had in a like proceeding.

We must conclude that the statute of limitations must be applied as in the case of an ordinary action upon an implied contract. The form of action, and not the cause of action, must determine whether the claimant's action is barred: *Christy v. Farlin*, 49 Mich. 319, 13 N. W. 607; *Stewart v. Sprague*, 71 Mich. 50, 38 N. W. 673; *Avery v. Miller*, 81 Mich. 85, 45 N. W. 503. To determine whether the claim, or any part of it, is barred by the statute, it is necessary to compute the time which has elapsed since the right of action arose. The testator, Willis Stevens, died June 7, 1887. The first annual payment of money was due his widow June 7, 1888. A payment became due on June 7th of each year thereafter, to and including June 7, 1896. The widow died February 28, 1897. From the time of her death the running of the statute was suspended until May 31, 1899—two years after the appointment of her administrator: 3 Comp. Laws, sec. 9737; *Field v. Loveridge*, 114 Mich. 220, 72 N. W. 160. From that date the statute would run until ¹⁸⁹⁹ the death of Thomas Stevens, April 9, 1903. This claim was filed in August, 1903. At the time of the widow's death three of the payments due and unpaid for more than six years had become barred by the statute. Against the other payments, respectively, the statute had run as follows: Fourth, five years, eight months, twenty-one days; fifth, four years, eight months, twenty-one days; sixth, three years, eight months, twenty-one days; seventh, two years, eight months, twenty-one days; eighth, one year, eight months, twenty-one days; ninth, eight months, twenty-one days. Adding to each

of these periods the time elapsed from May 31, 1899, to April 9, 1903 (three years, ten months, nine days), we find that all but the eighth and ninth payments were barred by the statute. For these two payments and interest claimant was entitled to recover. According to the computation presented by claimant, which is not questioned, this at the time of the trial amounted to the sum of three hundred and one dollars and fourteen cents.

It is urged that interest on this claim should not have been allowed. The authorities are in conflict upon the question of the allowance of interest upon arrearages of annuities. Where the annuity has been for the support and maintenance of a wife or child, interest has usually been allowed. The weight of the English authorities holds to this effect: *Newman v. Anling*, 3 Atk. 579; *Litton v. Litton*, 1 P. Wms. 541. In general, it may be said that in other cases interest is not allowed. In the United States the cases where interest has been allowed are all cases of the kind referred to, where the annuity was for support of widow or child and a lien upon the land devised. Some of these cases hold that the allowance of interest for arrearages of an annuity is discretionary where it is for the support of widow: *Beeson v. Elliott*, 1 Del. Ch. 368; *Addams v. Heffernan*, 9 Watts, 529.

The entire amount of the claim is for payments of the amounts provided by the will to be annually made to Fanny Stevens, together with interest thereon. Upon these unpaid installments she during her lifetime should have allowed interest, and we know of no reason why the claim should cease to bear interest upon her ¹⁸⁷ death. The money was due to the widow annually. We think it but justice to require the legal rate of interest to be paid by the devisee in default, who was in the enjoyment of the estate upon which this claim was so charged. It is true that nearly all the authorities cited as in favor of allowing interest in these cases are chancery cases, where an enforcement of lien is sought. We think the same rule should apply in a case at law where the lien is waived, and recovery sought of the devisee or his estate upon an implied promise.

It is insisted that the assignment of error is not sufficiently specific, and does not comply with the rule. There were but two questions in the case, both of which were presented fully to the court below. These were, that the statute had run against the claim, and no recovery could be had;

and that if the claim was allowed it should not bear interest. We think the assignment under the circumstances sufficient.

Our conclusion is that the court was in error in instructing the jury to find for claimant the entire claim, with interest. The instruction should have been for the amount above specified. The judgment may stand for that amount, with costs to appellant, provided the balance is remitted by claimant; otherwise the judgment is reversed, and a new trial granted.

Blair, Montgomery, Ostrander, and Hooker, JJ., concurred.

A Legacy is not Within the Statute of Limitations, according to Perkins v. Cartmell, 4 Harr. 270, 42 Am. Dec. 753, and courts of equity in suits for legacies do not adopt the statute or its exceptions, or act in conformity to it. A bequest to a married woman will not be defeated by reason of the laches of her husband in prosecuting her claim therefor: Black v. Whitall, 9 N. J. Eq. 572, 59 Am. Dec. 423.

BARTLETT v. SMITH.

[146 Mich. 188, 109 N. W. 260.]

VENDOR AND PURCHASER—Breach of Contract to Sell—Measure of Damages.—If a vendor in an unrecorded contract for the sale of land conveys the premises to a third person, the measure of the purchaser's damages is his payments, and the reasonable value of the improvements made in good faith, less the value of the use of the premises. (p. 627.)

VENDOR AND PURCHASER—Contract to Sell Land—Extension of Time of Payment.—A mere naked parol promise by the vendor in a contract for the sale of land to extend the time of payment is not binding upon him. (p. 627.)

VENDOR AND PURCHASER—Contract to Sell Land—Covenants—Breach.—If a vendor in a contract for the sale of land covenants against encumbrances, and the land is subject to a mortgage, he is not entitled to demand payment and forfeit the contract, until he has satisfied the mortgage and is in a position to perform the contract himself. (p. 627.)

VENDOR AND PURCHASER—Breach of Contract to Convey—Evidence.—In an action by a purchaser in a contract for the sale of land to recover for a breach thereof by the vendor in conveying to a third person, evidence that the grantee took with a knowledge of such purchaser's rights is admissible. (p. 627.)

VENDOR AND PURCHASER—Breach of Contract to Sell—Possession by Purchaser, Effect of.—Possession by the purchaser under an unrecorded contract for the sale of land is notice of his rights,

and he can suffer no injury by the fact that his vendor deeds away his title, since he can enforce his contract against his vendor's grantee, as well as against his vendor. (pp. 627, 628.)

Louisell & Nevius and P. C. Gilbert, for the appellant.

D. G. F. Warner, for the appellees.

¹⁸⁸ GRANT, J. On April 18, 1902, plaintiffs and defendant executed a ¹⁸⁹ land contract, by which the defendant agreed to sell plaintiff's forty acres of land for the sum of four hundred dollars; twenty-five dollars on delivery of contract, fifty dollars per year for six years, and seventy-five dollars the seventh year, with interest at six per cent payable annually. That portion of the contract material to the issue reads as follows: "And that if any of the payments and conditions above set forth, on the part of said parties of the second part to be made and performed, shall not be made and performed in conformity with the terms hereinbefore set forth, the payments previously made shall be forfeited, and the premises, with the buildings and improvements thereon, shall revert to said party of the first part, his representatives and assigns, and he may thereupon peaceably re-enter upon and take possession of the same. Or, if he shall so elect, the said party of the first part, his representatives and assigns, may enforce payment in law of the money due, and make conveyance, as aforesaid."

The cash payment was made, and also the payment and interest due the first year. The payment of fifty dollars principal and twenty-three dollars interest, due April 18, 1904, was not made. Plaintiffs claim that they secured an extension of sixty days. They, however, made no tender within the sixty days. Plaintiffs testified that they made a tender on July 1st. There were no buildings upon the land, but plaintiffs went into possession, cultivated, and raised crops. On June 8, 1904, defendant sold the land to one Symons by warranty deed, which contained no reference to the land contract. Upon learning of this deed plaintiffs brought suit to recover the amount they had paid defendant. The court directed the jury to find a verdict for the plaintiffs for the full amount they had paid the defendant, less what plaintiffs "had received from the land over and above what they put onto it." The jury found a verdict for the full amount claimed.

¹⁹⁰ 1. The plaintiffs had had the possession and use of the land for three years. They had made no improvements. The

result of the instruction given by the circuit judge and the verdict of the jury is to deprive the defendant of the use of the property for three years, and to give the use thereof to the plaintiffs free of rent. Such an inequitable result finds no support in the law. If plaintiffs were entitled to recover, the rule is that they were entitled to recover the payments made, and the reasonable value of the improvements made in good faith, less the value of the use of the premises: 2 Sutherland on Damages, sec. 586.

2. The promise to extend the time of payment, if made, was a mere naked promise, resting in parol, without any consideration, and was therefore of no validity: *Ferris v. Johnson*, 136 Mich. 227, 98 N. W. 1014.

3. Defendant insists that time was of the essence of the contract, and that plaintiff had violated the contract by non-payment, and therefore cannot maintain a suit at law; while plaintiff urges that it was the duty of the defendant to give notice of his option to declare the contract forfeited, and that the execution of a deed without plaintiff's knowledge or consent was a violation of the contract, and entitled him to recover back the money; citing *Atkinson v. Scott*, 36 Mich. 18; *Davis v. Strobridge*, 44 Mich. 157, 6 N. E. 205; *Weaver v. Aitcheson*, 65 Mich. 285, 32 N. W. 436. It is unnecessary to determine these questions, as plaintiff for another reason is entitled to maintain his suit. Defendant covenanted that the land was free from all encumbrances, and to give a warranty deed. The land was subject to a mortgage, which was not discharged until June 14, 1904. Defendant was not in position to demand payment or to forfeit the contract until he was in a position to perform it himself: *Dwight v. Cutler*, 3 Mich. 566, 64 Am. Dec. 105; *Getty v. Peters*, 82 Mich. 661, 46 N. W. 1036, 10 L. R. A. 465.

4. Defendant offered to show that the grantee to whom he conveyed the land was informed of the plaintiff's land contract, and purchased subject to it. It was error to reject ¹²¹ this testimony: *Kreibich v. Martz*, 119 Mich. 343, 78 N. W. 124.

5. In view of a new trial, it is well to state that the plaintiff testified that he was in the possession of this property at the time the sale was made. If he was in possession, he could not have suffered damage by the act of the defendant in deeding away his interest in the property. Possession was notice to the purchaser of all his rights, and he could assert

his contract against defendant's vendee, as well as against the defendant.

Judgment reversed, and new trial ordered.

Carpenter, C. J., and McAlvay, Hooker and Moore, JJ., concurred.

The Measure of Damages for a Breach of Contract to Convey Land is ordinarily the difference between what it actually is worth and what the plaintiff has agreed to pay for it: *Cornell v. Rodabaugh*, 117 Iowa, 287, 94 Am. St. Rep. 298. As to the right of the vendee in a parol contract to convey to recover for improvements, see *Luton v. Badham*, 127 N. C. 96, 80 Am. St. Rep. 783.

Where a Vendee of Land Goes into Possession under a deed or contract of sale, his possession is constructive notice of his rights to subsequent purchasers and encumbrancers: See the note to *Crooks v. Jenkins*, 104 Am. St. Rep. 347, on the effect of the possession of real property as notice.

TOWNSHIP OF WEST BLOOMFIELD v. DETROIT UNITED RAILWAY.

[146 Mich. 198, 109 N. W. 258.]

STREET RAILROADS—Franchise—Equipment.—If a franchise granted to a street railway company provides that its passenger-cars shall be equipped with suitable appliances for a suburban railway, insuring the comfort and convenience of its passengers, a finding of failure to comply with its franchise is proper when the evidence shows that it has not supplied its cars with toilet-rooms or water-tanks. (p. 630.)

STREET RAILROADS—Franchise—Place of Sale of Tickets.—If a franchise granted to a suburban street railway company provides that family tickets shall be sold entitling the holder and members of his family to ride from any point in the township to a certain city, such franchise is violated by placing such tickets on sale at a single store in such city, as everyone has a right to purchase a family ticket at a place where he has a right to board the cars with his family for passage. (p. 630.)

CERTIORARI—Questions Reviewable on.—The whole judgment of the lower court is reviewable on certiorari, though as to one of the questions involved, it was decided not on its merits, but because the case must necessarily find its way to the supreme court on the other questions involved. (p. 631.)

STREET RAILROADS—Franchise—Rates of Fare.—A provision in a franchise granted to a suburban street railroad that the rate of fare from any point in a certain township to a certain city shall not at any time exceed the rate then charged by the company granted such franchise from a certain town to such city, not only includes the company named in such franchise but also any line which that company or its assignee may at any time build or purchase. (pp. 631, 632.)

M. F. Lillis and Clark, Jones & Bryant, for the relator.

J. H. Lynch and Brennan, Donnelly & Van De Mark, for the respondent.

¹⁹⁸ GRANT, J. Mandamus by the township of West Bloomfield to compel ¹⁹⁹ the Detroit United Railway to comply with the provisions of its franchise. There was an order granting the writ, and respondent brings certiorari. Affirmed.

The relator, the township of West Bloomfield, granted a franchise to the Pontiac and Sylvan Lake Railway Company, a street railway corporation, its successors and assigns, to construct a road through the township. Among the conditions granted and accepted and which are involved in this case are:

(a) All passenger-cars to be used on said railway shall be of modern design, first class in every particular, and supplied with suitable appliances for a suburban railway, insuring the comfort, convenience, and safety of its patrons.

(b) The rate of fare in said township was fixed, and it was provided "that there shall be sold by said company, its successors or assigns, a family ticket entitling the purchaser or any member of his immediate family to ten rides from any point in said township to and in the city of Pontiac, and vice versa, which ticket shall be sold for one dollar."

(c) "Provided further that the rate of fare from any point in said township to the city of Detroit, and vice versa, shall at no time exceed the rate then charged by the company from Pontiac to Detroit, and vice versa."

Another road, known as the "Detroit and Pontiac Railway," was then in operation from Pontiac to Detroit. The respondent's road was on another route, and was a competing line with the Detroit and Pontiac. The respondent subsequently became the purchaser and successor of the Pontiac and Sylvan Lake Railway Company. The fare over the competing road from Pontiac to Detroit was twenty-five cents. The Pontiac and Sylvan Lake road was completed about December 1, 1899. The rate of fare to Detroit was twenty-five cents. This rate of fare was continued for about two years, until its purchase by the respondent, which continued the same rate for the period of about six months. Relator claimed that the respondent had violated its franchise or contract in three particulars: ²⁰⁰ 1. That it has not equipped its cars, which run through the township, with toilet closets, and water-tanks for drinking purposes; 2. That

it has not kept on sale upon its cars and within its township the family ticket; 3. That it has charged thirty-five cents fare to Detroit, and vice versa, instead of twenty-five.

Issues were duly framed and decided in favor of the relator, the jury finding that the respondent had violated its charter in the three respects named, and the court entered an order directing it to comply with these provisions. The case is now before us for review upon the writ of certiorari.

1. The jury, to whom the issues were submitted, found upon the evidence that the respondent's cars were not of modern design, and were not supplied with suitable appliances for a suburban railway to insure the comfort and convenience of passengers, in that they had no toilet-rooms or water-tanks. The evidence fully sustains the finding. A car in a city, which one may take on emerging from his home, or after a few minutes' walk, is different from a car running through the country, where its patrons often have to ride or walk an hour or more before entering the car. Facilities for attending to the demands of nature may be necessary in the one case, but not in the other.

2. The respondent placed on sale near its terminus, in a drug store in the city of Pontiac, the family tickets for which its franchise provided. This is not a compliance with its contract. It was not contemplated that the citizens of West Bloomfield should go to Pontiac to buy tickets. Everyone had a right to purchase a family ticket at the place where he had a right to board the cars ²⁰¹ with his family for passage. These roads do not have ticket offices stationed through the country. They do their business on the cars, and, wherever passengers have a right to take the cars, there they have the right under the franchise to purchase these tickets: *Sternberg v. State*, 36 Neb. 307, 54 N. W. 553, 19 L. R. A. 570; *City of Detroit v. Ft. Wayne etc. Ry. Co.*, 95 Mich. 456, 35 Am. St. Rep. 580, 54 N. W. 958, 20 L. R. A. 79.

3. The third question is the one which perhaps presents the greatest difficulty. The learned circuit judge did not pass upon it, but expressly stated that he expressed no opinion, that "the language could be read both ways," and added: "The case is one that will find its way to the appellate court anyhow, unless a compromise is agreed upon by the parties. As the respondent must take the case there if not satisfied with the findings of this court upon the questions of the cars and sale of commutation tickets, it is as well to is-

sue the writ as to all the contentions of the petitioner, and let all be taken there for settlement by the respondent."

It is the duty of circuit courts to pass judgment upon cases presented to them for determination, and it then and then only becomes the duty of this court to review the conclusions reached by the circuit court. Circuit courts are not authorized by the constitution and the law to sit and enter judgments solely that such judgments may be taken to the supreme court. Had this been the theory of the constitution and the law the framers of the constitution would have made provisions therefor. Suppose this were the only point in the case and the court had refused to hear and decide it, but had said: "It will go to the supreme court in any event, and I will therefore enter a judgment not based upon any conclusion or judgment of my own, but solely for the purpose of having it taken to the appellate court."

Is this such a judgment as this court is called upon to consider and determine? I think not. The judge might as well have flipped up a cent to determine what judgment ²⁰² should have been entered. In my opinion, this is not such a judgment as this court is called upon to consider and determine. Where a judgment or decree involves several distinct claims, both parties may appeal where some are decided against each. My brethren, however, are of the opinion that while the court should have passed upon all the issues, yet there is a formal judgment rendered against the defendant for which it is not responsible, and therefore it would not be just to send it back for a new trial. We must therefore determine the question.

The language of the provision that the rate of fare from any point in the township to Detroit "shall at no time exceed the rate then charged by the company from Pontiac to Detroit, and vice versa," is unambiguous. It referred to the company mentioned in the franchise, but it included any line which that company or its assignee might at any time build or purchase. Counsel for respondent in their brief say: "The clear purpose of this provision was to provide that the township of West Bloomfield should get the benefit of such rate as might be brought about by competition between the companies operating between the two terminal points and thus, though not by virtue of location naturally entitled to the benefits of competition, yet, by express contract, obtaining the benefit of the competition which may exist as to the terminal points."

There was then a competing line between Detroit and Pontiac, a shorter route by several miles than the one through the township of West Bloomfield, and the rate of fare was twenty-five cents. The fare over this line of the respondent was fixed at the same rate as that over the competing road, and was retained for about three years, until the Detroit and Pontiac Railroad was purchased by the respondent. There was afterward no competition, the competing line belonging to the respondent, the assignee of the company mentioned in the franchise. If the respondent had built another line from Pontiac to Detroit it could not have ²⁰³ charged a higher rate over the old line than it did over the new. The terms of the franchise must be construed strictly against the respondent. When it purchased the Detroit and Pontiac line it became a line of the company. The rate charged from Pontiac to Detroit over that line is now twenty-five cents. The respondent can charge no more over this line of its road. It cannot thus destroy the competition for which the relator in fact contracted.

The order of the court below is affirmed.

McAlvay, J., concurred with Grant, J.

CARPENTER, C. J. I agree with my Brother Grant that every judgment should be rendered in accordance with the deliberate convictions of the judge who announces it. But if it is not, the judgment is none the less valid and binding upon the parties, and it is therefore none the less the duty of this court to review it. In reviewing that judgment, we are called upon to determine whether it is or is not in accordance with law. We are not called upon to determine the correctness of the reasoning of the trial judge or the sincerity of his convictions. I therefore think it our duty to determine the third question discussed in the opinion of Justice Grant. Except as indicated above, I approve that opinion.

Montgomery and Ostrander, JJ., concurred with Carpenter, C. J.

The Regulation of Street Railways by municipal corporations is the subject of a note to *People v. Detroit United Railway*, 104 Am. St. Rep. 636. The rights and franchises of a street railroad company are not destroyed or unreasonably impaired by a city ordinance requiring it to sell tickets to all persons applying therefor on each of its cars, to be good for transportation over its entire route or any portion thereof, traveling continuously either way between certain hours, at the rate of eight tickets for twenty-five cents: *Detroit v. Fort Wayne etc. Ry. Co.*, 95 Mich. 456, 35 Am. St. Rep. 580.

ALBERTS v. CITY OF MUSKEGON.

[146 Mich. 210, 109 N. W. 262.]

MUNICIPAL CORPORATIONS—Negligence of Officers.—A municipal corporation is not liable under the common law for the loss of private property by fire caused by sparks from a steam roller used by the city officers in repairing street pursuant to a duty imposed upon the city by general law. (p. 634.)

J. E. Sullivan, for the appellant.

W. Carpenter, for the appellee.

²¹⁰ OSTRANDER, J. Plaintiff, the owner of a barn on premises abutting upon Clay avenue in the defendant city, sued the city in an action on the case for damages resulting from destruction of the barn and its contents by fire. It is charged in the declaration of the plaintiff that "the said defendant was operating a certain steam roller along Clay avenue in front of and adjoining the premises occupied by the plaintiff's property, . . . which said steam roller the said defendant had negligently and carelessly failed to equip with suitable devices for preventing the escape of sparks and fire therefrom, and by reason thereof, in its operations on the said street, the said steam roller threw off large quantities of sparks and fire which ignited and set fire to the plaintiff's said barn," etc. It is further charged that the defendant city, in operating a certain steam roller in the said street, "managed and conducted the same carelessly and negligently without taking any precautions to prevent the escape of fire and sparks, . . . and ²¹¹ thereby fire and sparks were emitted from said roller, and set fire to the plaintiff's said property."

The testimony for the plaintiff tended to prove that the defendant city was engaged in repairing the street in question with crushed stone and, in the operation, was using a roller moved and operated by steam, having an upright boiler and a stack, into which steam was exhausted to create a draft; that the fuel used was soft coal; that there was no appliance to prevent the escape of sparks and fire from the stack; that, upon the occasion in question, the wind was blowing from the roller toward the premises of the plaintiff, in front of which the roller was run up and down the street; that fire escaped from the stack, igniting refuse outside the barn, spreading to and consuming the barn and its contents. It does not appear

that all of the testimony introduced on the part of the plaintiff is returned. Such of it as is printed tends to prove that, as it was equipped, the roller could not be operated for the purpose for which it was employed without throwing out fire. When the case for the plaintiff was rested, there was a demurrer to the evidence, and a motion to direct a verdict for defendant, which motion was overruled.

On the day after the fire, the engineer in charge of the roller, without direction or authority from defendant, put a spark-arrester on the stack. The common council has general supervision and control of the streets of the city and power, if the estimated cost of repairs and improvements exceeds five hundred dollars, to perform the same by contractors. It also has power in case of such repairs as were being made to cause the same to be done. The council made no determination to do the work in question further than that it should be done by the city's agents and employes. The work itself was under the personal supervision of the street commissioner, who is subject to the direction of the council. He employed the engineer, gave him the roller to use, and directed him when and where to use it.

The jury were instructed, in substance, that the defendant ²¹² city was bound to exercise the care which an ordinarily careful and prudent person should and would have exercised under the circumstances, both with respect to the equipment and the operation of the roller, failing in which, if it was found that the fire and loss resulted, the city was liable. Error is assigned upon the refusal of the court to direct a verdict for defendant, and upon a portion of the charge given, which is as follows: "The city of Muskegon has no more right than any private individual or private corporation to operate on its streets engines or machinery dangerous to adjoining property, without using proper precautions to prevent injury to such property."

The position of counsel for appellant is that the duty of the city to keep the streets in repair is a public and not a private duty, in the performance of which, in the absence of a statute creating one, no liability arises for injuries resulting, directly or indirectly, to a citizen from the negligence of agents or servants, or from the use of apparatus employed.

On the other hand, counsel for plaintiff insists that defendant was not acting in a governmental capacity, and, if it was, the act complained about is of a character which no public au-

thority can commit without making restitution for resulting damages.

It is clear that, so far as the repairs upon the streets are concerned, the duty to make them is imposed by the general law. The demand of the plaintiff does not, however, arise out of a failure of the duty to repair the street or the character of the repairs made, nor is the injury complained about one necessarily resulting from a proper and skillful performance of general public duties. Conceding the duty to repair the street, and conceding the right of the city to make choice—involving discretion—of materials to ²¹³ be used and means to be employed in performance of the duty, the real question, which it is sought to have answered, arises upon the breach of a further alleged duty not to employ means certain or likely to involve, as a result of their use, and not to so use the means employed as to cause, damage to private property.

Plaintiff complains of the invasion of a private right in no way dependent upon the duty imposed on the city to repair the streets; in which respects, it is obvious, the case differs from *City of Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 450, and like cases, upon the principle of which defendant mainly relies. In the case cited, the right upon which the plaintiff relied was the right, as one of the public, to use the way. The defendant city was charged with neglect to repair the way and not with active misconduct, nor with the invasion of any right of the plaintiff which was not common to all of the public having occasion to use the way. The doctrine that legislative action is required to create liability to private suit, for neglect to repair public ways, was established by that case, and has since been recognized. The alternative doctrine there pressed upon the court, and which received the indorsement of Mr. Justice Cooley, was supported by the argument that cities were to be distinguished from towns and counties, for the reason that they were not like those quasi municipalities mere political subdivisions of the state, upon which, without their assent, duties were imposed by general laws, but were to be regarded as communities soliciting and obtaining from the legislature responding duties, involving the implied undertaking to perform the duties. The doctrine that political divisions of the state having duties imposed upon them by general law without their assent are not liable to respond to individuals in damages for neglect of those duties unless expressly made liable by statute is as well recognized in the minority as in the

majority opinion in that case. There are many decisions of this and of other courts which deny the ²¹⁴ liability of municipal corporations to suits for injuries to private rights as distinguished from rights which the individual shares with or has as one of the public. Examples are to be found in those cases in which the negligence or other misconduct of officers occasions the injury complained about, and it is found that such officers are not agents or servants of the municipality but are independent public officers performing public duties: See *Murray v. Village of Grass Lake*, 125 Mich. 2, 83 N. W. 995; *Nicholson v. City of Detroit*, 129 Mich. 246, 88 N. W. 695, 56 L. R. A. 601; *Whitehead v. Board of Education of Detroit*, 139 Mich. 490, 102 N. W. 1028. It is well settled that cities may be liable for positive mischief produced by the active misconduct of the municipality itself. And this independent of the fact, sometimes regarded as controlling, that the city had, or had not, a private or proprietary, as distinguished from a mere public, interest in the doing of the act or in performing the work which occasioned the injury. It was said in *Sheldon v. Village of Kalamazoo*, 24 Mich. 383, in reply to the argument that the president and trustees of Kalamazoo acted in the capacity of public officers and not as municipal agents, that: "The injurious act complained of is not a public grievance, but it is a wrong done to a private person. It is not a wrong arising from neglect, but is the direct operation of a willful trespass. . . . The doctrine is entirely untenable that there can be no municipal liability for unlawful acts done by municipal authorities to the prejudice of private parties. In this respect, public corporations are as distinctly legal persons as private corporations. There are officers who are corporation agents, and there are municipal officers whose duties are independent of agency and with distinct liabilities. But when the act done is in law a corporate act, there is no ground upon reason or authority for holding that if there is any legal liability at all arising out of it, the corporation may not be answerable. There is no conflict whatever in the authorities on this head. The only disagreement is concerning corporate responsibility in cases of alleged neglect of duty, and concerning the bounds of what may be termed their legislative discretion, as distinguished from their other action."

²¹⁵ So, in *Ferris v. Board of Education of Detroit*, 122 Mich. 315, 81 N. W. 98, it was held that a school district was liable for injuries resulting from snow and ice falling from

a school building upon private property, the building having been so constructed that such precipitation upon plaintiff's premises was inevitable.

The case at bar is not one of damages resulting from a direct trespass or from misfeasance of the city amounting to a trespass. It is a case of consequential injury resulting directly from the negligent conduct of the defendant's agents. In this fact lies the distinction which, in view of former decisions of this court, must be made, and, when made, is controlling. The basis of the liability asserted is negligence. It is the basis, substantially, of all legal liability, in this country, for damages caused by fire: See 1 Street's Foundations of Legal Liability, 56. The case is, therefore, unlike *Defer v. City of Detroit*, 67 Mich. 346, 34 N. W. 680, *Rice v. City of Flint*, 67 Mich. 401, 34 N. W. 719, *Ashley v. City of Port Huron*, 35 Mich. 296, 24 Am. Rep. 552, and other like cases. In the opinion in the case last cited, after extended reference to adjudicated cases, it is said: "It is very manifest from this reference to authorities, that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction."

In the case at bar, it cannot be said that the burning of plaintiff's property was the necessary result of employing²¹⁶ the roller as equipped upon the road. The machine and the agents of the city were properly employed in performing a public work. This employment involved no injury to plaintiff's property. Between the performance of the work and the injury complained of were the alleged facts of improper equipment of the roller; direction and velocity of the prevailing wind; management of the machine. In some re-

spects, the case may be regarded as closely resembling many in which municipal liability has been judicially affirmed. In essentials it belongs to the class of cases where the injury is the result of negligence of municipal agents employed in public work for which the municipality is not at common law liable.

The judgment is reversed, with costs of both courts to defendant. No new trial will be granted.

Carpenter, C. J., and McAlvay, Grant, Blair, Montgomery, Hooker and Moore, JJ., concurred.

The Liability of Cities for the Negligence and misconduct of their officers and agents is discussed in the note to Goddard v. Harpswell, 30 Am. St. Rep. 376; Rhobidas v. Concord, 70 N. H. 90, 85 Am. St. Rep. 604; Williams v. Greenville, 130 N. C. 93, 89 Am. St. Rep. 860. If a city, in the exercise of its police power, employs a person to cut weeds in an alley, it is not answerable for his negligence in operating the mower, whereby a child is injured: McFadden v. Jewell, 119 Iowa, 321, 97 Am. St. Rep. 321.

FOURNIER v. CLUTTON.

[146 Mich. 298, 109 N. W. 425.]

DIVORCE—Assignment of Alimony.—Alimony granted in a suit for divorce is not assignable. (p. 639.)

DIVORCE—Assignment of Alimony—Tender—Waiver of Restoration of Consideration.—If before seeking by suit to set aside an assignment of a decree for alimony, the plaintiff undertakes to make a tender of the consideration received therefor, which the assignee refuses to accept, a more formal tender is excused. (p. 641.)

E. S. Grece, for the complainants.

Jeffries & Williams, for the defendant.

²⁹⁹ CARPENTER, C. J. Complainant Frances L. Fournier is the divorced wife of Charles A. Fitzsimmons. The other complainants are the children of Frances L. Fournier and Charles A. Fitzsimmons. Charles and Frances were divorced May 10, 1895. By this decree it was "Ordered and decreed that the defendant (Charles A. Fitzsimmons) pay to the complainant (Frances L. Fournier) the sum of one thousand dollars together with the costs to be taxed in said cause, the same being in full of all rights, claims, and demands of

the said complainant upon the said defendant for permanent alimony. . . . It is further ordered that the complainant have the care, custody, and education of the children, the issue of said marriage, until the further order of this court."

On the twenty-seventh day of May, 1897, complainant sold, assigned and transferred said decree to the first-named defendant for the sum of two hundred dollars. The object of this suit is to set aside said assignment on the ground that a decree for alimony is not assignable. The trial court dismissed said bill. Complainants appeal.

The briefs of counsel and my own research have enabled me to find but two cases touching the question of the assignability of decrees for alimony, viz., *In re Robinson*, L. R. 27 Ch. D. 160, and *Kempster v. Evans*, 81 Wis. 247, 51 N. W. 327, 15 L. R. A. 391. Each of these cases holds that such a decree is not assignable. In each of them the alimony assigned was an annuity not yet due. While the circumstance distinguishes these decisions from the case at bar, it cannot be said that the reasoning upon which they rest is altogether inapplicable to this case. The ground of the decision in *Re Robinson*, (L. R. 27 Ch. D. 160) is found in these words quoted from the opinion: "The very nature of alimony is inconsistent with its being capable of assignment. We are familiar with instances of allowances which are not alienable in the case of men, such as the half-pay of the officers in the army and navy, which are given them in order that they may maintain themselves in a sufficient position in life to enable them to be called out for future service if required. ³⁰⁰ Although alimony is not the same thing, it is governed by the same principle. Alimony is an allowance which, having regard to the means of the husband and wife, the court thinks right to be paid for maintenance from time to time, and the court may alter it or take it away whenever it pleases."

In *Kempster v. Evans*, 81 Wis. 247, 51 N. W. 327, 15 L. R. A. 391, it is decided that a decree for alimony is not assignable, because it may be modified or annulled by the court which gave it.

I think our own decisions (see *Brownson v. Roy*, 133 Mich. 617, 95 N. W. 710, and cases there cited) will prevent our holding, as did the court in *Kempster v. Evans*, 81 Wis. 247, 51 N. W. 327, 15 L. R. A. 391, that a decree for alimony is not assignable, merely because it may be modified by the court which pronounced it. Can we follow the reasoning of the

court in *Re Robinson*, L. R. 27 Ch. D. 160? The ground upon which the court in that case held that an award of alimony was not assignable is, as I understand it, this, viz., that the purpose for which the law gives alimony is to secure the maintenance of the wife. I think this ground is sound and that it is applicable to the case at bar. The reason why a wife is denied the right to assign an award of alimony intended by the law for her maintenance is not stated, but it is obvious. It is that she may not, by the exercise of that right, frustrate the purpose of the law. That the principal object for which the law awards alimony is the maintenance of the wife, or of the wife and children, is clear. That the recognition of the wife's right to assign that alimony would tend to defeat this object may be easily shown. If the wife has the right to assign her alimony, she may assign it on such terms and conditions as she may make. She may, as in this case, assign a decree for one thousand dollars upon the receipt of two hundred dollars, and thus use it as a means of dissipating her husband's estate without any corresponding benefit to herself or to her children. It is not difficult to imagine instances in which the bulk of the husband's estate might thus be transferred to third persons—possibly to unworthy speculators—and the burden of maintaining ³⁰¹ his wife and children imposed upon the public. It is apparent that the wife is not the only person interested in the proper application of money decreed as alimony. Her former husband, her children, and the public are also interested (see *Ferguson v. Ferguson*, 145 Mich. 290, 108 N. W. 682), and their interests would be in constant jeopardy if she could at pleasure assign such decrees. I conclude, therefore, that the law gave complainant *Frances L. Fournier* no authority to assign her decree for alimony.

I am not sure that Act No. 230 of the Public Acts of 1899, which makes awards for permanent alimony enforceable by contempt proceedings, has not some bearing upon the question under discussion. I think that act was passed upon the assumption that such awards were not assignable. If it were not passed upon that assumption, we must impute to the legislature the intention of giving to the assignees of such awards the right to enforce them by contempt proceedings. I find it difficult to believe that the legislature had any such intention.

I do not doubt that the suggestion will occur to many who read this opinion that its effect will be injurious to the interests of the wife where she has a decree against a husband who has no present means of support, but who has such expectations that some speculator will buy her decree and advance money which will relieve her present necessities. To those who think this a legitimate criticism, we suggest that they compare the injury resulting in such instances with the benefits that will result in other instances both to the wife and to the public generally by the denial of her right to assign a decree for alimony. But the proper answer to the suggestion is that it is not a legitimate criticism of the opinion. It assumes that the opinion is based on the ground that it is beneficial to wives generally to be denied the right to assign their alimony. While we believe it is so beneficial, this opinion is not based on that ground. It is based on the ground, as heretofore stated, that the existence of the right to assign frustrates the ³⁰² purpose of the law that alimony shall be used for the maintenance of the wife, or of the wife and children.

It is urged that complainant's bill was properly dismissed on the ground that she was guilty of laches. We think this contention is answered by the case of *Ripley v. Selington*, 88 Mich. 177, 50 N. W. 143.

It is also claimed that complainant did not tender defendant the two hundred dollars she obtained from him, and that for that reason the decree of the lower court should be affirmed. We are convinced by the testimony that before this bill was filed complainant undertook to make a tender, and that she did not do so because defendant said he would not accept it. This, in our judgment, excused a more formal tender: See *Lacy v. Wilson*, 24 Mich. 479.

The decree of the circuit court should be reversed, and a decree entered in this court in accordance with the prayer of complainant's bill. Complainant is entitled to costs of both courts.

McAlvay, Grant, Blair and Moore, JJ., concurred.

Alimony Granted to a Wife in a suit for a divorce is a personal right which is not susceptible of assignment: Lynde v. Lynde, 64 N. J. Eq. 736, 97 Am. St. Rep. 692.

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BOYNE CITY, GAYLORD AND ALPENA RAILROAD COMPANY v. ANDERSON.

[146 Mich. 328, 109 N. W. 429.]

EMINENT DOMAIN—Evidence.—If, in proceedings to condemn land for railroad purposes, the land owner expressly disclaims the right to recover damages for increased fire risk, evidence concerning the insurance rate on his buildings is inadmissible. (p. 643.)

EVIDENCE—Phonographs as.—In proceedings to condemn land for railroad purposes, the land owner, after laying the proper foundation, is entitled to operate a phonograph in the presence of the jury to reproduce sounds claimed to have been made by the operation of trains in proximity to his hotel and other premises. (p. 643.)

EMINENT DOMAIN—Appeal—Rulings on Evidence.—Questions raised over the introduction of evidence in condemnation proceedings cannot ordinarily be considered on appeal, though evidence clearly improper might justify a reversal if it appear that it caused a substantial error on the part of the jury. (p. 644.)

EMINENT DOMAIN—Review of Award of Damages.—The amount of damages awarded in condemnation proceedings will not be reviewed by the supreme court on appeal, further than to ascertain that the finding is supported by the evidence. (p. 644.)

EMINENT DOMAIN—Attorney's Fees—Review.—The lower court is the final arbiter as to the amount of attorney's fees to be awarded in condemnation proceedings, and that question cannot be reviewed on appeal. (pp. 644, 645.)

J. M. Harris, L. F. Knowles and J. H. Campbell, for the appellant.

H. A. Jersey and G. E. Nichols, for the appellee.

³²⁹ **BLAIR, J.** Petitioner commenced condemnation proceedings in July, 1905, to determine the necessity for laying its tracks upon and along Ray street in Boyne City, opposite respondent's hotel property, and for an appraisal of the damages in consequence thereof. The jury found that it was necessary for petitioner to occupy the street and appraised respondent's damage at the sum of fifteen hundred dollars. The circuit judge confirmed the report of the jury, and petitioner has appealed to this court, specifying the following objections:

"1. Rejection of evidence showing insurance rates on respondent's buildings and upon other buildings in Boyne City.

"2. Admitting in evidence the use of the phonograph.

"3. Admitting evidence to show that the petitioner could build its railroad upon another and different line in ³³⁰ the

village of Boyne City than the route shown by its map, approved by the state railroad crossing board and filed in the office of the register of deeds, and upon which the tracks were actually built in 1893.

"4. Admitting evidence as to another line and permitting the jury to view and go over the said line.

"5. The admission of evidence as to such other line and arguments relating thereto was prejudicial to the petitioner respecting the amount of damages awarded, although the jury found that the use of the property described in the petition was necessary.

"6. The damages (\$1,500) awarded by the jury are grossly exorbitant, extravagant, and excessive.

"7. The damages awarded are so excessive, unwarranted, and unjust as to show that the jury were actuated by false reasoning, immaterial matters, or by passion or prejudice.

"8. The damages awarded are unwarranted by, and are against, the weight of the evidence, and out of proportion to the value of the property claimed to be damaged by the proximity of the railroad.

"9. Admission of evidence and of argument to the jury claiming damages by reason of depreciation of the property on account of proximity of the railroad tracks, while the undisputed evidence shows that the property has appreciated in value continuously during the time since the tracks have been built."

ADMISSION AND EXCLUSION OF EVIDENCE.

1. Respondent expressly disclaimed any right to recover damages for increased fire risk.

2. A phonograph was permitted to be operated in presence of the jury to reproduce sounds claimed to have been made by the operation of trains in proximity to respondent's hotel. With proper proofs, such as were fully given in this case, to justify the introduction of the instrument as a substantially accurate and trustworthy reproducer of the sounds actually made and testified to, we think its use legitimate. Communications conducted through the medium of the telephone are held to be admissible, at least in cases where there is testimony that the voice was recognized: 27 Am. & Eng. Ency. of Law, 2d ed., p. 1091, and cases cited; 1 Wigmore on Evidence, sec. 669; 3 Wigmore on Evidence, sec. 2155. The ground for receiving ²⁸¹ the testimony of the phonograph would seem to

be stronger, since in its case there is not only proof by the human witness of the making of the sounds to be reproduced, but a reproduction by the mechanical witness of the sounds themselves.

Even if it should be held that it was error to permit the use of the machine, its mild reproduction of sounds could not have so seriously prejudiced petitioner as to require a reversal of the case upon that ground. As we have recently said: "Questions raised over the introduction of evidence cannot be considered, in these proceedings, ordinarily. We have so held in many cases cited in the briefs of counsel, repeated here for future reference: *Michigan Air Line Ry. v. Barnes*, 44 Mich. 222, 6 N. W. 651; *Toledo etc. R. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271; *Port Huron etc. R. Co. v. Voorheis*, 50 Mich. 506, 15 N. E. 882; *Detroit etc. R. Co. v. Crane*, 50 Mich. 182, 15 N. W. 73; *Fort Street Union Depot Co. v. Jones*, 83 Mich. 415, 47 N. W. 349; *Marquette etc. R. Co. v. Longyear*, 133 Mich. 94, 94 N. W. 670. It is true that evidence clearly improper might justify a reversal of confirmation, should it appear that it had caused a substantial error on the part of the jury; but we do not find such to be the fact here": *Detroit etc. R. Co. v. Campbell*, 140 Mich. 384, 103 N. W. 856.

3, 4. The jury found it necessary for petitioner to occupy the street as alleged by petitioner, and errors, if any were committed, were harmless as far as these specific objections are concerned.

DAMAGES.

5-9. These objections relate to the subject of damages. The range of inquiry upon the subject of damages in such proceedings is quite wide; the object of the inquiry being to ascertain the respondent's entire loss, for the purpose of making it good to him: *Grand Rapids etc. R. Co. v. Weiden*, 70 Mich. 390, 38 N. W. 294; *Grand Rapids etc. R. Co. v. Chesebro*, 74 Mich. 466, 42 N. W. 66; *Commissioners of Parks & Boulevards of Detroit v. Chicago etc. R. R. Co.*, 91 Mich. 291, 51 N. W. 934; *Commissioners etc. v. Moesta*, 91 Mich. 149, 51 N. W. 903; *City of Detroit v. Brennan & Co.*, 93 Mich. 338, 53 N. W. 525; *Keyser v. Lake Shore etc. Railway Co.*, 142 Mich. 143, 105 N. W. 143. There was an abundance of testimony, if believed by the jury, to sustain their award.

"It is not within our province to review the question of fact, further than to see that the finding is supported by the evidence": *Detroit etc. R. Co. v. Campbell*, 140 Mich. 397. See,

also, Detroit etc. R. Co. v. Hall, 133 Mich. 302, 94 N. W. 1066. The order of confirmation is affirmed, with costs of this court to respondent.

At the time of filing his motion for the confirmation of the report of the jury and to fix his attorney fees and costs, respondent also filed a statement of the account of his attorneys, as follows: An itemized statement of the account of his counsel, George E. Nichols, amounting to the sum of eight hundred and thirty-three dollars and fifty cents; an itemized statement of the account of his local attorney, H. A. Jersey, amounting to the sum of three hundred and thirty-three dollars and seventy-five cents. Of these sums, three hundred and twenty-seven dollars and eighty-five cents was charged for services and expenses in a chancery proceeding to enjoin the railroad company from operating its road in front of respondent's premises. The circuit judge taxed respondent's costs at the sum of one hundred and one dollars and eighty cents and allowed two hundred dollars for attorney fees and expenses of attorneys. Respondent applied to this court for a writ of mandamus to require the circuit judge to allow his attorneys' fees and expenses as presented in their statements. An order to show cause was issued, to which the circuit judge made his return, and the matter was argued with the principal case. The return substantially admits that the services charged for were rendered and the amounts charged were reasonable as between attorney and client, but denies that they were reasonable within the meaning of the statute: 2 Comp. Laws, sec. 6240. We think it was the intention of the legislature to make the circuit judge the final arbiter as to the amount of the attorney fees to be awarded in such proceedings, and that we cannot review his determination: Detroit etc. R. Co. v. Hall, 133 Mich. 302, 94 N. W. 1066.

Writ denied.

Carpenter, C. J., and McAlvay, Grant and Moore, JJ., concurred.

The Admissibility in Evidence of photographs is discussed in the notes to State v. Matheson, 114 Am. St. Rep. 437; Baustian v. Young, 75 Am. St. Rep. 468; and the admissibility of telephone conversations is considered in Godair v. Ham Nat. Bank, 225 Ill. 572, 116 Am. St. Rep. 172; Young v. Seattle Transfer Co., 33 Wash. 225, 99 Am. St. Rep. 242; Shawyer v. Chamberlain, 113 Iowa, 742, 86 Am. St. Rep. 411.

IN RE FISHBECK'S ESTATE.

[146 Mich. 348, 109 N. W. 666.]

EXECUTORS AND ADMINISTRATORS—Deposit in Bank—Liability for Loss.—If an administrator deposits money as administrator in a bank then in good standing and credit, and without any negligence on his part the deposit remains in such bank until it fails, he is not liable for the loss. (p. 649.)

EXECUTORS AND ADMINISTRATORS—Deposit in Bank—Liability for Loss.—If an executor retains funds of the estate in his hands for the care of the testator's widow, and such funds consist of the proceeds of a mortgage which, without negligence on his part, he has deposited in a bank, then of good standing and credit, he is not liable for a loss caused by the subsequent failure of such bank. (pp. 649, 650.)

EXECUTORS AND ADMINISTRATORS—Right to Erect Vault and Keep It in Repair.—The expenditure of a reasonable amount of money by an administrator for the erection of a vault for the deceased in a cemetery and keeping such vault in repair, is a proper charge against the estate of the deceased, although the title to the lots on which such vault is erected is taken in the names of the widow and sons of the deceased. (p. 650.)

EXECUTORS AND ADMINISTRATORS—Collection of Debts—Interest.—If, on the settlement of a deceased administrator's account, it does not appear at what time a mortgage belonging to the estate was paid, such administrator is chargeable with interest only to the time of the appraisement of the estate. (p. 651.)

EXECUTORS AND ADMINISTRATORS—Compensation.—Heirs cannot complain of the allowance of statutory fees to an administrator who took care of the real estate, consisting of a homestead farm, promptly collected the funds of the estate, cared for the decedent's widow and promptly paid to each heir his share of the estate. (p. 651.)

Shields & Shields, for the appellants.

L. E. Howlett and W. P. Van Winkle, for the appellee.

349 GRANT, J. Freeman Fishbeck died July 21, 1882, leaving a widow and five children—three sons, named William, Charles, and John, and two daughters, Mrs. Ida Smock and Mrs. Alma Jessup. Upon the petition of Mrs. Jessup, Charles was appointed administrator, and filed a bond with John and William as sureties. September 6, 1882, an inventory was filed showing an appraisal of personal property of \$11,752.47; real estate, \$2,500—total, \$14,252.47. The personal property consisted of notes, merchandise, farm stock, tools, and household goods. Charles continued as administrator until his death, March 21, 1903. He never rendered an annual or final account, and no account was found showing an

itemized statement of receipts and disbursements. For four years he was also judge of probate. No commissioners on claims were appointed, and no claims were presented to or allowed by the probate judge. His widow lived upon the small farm, the homestead, about seventeen acres of which only was improved, until her death in 1892. Her estate was never probated. She had nothing except that to which she was entitled from her husband's estate. No allowance was made for her support and maintenance, neither was a dower admeasured to her. ³⁵⁰ The small farm was leased, evidently with the understanding on the part of all the heirs, to a tenant, who took care of their mother, with what assistance Charles provided her with out of the estate. Mrs. Smock testified that she was "perfectly willing that Charles should take whatever needed, and pay it to her. I thought he was doing it."

On January 1, 1883, the administrator distributed among the heirs \$7,500; April 15, 1885, \$1,000; May 20, 1892, \$3,250. In all he has distributed to each of his brothers and sisters out of the estate the sum of \$3,146.05, making a total, including the same amount to himself, of \$15,730.25. Upon the death of the administrator, his daughter Grace Knapp was appointed administratrix de bonis non, and filed an account as near as it could be ascertained of receipts and disbursements by her father. To this allowance Mrs. Smock and Mrs. Jesup objected. The account was allowed by the probate court, and an appeal taken to the circuit court. The trial was there had before a jury. The account as filed showed credits of \$19,843.18, and debits amounting to \$19,266.28. In this account the jury made one correction, charging the administrator with an item of \$355.47. Among the items so allowed was an item of services by the administrator for twenty-one years of \$750. The court, in rendering judgment, reduced this item to the statutory allowance, so that the judgment as rendered made the credits \$19,330.37 and the debits \$19,266.28. It thus appears that the administrator had paid out \$64.09 more than he received.

The objections relate (1) to amount paid heirs at law; (2) to a loss by the administrator of funds deposited in a bank known as the "Weimeister Bank"; (3) to the payment of certain debts without their allowance by commissioners, or by the probate judge acting as commissioner; (4) expenses in erecting the vault; (5) a mortgage known as the "Yelland mortgage"; (6) administrator's fees; (7) the item of \$750,

allowed to the administrator as paid to the widow of Freeman Fishbeck.

³⁵¹ Freeman Fishbeck left no debts except the expenses of his last sickness, and perhaps two other small items. These were paid by the administrator. The contestants, Mrs. Smock and Mrs. Jessup, admit in their answer that the charge of \$132.52 for services of physicians during their father's illness was reasonable and a fair charge, that the funeral expense was also reasonable and a proper charge, and that the physicians' bills for their mother should be allowed. The holding of this court in *Brown v. Forsche*, 43 Mich. 492, 5 N. W. 1011, speaking through Justice Cooley, is applicable to this case: "A probate case on appeal is to be tried and determined on the same principles that would be administered by the probate court itself. That court, in adjusting the accounts of administrators, is governed by the broad principles of equity; and it is at all times competent for the administrator, unimpeded by technical rules, to show the fairness of his dealings, the real nature of his transactions, and to restrict the amount for which he should be held liable to that which equity demands."

This case must be examined and determined upon equity principles. The contestants are presumed to know the law. There is no claim that they did not. The first distribution gave each of the heirs the full amount of the personal property aside from that which should have been assigned to the widow. There was no necessity of administration, except to pay the insignificant amount of the debts and distribute the estate. While there is no evidence of any express agreement between the heirs of Freeman Fishbeck that the estate should be divided without further expense of administration, the conclusion is irresistible that they trusted their brother Charles, the administrator, to divide the estate, which he promptly did, to ³⁵² retain enough for the care of their mother, and to preserve the homestead for her use while she lived. That the administrator faithfully and honestly did this is beyond dispute. Upon the death of the mother the real estate was sold by the heirs and the amount received divided among them.

We will now discuss the several claims of the respondent:

1. Without entering much into detail, we think it is clearly shown by the evidence that both contestants received each the same amount as the brothers received, to wit, \$3,146.05. Mrs.

Jessup was not a witness, neither was her deposition taken. The dispute in her case arises over a certificate of deposit for \$700. It is sufficient to say that she received it from the administrator, and it was a payment upon her distributive share. Mrs. Smock claims that her amount is \$300 short. This \$300 is accounted for by the fact that her husband received it for her, and with the understanding that he received it as a part of her distributive share. She testified: "If my husband got it, I am willing to have it apply on my share." He testified that he did get it, and that it was to apply on her share of the estate.

2. The administrator deposited money as administrator in the Weimeister Bank. The bank then had good credit and standing in the community. It subsequently failed. The percentage received by the administrator from the bank was promptly divided among the heirs and receipted for by them. There is nothing in the record to show that the administrator was guilty of negligence in so depositing the funds. The law, therefore, does not hold him liable for the loss: *In re Grammel's Estate*, 120 Mich. 487, 79 N. W. 706, and authorities there cited. It is, however, claimed that the administrator's estate is liable for the loss, because he was dilatory in the settlement of the estate, and that had he divided the estate seasonably the loss would not have occurred; citing *Wood v. Myrick*, 17 Minn. 408; *Palmer's Appeal*, 1 Doug. (Mich.) 422; 7 Am. & Eng. ³⁵³ Ency. of Law, 1st ed., p. 352, and note. This money was received by the administrator in payment of a mortgage on June 18, 1889. The bank failed three months and seven days thereafter. The administrator had the right to retain funds in his hands for the care of his mother, and it was evidently so understood by all the heirs that he should do so. She might at any time apply for her share of the estate. The principle of those cases therefore does not apply.

3. Whether under any circumstances an administrator may pay the debts of the estate which have not been allowed by commissioners or by the probate judge we find it unnecessary to determine. The administrator kept no regular book account. In a tin box were found some receipted bills and memoranda of payments made by him for various items. Some are dated and some are not; the receipted bills not being printed in the record and the date not given. They were in evidence before the jury and the court. All the record shows in regard to the item of \$35.50 for merchandise, purchased

from Hickey & Goodnoe, appears from a witness who produced the papers from the tin box. After testifying to certain small items, consisting of repairs upon the barn, dated July 12, 1892, the witness said: "The next item of merchandise to Hickey & Goodnoe, \$35.50, I got from the items in the tin box." Its date is not shown, and we cannot determine whether it was incurred by the deceased in his lifetime, or expended by the administrator for the support of his mother, or for repairs. As already stated, the answers of the respondents conceded the correctness of the services for medical attendance. This concession eliminates them from consideration. Aside from these items, the amount is so small that it is not equal to the balance due the administrator as allowed by the court.

4. The administrator was allowed \$450 for the construction of a vault, and subsequently other items were allowed for repairing it. The three brothers contributed \$200 apiece out of their own funds toward its construction. ³⁵⁴ Mrs. Jessup subsequently contributed \$100 toward repairing it. This repair was necessary for the preservation of the vault and the bodies there reposing. The erection of the vault was in accordance with the expressed wish of the father. The amount was reasonable and was properly allowed: *Jackson v. Leech's Estate*, 113 Mich. 391, 71 N. W. 846. To construct a vault for the repose of the dead is as proper as the erection of a monument: *In re Shipman's Estate*, 82 Hun, 108, 31 N. Y. Supp. 571. The two cemetery lots were purchased on which to erect the vault. The title of one lot was taken in the name of the mother. The title of the other was taken in the name of the three sons and the mother. It is immaterial that the title to the lots was taken in the names of the mother and the sons: *Birkholm v. Wardell*, 42 N. J. Eq. 337, 7 Atl. 569. The expenditure of a reasonable amount of money to keep the vault in repair was a proper charge against the estate: *Bell v. Briggs*, 63 N. H. 592, 4 Atl. 702.

5. One of the assets of the estate was a mortgage, dated February 27, 1877, due five years from date, and given by one Yelland for \$700. This mortgage was found among the papers of the administrator after his death. The administratrix with the will annexed, in the honest belief that this had not been paid, commenced foreclosure suit. The bill was dismissed, the court finding that the mortgage had been paid. The foreclosure proceedings are not in the record, and it does

not appear when the mortgage was paid to the administrator. He was charged with the face of the mortgage and the interest up to the time of the appraisal of the assets of the estate. It is stated in the brief of counsel for the appellee that the court found that the mortgage must have been paid soon after the death of Freeman Fishbeck, or soon after it became due. Why it was not discharged does not appear. In the absence of proof, the presumption is that past-due debts of the estate were promptly collected by the administrator. The court so held. It follows that the administrator is not chargeable with interest on this item.

³⁵⁵ 6. The administrator was allowed the statutory fees. Considering that the administrator collected the funds of this estate, took care of the farm, looked after the care of his mother, and promptly divided to each his share, the court might with propriety have allowed some extra compensation. The petitioners cannot justly find fault with the allowance of the statutory fees.

7. It is evident that the mother could not be properly cared for upon the income from the little farm on which she lived. It is shown from the memoranda made by the administrator found in the tin box that from July, 1882, to October 4, 1884, he paid her cash amounting to \$171.75. In making out the account the administratrix *de bonis non* credited him with \$75 a year for the benefit of the mother. We think the evidence justifies this allowance.

8. It is entirely clear that the administrator acted with promptness in the collection and distribution of the estate among his brothers and sisters; that by the assent of all he provided for his mother, took her to his home during her last illness, paid her physicians' bills and funeral expenses; and that after her death he promptly divided among them what he had retained for her support. It is impossible to read this record without reaching the conclusion that he acted honestly, that none of the estate remained in his hands, and that all understood that the entire estate was divided. The contestants and their brothers were intelligent, were fully cognizant of their rights, and it is impossible to believe that they would have waited twenty years after the death of their father and ten years after the death of their mother, if they had supposed that their brother still retained in his hands moneys belonging to them. Undoubtedly the discovery of the Yelland mortgage after his death caused the proceedings for

the appointment of an administratrix de bonis non. It proved that there was no estate left to administer.

The judgment is affirmed.

Blair, Montgomery, Ostrander and Hooker, JJ., concurred.

The Duty and Liability of Executors and Administrators in making deposits in bank of funds belonging to the estate of the decedent are considered in the note to *Officer v. Officer*, 98 Am. St. Rep. 371.

The Reasonable Expenses for the Burial of a deceased person are a charge upon his estate: *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 334; *O'Reilly v. Kelly*, 22 R. I. 151, 84 Am. St. Rep. 833. As to what are reasonable expenses for this purpose, see *Foley v. Brock-smith*, 119 Iowa, 457, 97 Am. St. Rep. 324. The expense of a suitable tombstone over the grave of the decedent is a legitimate item of credit in the accounts of an executor or administrator: *Webb's Estate*, 165 Pa. 330, 44 Am. St. Rep. 666; *Moulton v. Smith*, 16 R. I. 126, 27 Am. St. Rep. 728; *Van Emon v. Superior Court*, 76 Cal. 589, 9 Am. St. Rep. 258.

'SHAAF v. O'CONNOR.

[146 Mich. 504, 109 N. W. 1061.]

JUDGMENTS—Collateral Attack—Tax Deeds.—A suit against the holder of a tax deed to restrain an action of ejectment brought thereon, on the ground of the payment of the tax upon which the decree of sale is based, is a collateral attack upon such decree, and cannot prevail, when no suit has been brought to set aside the sale. (p. 653.)

A. McClatchey, for the appellant.

T. S. Viets, for the appellees.

⁵⁰⁴ HOOKER, J. There is no substantial dispute about the facts in this case. They are as follows: In 1858, while the several parcels of land which are the subject of this litigation constituted one parcel, owned and occupied by Jarvis Hurd, a tax was levied against the land. Being returned delinquent, said Hurd caused payment to the auditor general of one-half of the tax, which payment was seasonable, and was accepted and entered upon the books of the department as payment and satisfaction for the undivided one-half of the land. Upon the tax sale the remaining one-half was offered for sale, when Hurd's agent ⁵⁰⁵ paid to the county treasurer the remaining one-half of said taxes, with all interest, costs,

and charges, and the same was entered upon the books of the county treasurer and the auditor general's office, and it appears and has at all times since appeared therefrom that said tax was fully paid. Subsequent taxes have all been seasonably paid.

In 1885 an undivided half interest in the land was bid in to the state at the annual tax sale for that year, and, not being redeemed, was held as state tax land until November 7, 1899, when the auditor general, acting under section 139 of the tax law (Act No. 169, Pub. Acts 1899), canceled the sale, for the reason that the law of 1885 was not retroactive, and therefore would not support such sale. He thereafter included an undivided half of these lands in the petition for the foreclosure of tax liens of 1899 and prior years (see section 139), and a decree was duly entered without objection, and it was again bid in to the state at the annual tax sale held in May, 1902, and on June 9, 1902, it was sold to William O'Connor, trustee, who, in due season, received a deed from the auditor general therefor, as is usual in such cases. Some time afterward the statutory notice was served by O'Connor, trustee, upon the persons entitled thereto, and after waiting considerably more than the statutory period an action of ejectment was commenced by him to recover these lands.

The bill in this case was filed to restrain the prosecution of the ejectment case, to quiet the title, to require O'Connor to execute and deliver a deed, and for general relief. Answers were filed by both O'Connor and the auditor general, the latter of whom, while admitting the foregoing facts, justifies his omission to cancel the tax, upon the ground that he had no such authority, when applied to, more than six months having elapsed after the filing of proof of service of the statutory notice with the clerk. Defendant O'Connor appealed from a decree against him. The record shows that the auditor general's petition asserted a lien based upon a readvertised tax. A decree followed, and sale was made and confirmed.

⁵⁰⁶ This is a collateral suit which can only be made to prevail by attacking the validity of the decree. The record shows to our satisfaction that the decree was an unjust one, for the tax had been paid, but we can only so determine by trying a question of fact that might have been tried in that case, and of which that decree was conclusive. This we cannot do, such decree not being subject to collateral attack: See *Kneeland v. Wood*, 117 Mich. 174, 75 N. W. 461; *Peninsular Sav.*

Bank v. Ward, 118 Mich. 87, 76 N. W. 161, 79 N. W. 911; *Wilkin v. Keith*, 121 Mich. 66, 79 N. W. 887; *Haven v. Owen*, 121 Mich. 51, 80 Am. St. Rep. 477, 79 N. W. 938; *Gates v. Johnson*, 121 Mich. 663, 80 N. W. 709; *Blondin v. Griffin*, 133 Mich. 647, 95 N. W. 739; *Rumsey v. Griffin*, 138 Mich. 413, 101 N. W. 511; *Hoffman v. Flint Land Co.*, 144 Mich. 564, 108 N. W. 356.

We held in *Hayward v. O'Connor*, 145 Mich. 52, 108 N. W. 366, that "when the owner of land has notice—no matter how he obtains that notice—that his land has been sold for taxes, he must, if he desires to have the sale set aside by the circuit court, take proceedings within one year."

Notwithstanding the hardship of this case, we cannot set aside this sale without overruling the settled law of the state. It is clear, however, that the auditor general, if applied to seasonably, should have canceled this sale; but such application was not made, if made at all, until the period of six months after proof of the service of the statutory notice had elapsed. In view, however, of the decision in the cases of *Jakobowski v. Auditor General*, 144 Mich. 46 107 N. W. 722, and *O'Connor v. Carpenter*, 144 Mich. 240, 107 N. W. 913, we cannot say that section 143 (Act No. 128, Pub. Acts 1901) precludes cancellation after the expiration of six months.

Without passing upon the question of whether complainants may yet obtain relief, through cancellation, we will reverse the decree, and dismiss the bill without costs to either party, of either court, and without prejudice to other remedies which complainant may choose to seek.

Grant, Blair, Montgomery and Ostrander, JJ., concurred.

A Judgment without jurisdiction is void, and may be denied or contested in any proceeding, direct or collateral: Thornily v. Prentice, 121 Iowa, 89, 100 Am. St. Rep. 317; *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959. But when a court acquires jurisdiction, its judgment, however erroneous, is not subject to collateral attack: *Fraaman v. Fraaman*, 64 Neb. 472, 97 Am. St. Rep. 650; *Spencer v. Spencer*, 31 Ind. App. 321, 99 Am. St. Rep. 260. As to what is a collateral attack, see the note to *Morrill v. Morrill*, 23 Am. St. Rep. 104.

A Decree for the Sale of Land for Taxes, fair upon its face, cannot be collaterally attacked by showing that, subsequently to its entry, a blank therein was filled, so as to show the amount decreed against the land: *Haven v. Owen*, 121 Mich. 51, 80 Am. St. Rep. 477.

HUNT v. UNITED STATES ACCIDENT ASSOCIATION.

[146 Mich. 521, 109 N. W. 1042.]

INSURANCE, ACCIDENT—Voluntary Exposure to Danger.—A policy of accident insurance exempting from liability for injuries resulting from "voluntary or unnecessary exposure to danger," means cases in which there is a realization that an accident will in all probability result, and an injury follow, from the action about to be taken, and the danger of injury must be obvious. (p. 656.)

INSURANCE, ACCIDENT—Voluntary Exposure to Danger—Indoor Baseball.—An insured, under an accident policy exempting the insurer from liability for injuries resulting from "voluntary and unnecessary exposure to danger," is entitled to recover for a broken ankle caused by putting out his foot to prevent his running against a wall while playing indoor baseball. (p. 657.)

M. J. Schaberg, for the appellant.

T. A. E. Weadock, for the appellee.

⁵²¹ GRANT, J. Plaintiff, thirty-six years of age, was engaged in playing a game of indoor baseball in the gymnasium of the Young Men's Christian Association. The floor was smooth and slippery. The game is played with a soft ball, about twice the size of an ordinary ball. Plaintiff was batting, and, having struck the ball, ran to first base, twenty feet from the home plate. The side wall of the gymnasium was between six and ten feet beyond the first base. The pitcher caught the ball; tossed it at plaintiff, and touched him, before he could reach the first base. He ran beyond the base, and put out his foot and hand against the wall, which he ⁵²² had been in the habit of doing, to stop himself. His ankle was broken. He had a policy in the defendant company. In his application plaintiff agreed that the benefits under the policy "shall not extend to or cover . . . voluntary or unnecessary exposure to danger." The court directed a verdict for the defendant, holding that the accident was the result of an involuntary and unnecessary exposure to danger. He based his direction upon the following testimony, given by plaintiff upon cross-examination:

"Q. Now, you were running so hard that you could not stop yourself until you ran against the wall; that was the fact, was it? A. Well, I would not say as to that.

"Q. Why didn't you stop, if that was not a fact? A. Oh, I was feeling good. I felt like running.

"Q. Felt like running against the wall? A. Not necessarily.

"Q. Well, you saw the wall, didn't you? A. Yes.

"Q. You knew you were thirty-five feet away from it, where you stood? A. Well, sir, in that neighborhood, I suppose.

"Q. You were running so hard that you could not stop yourself until you ran into the wall? A. Oh, I might, if I had tried.

"Q. Why didn't you? A. I don't know why I didn't. It wasn't necessary.

"Q. What's that? A. I don't know why I didn't. I didn't, though.

"Q. You didn't think it was necessary to stop when you were running, to prevent your running against the wall, to prevent yourself running against the wall? A. I was not running very hard.

"Q. Why did you run into the wall, if you were not running very hard? A. Oh, that was just the way I had of stopping.

"Q. What? A. That was just the way of stopping, was all.

"Q. The wall stopped you? A. Yes.

"Q. You didn't stop at all? You didn't stop yourself at all? You ran right into the wall? ⁵²³ A. You might put it that way; yes.

"Q. Well, that is the fact, isn't it? A. I didn't stop until I struck the wall."

That negligence which would defeat a plaintiff in an action for damages on account of the negligence of a defendant finds no place as a defense in the law of insurance against accidents. Such contracts must be shorn of much of their value if ordinary contributory negligence could be interposed as a defense. Thoughtless and inconsiderate acts are some of the very things which these policies are designed to cover. One might easily ascertain whether his gun was loaded before he undertook to clean it. The hunter, in going through the brush, or getting over a fence, or rowing in his boat, should be careful to handle his gun so as to prevent accident. One climbing a ladder should see that the rounds were sound and securely fastened. Ordinary prudence would require these precautions, but hundreds of accidents happen because they are not taken. The term "voluntary exposure to danger" means a realization that an accident will in all probability result, and an injury follow, from the action about to be taken. The danger of injury must be obvious. That point has been decided in this court in *Johnston v. London & Acc. Co.*, 115

Mich. 86, 69 Am. St. Rep. 549, 72 N. W. 1115, 40 L. R. A. 440, where we said: "The term 'voluntary exposure to unnecessary danger,' as used in an accident policy exempting the insurer from liability for injuries caused by such exposure, means a conscious or intentional exposure, involving gross or wanton negligence on the part of the insured."

This is the well-established rule: *Fidelity & Casualty Co. v. Sittig*, 181 Ill. 111, 54 N. E. 903, 48 L. R. A. 359; *United States Mut. Accident Assn. v. Hubbell*, 56 Ohio St. 516, 47 N. E. 544, 40 L. R. A. 453; *Rustin v. Standard etc. Ins. Co.*, 58 Neb. 792, 76 Am. St. Rep. 136, 79 N. W. 712, 524 46 L. R. A. 253; *Fidelity & Casualty Co. v. Chambers*, 93 Va. 138, 24 S. E. 896, 40 L. R. A. 432; *Manufacturers' Accident Indemnity Co. v. Dorgan*, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620; *Burkhard v. Travelers' Ins. Co.*, 102 Pa. 262, 48 Am. Rep. 205; *Champlin v. Railway P. Assur. Co.*, 6 Lans. (N. Y.) 71; *Follis v. United States Accident Assn.*, 94 Iowa, 435, 58 Am. St. Rep. 408, 62 N. W. 807, 28 L. R. A. 78; *Schneider v. Provident L. Ins. Co.*, 24 Wis. 28, 1 Am. Rep. 157.

Plaintiff did not anticipate injury from doing what he had done before, and what others have repeatedly done. There was no obvious danger of injury. Granting that he might have stopped, we cannot say that there would not have been as much danger in trying to stop upon a slippery floor as in running against the wall. A jury would be justified in finding that the plaintiff had no anticipation of an accident, and did not realize that there was any danger. Even if he were careless, and might have avoided running against the wall, but in doing so did not realize any danger, he was entitled to recover. The learned circuit judge was in error in directing a verdict for the defendant.

Judgment reversed, and new trial ordered.

Carpenter, C. J., and McAlvay, Blair and Moore, JJ., concurred.

The Words "Voluntary Exposure to Unnecessary Danger," when employed in an insurance contract, relate to dangers of a substantial character which the insured recognizes and to which he nevertheless consciously and purposely exposes himself, intending at the time to assume the risk of the danger: *Travelers' Ins. Co. v. Clark*, 109 Ky. 350, 95 Am. St. Rep. 374, and see the cases cited in the cross-reference note thereto. It is a voluntary exposure to unnecessary danger to engage in riding a steeplechase: *Smith v. Aetna Life Ins. Co.*, 185 Mass. 74, 102 Am. St. Rep. 326.

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CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

KENNEDY v. FIDELITY AND CASUALTY COMPANY.

[100 Minn. 1, 110 N. W. 97.]

INSURANCE, CASUALTY—Indemnity—Right of Action.—A casualty insurance policy providing that "no action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within sixty days from date of such judgment and after trial of the issue," constitutes a contract of indemnity, and such judgment may be paid and satisfied by the assured by the execution and delivery of notes in good faith and so accepted by the judgment creditor, and the assured is thereupon entitled to recover against the insurance company. (pp. 659, 660.)

R. E. Olds and Davis, Kellogg & Severance, for the appellant.

S. A. Anderson and J. C. Mangan, for the respondent.

* LEWIS, J. Respondent was the owner and operator of a steam laundry, and was insured by appellant company against loss up to \$5,000 from liability for damages on account of bodily injuries suffered by his employés. One of his employés, Kathryn Carlin, was injured during the term of the policy and recovered a judgment against respondent for \$7,943.75, which was entered January 19, 1906. February 24, 1906, the judgment was satisfied, and in full payment thereof respondent delivered to the judgment creditor, or her attorney, four promissory notes, dated on that day, with interest at six per cent per annum, and indorsed by M. J. Clark, guarantor; one for \$1,000, payable in three installments, \$200 sixty days, \$400 six months, and \$400 one year from date thereof; another for \$1,000, payable in four equal quarterly

installments beginning May 24, 1907; one for \$1,000, payable in four equal quarterly installments beginning May 24, 1908; and one for \$2,000, payable in four equal quarterly installments beginning May 24, 1909. No cash, property, or other consideration than the execution and delivery of the notes passed from respondent to Kathryn Carlin in satisfaction of the judgment. Respondent, having made demand upon appellant company for the payment of the face of the policy, commenced this action, and at the close of the case the court directed a verdict for plaintiff for the full amount demanded. Appeal was taken from an order of the court denying appellant's motion for judgment notwithstanding the verdict, or for a new trial. Two hundred and two dollars was paid on the first note after the action was commenced.

The policy upon which the suit was founded provided that the company, in consideration of the warranties made in the application for the policy and \$25, agreed to indemnify respondent for the period of twelve months, subject to certain special and general agreements, against loss from common-law or statutory liability for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered ³ within the period of this policy by any employé or employés, etc., and under the head of general agreements, subdivision 7 reads: "No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within sixty days from date of such judgment and after trial of the issue. No such action shall lie unless brought within the period within which a claimant might sue the assured for damages unless at the expiration of such period there is such an action pending against the assured in which case an action may be brought against the company by the assured within sixty days after final judgment has been rendered and satisfied as above. The company does not prejudice by this clause any defenses to such action which it may be entitled to make under this policy."

We accept the views of appellant that this is a contract of indemnity, and not one of insurance, to the extent of \$5,000. In this respect the policy differs materially from the one considered in *Anoka Lumber Co. v. Fidelity & Casualty Co.*, 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689. The contract contemplates that an actual loss shall be sustained and paid before the company becomes liable, and appellant submits that

by the fair and reasonable meaning of the language the assured cannot accomplish payment or satisfaction of the judgment in any other way than by actually parting with the cash. It is admitted that the debt and judgment was paid and satisfied by the execution of the promissory notes, if given in good faith: *Bausman v. Credit Guarantee Co.*, 47 Minn. 377, 50 N. W. 496. But the whole argument of appellant rests upon the claim that the mere giving of the notes did not amount to a loss actually sustained for the reason that the maker of the notes and the guarantor might never be called upon to make payment, might become insolvent, that there is no certainty they will ever be paid, and, if not paid, there is no loss actually sustained. This means that the party assured, no matter what his financial condition might be, would be compelled to raise the actual cash within sixty days and pay it to the judgment creditor, or be foreclosed from enforcing the indemnity against the company. If the position is sound, the money could not be raised by borrowing at a bank, or at any other place, upon promissory notes secured either by a signer or by property, because, before the notes became due, the property might become worthless, deteriorate in value, or the parties might become insolvent, and no actual payment ever be made; hence no loss. Fairly construed, the language means simply that the judgment must be paid and satisfied within sixty days from date of its entry, and, when such judgment is paid or satisfied, the loss is actually sustained. Of what consequence is it to the company whether respondent has on hand immediate cash to pay the judgment, or whether the judgment debtor is compelled to borrow that amount on the most favorable terms, or whether he makes the payment and secures the satisfaction by the execution of promissory notes running direct to the judgment creditor? Logically there is no difference in the method, and in either case it amounts to a payment and satisfaction of the judgment.

If the assured accomplished the satisfaction and payment of the judgment by executing and delivering the promissory notes above described, the good faith of that transaction was hardly open to question, even though it gave the assured the advantage of collecting from appellant company the amount of insurance before the notes came due. So far as the record shows, the assured paid the judgment in good commercial paper, and there is nothing upon the face of the transaction

to indicate that the arrangement was made for a fraudulent purpose.

Order affirmed.

For Recent Authorities on the Nature of Contracts of indemnity or casualty insurance, see Sanders v. Frankfort etc. Ins. Co., 72 N. H. 485, 101 Am. St. Rep. 688, and cases cited in the cross-reference note thereto: Frye v. Bath Gas etc. Co., 97 Me. 241, 94 Am. St. Rep. 500.

WALLER v. ROSS.

[100 Minn. 7, 110 N. W. 252.]

NEGLIGENCE—Fall of Awning—Res Ipsa Loquitur.—The liability of the owner of a building for damages to a traveler upon the highway caused by the falling of an awning attached to such building is to be determined upon the principle of negligence in accordance with the maxim "*res ipsa loquitur*," and not upon the doctrine of insurance of safety, when there is no issue as to nuisance in the case. (p. 662.)

NEGLIGENCE—Fall of Awning.—If a traveler upon the highway is injured by the fall of an awning attached to a building, the owner of such building is *prima facie* guilty of negligence. (p. 666.)

Ayers & McDonald, for the appellant.

H. E. Fryberger, for the respondent.

⁷ JAGGARD, J. This was an action for personal injuries claimed to have been sustained by plaintiff and appellant while she was walking upon the sidewalk on a public street in Minneapolis. While plaintiff was in front of a building of defendant and respondent, an awning which had been ⁸ attached to that building fell and struck her, and caused the damages for which recovery was here sought. Defendant had a verdict. Plaintiff appealed from an order denying her motion for a new trial.

The plaintiff argues that the rule of law applicable is that when the plaintiff's evidence showed an injury sustained by her while a passenger upon the street, because of the falling upon her of an awning, the burden of proof shifted to the defendant, and that it was incumbent upon the defendant to show, first, that the accident was unavoidable; or, second, that the plaintiff was not injured, before he would be relieved from liability on account of the accident; that is to say, plaintiff

invokes the doctrine of insurance of safety as announced in *Rylands v. Fletcher*, L. R. 3 H. L. 330, and would hold the owner of an awning which did damage to a person properly using the street absolutely responsible notwithstanding the exercise of due care on his part.

In support of that contention she cites *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 11 Sup. Ct. Rep. 859, 35 L. ed. 458, in which the federal supreme court quotes as follows from an English decision, namely: "A man who for his own benefit suspends an object or permits it to be suspended over the highway and puts the public safety in peril thereby is under an absolute duty to keep it in such a state as not to be dangerous." That English case was *Tarry v. Ashton*, 1 Q. B. 314. It is to be noted, however, that there the jury had found negligence on part of the defendant personally. The lamp overhanging the highway, which fell and injured the plaintiff, a foot-passenger, was out of repair through general decay, although not to defendant's knowledge. The court also referred with approval to the leading case of *Kearney v. London*, L. R. 5 Q. B. 411, L. R. 6 Q. B. 759, as being directly in point, and as holding that the doctrine of *res ipsa loquitur* applied to the case of plaintiff injured, while walking on a public highway, by a brick which fell from a pier of defendant's bridge. The case is an authority for the doctrine of *res ipsa loquitur* in such cases, but not for the doctrine of insurance of safety. *Gleeson v. Virginia Midland Ry. Co.*, 140 U. S. 435, 11 Sup. Ct. Rep. 859, 35 L. ed. 458, itself held a railway company responsible for negligence in maintaining a cut with sides of the character shown by the evidence in that case, because of which loosened earth obstructed the track and derailed the train on which plaintiff was a passenger, whereby he was injured. Not the facts nor the theory, nor the cases cited therein, tend to support the contention * of absolute liability in this case; but, on the contrary, sustain the application of the maxim "*Res ipsa loquitur*."

A large number of cases have been presented to the courts in which a body of considerable weight has been suspended or put in position where it is likely to fall, and has, in fact, fallen and produced damage to a person lawfully using a highway. The liability of the person responsible for such damages has been, under different circumstances, determined upon the doctrine of insurance of safety, of nuisance, of *prima facie*

negligence, or rarely of ordinary negligence. While there is not entire unanimity of opinion either as to the correct principle to be adopted or as to its application, the marked tendency of the decisions is to base liability in such cases upon culpability, and not to extend absolute responsibility to which the exercise of reasonable care is no defense to cases in which there is no necessary or inherent tendency of the thing of weight to do considerable harm. The logic of damage from falling things of weight, according to the prevailing view, leads to the application of the maxim "*Res ipsa loquitur*."

"The most apt and concise statement of the principle" (7 Words and Phrases, 6139) is to be found in *Scott v. London*, 3 Hurl. & C. 596. There plaintiff, passing a warehouse, was hurt by the falling of barrels of sugar. The court said: "There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

The same principle has been applied to persons passing on a highway injured by a falling barrel (*Byrne v. Boadle*, 2 Hurl. & C. 722; *Welfare v. London*, L. R. 4 Q. B. 693; and see *White v. France*, 2 C. P. D. 308; *Briggs v. Oliver*, 4 Hurl. & C. 403); by a falling sign (*Morris v. Strobel*, 81 Hun, 1, 30 N. Y. Supp. 571; *St. Louis etc. Ry. Co. v. Hopkins*, 54 Ark. 209, 15 S. W. 610, 12 L. R. A. 189; *Taylor v. Peckham*, 8 R. I. 349, 91 Am. Dec. 235, 5 Am. Rep. 578; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354; *Jones v. City of Boston*, 104 Mass. 75, 6 Am. Rep. 194); by an iron guard (*Mentz v. Schieren*, 36 Misc. Rep. 813, 74 N. Y. Supp. 889); by a limb from an ornamental tree (*Waller v. McCormick*, ¹⁰ 52 N. J. L. 470, 19 Atl. 1101, 8 L. R. A. 798); by an iron beam (*McCauley v. Norcross*, 155 Mass. 584, 30 N. E. 464); by a falling derrick (*Scheider v. American B. Co.*, 78 App. Div. 163, 79 N. Y. Supp. 634); and by a broken bolt on an elevated railway (*Volkmar v. Manhattan*, 134 N. Y. 418, 30 Am. St. Rep. 678, 31 N. E. 870).

This view of the law has received the sanction of many decisions in which the damage was done by ponderous objects falling upon persons lawfully at the place to whom a duty was

owing and who had assumed no risk. It would uselessly encumber to collate them. See *Kaples v. Orth*, 61 Wis. 531, 21 N. W. 633, as to the fall of a block of ice; *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630, 59 N. E. 925, 52 L. R. A. 922, as to fall of cable and elevator counter-balance; *The Joseph B. Thomas*, 81 Fed. 658, 30 C. C. A. 333, 46 L. R. A. 158, as to the fall of a water keg.

The rule of *res ipsa loquitur* has been consistently applied to a damage done to one lawfully using a highway by the falling of buildings or parts of buildings. The common acceptance of this view in the two leading cases on the subject (*Ryder v. Kinsey*, 62 Minn. 85, 54 Am. St. Rep. 623, 64 N. W. 94, 34 L. R. A. 557, and *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530) is especially significant because the doctrine of *Rylands v. Fletcher*, L. R. 3 H. L. 330, has been accepted in Minnesota and essentially rejected in New York. See, also, *Travers v. Murray*, 87 App. Div. 552, 84 N. Y. Supp. 558, as to the falling of a chimney, but see *Bramwell, B.*, in *Nichols v. Marsland*, L. R. 10 Ex. 255, quoted in *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224, and *Isherwood v. H. L. Jenkins Lumber Co.*, 84 Minn. 423, 87 N. W. 931, as to the falling of a pile of lumber. And, generally, see *Martin v. Dufalla*, 50 Ill. App. 371; *Kappes v. Appel*, 14 Ill. App. 170; *Paterson v. Jos. Schlitz Brewing Co.*, 16 S. Dak. 33, 91 N. W. 336. There is no inconsistency with this rule in holding the person responsible for damages done by a falling wall on principles of nuisance under appropriate circumstances: See *Simmons v. Everson*, 124 N. Y. 319, 21 Am. St. Rep. 676, 26 N. E. 911; *Wilkinson v. Detroit S. & S. Works*, 73 Mich. 405, 41 N. W. 490; *Miles v. City of Worcester*, 154 Mass. 511, 26 Am. St. Rep. 264, 28 N. E. 676, 13 L. R. A. 841; *Murray v. McShane*, 52 Md. 217, 36 Am. Rep. 367. And see *Lauer v. Palms*, 129 Mich. 671, 89 N. W. 694, 58 L. R. A. 67; *Chute v. State*, 19 Minn. 271; *Nordheimer v. Alexander*, 19 Can. Sup. Ct. 248. So, also, the liability for damages caused by the falling ¹¹ of a cornice has been determined under the rule *res ipsa loquitur* or by the principles of nuisance: *Roberts v. Mitchell*, 21 Ont. App. 433, per Osler, J.; *Grove v. City of Ft. Wayne*, 45 Ind. 429, 15 Am. Rep. 262.

It is true, as is argued by counsel for the plaintiff, that the liability of the owner of a roof constructed so that it will inevitably, at certain seasons of the year and with more or less

frequency, subject innocent travelers to damage or danger may be found without reference to reasonable diligence upon the principle of *Rylands v. Fletcher*, L. R. 3 H. L. 330 (*Shipley v. Fifty Associates*, 101 Mass. 252, 3 Am. Rep. 346, 106 Mass. 199, 8 Am. Rep. 318; *Smethurst v. Barton & Church*, 148 Mass. 261, 12 Am. St. Rep. 550, 19 N. E. 387, 2 L. R. A. 695; *Shepard v. Creamer*, 160 Mass. 496, 36 N. E. 475), or of nuisance (*Hannem v. Pence*, 40 Minn. 127, 12 Am. St. Rep. 717, 41 N. W. 657; *Lowell v. Glidden*, 159 Mass. 317, 34 N. E. 459). But see *Garland v. Towne*, 55 N. H. 55, 20 Am. Rep. 164. The inherent and necessary tendency of a roof's eaves overhanging a highway to do harm, however, varies materially from the tendency of the ordinary awning to fall. That natural difference is a good foundation for the distinction between the legal principles of liability applicable to the respective owners for consequent damages. The same reasoning which holds the owner of such a roof responsible for damages without reference to culpability justifies the holding of the owner of such an awning in an action for negligence responsible on the theory of *res ipsa loquitur* only. It is true that the owner of the building to which the awning is attached may be held responsible for damage to a passer-by due to its fall, on the doctrines of nuisance: See *Hume v. Mayor*, 74 N. Y. 264. In the case at bar, however, the pleadings, the evidence, the assignments of error, and the brief on appeal present no question as to the liability of the defendant on the ground of nuisance. Under the circumstances we conclude that the theory of *res ipsa loquitur* was as favorable to the plaintiff as would have been proper under the circumstances.

The remaining assignments of error concern the charge of the court. While it is true that the trial judge did at one place correctly state the abstract doctrine of *res ipsa loquitur*, he did not adequately apply that rule to the facts in this particular case. In many other places, which are covered by the plaintiff's first five assignments of error, he gave the general rules of law applicable to an ordinary case of negligence, ¹² in which the burden of proof rests on the plaintiff and in which the mere happening of an accident is not evidence of negligence. The result we have concluded did not secure to the plaintiff the benefit of the rule of *res ipsa loquitur*.

On the one hand, it is well settled that it is the duty of counsel to correct verbal inaccuracies or obscurity or indefin-

iteness in a charge at the time it is given, and that, if he fail to call to the court's attention such matters at such time, he cannot subsequently predicate error on such grounds in the charge actually given. On the other hand, it is equally well settled that the trial court should not give undue prominence, by repetition or otherwise, to portions of the law applicable, and that, although unnecessary charges do not always constitute error, in the nature of things, undue emphasis upon correct, but inapplicable, rules of law, tends to mislead the jury and may result in an unfair trial: 11 Ency. of Pl. & Pr. 297, 299. Whether or not such undue emphasis so resulted is to be determined by an examination of each record. In the case at bar a prima facie case of negligence was clearly made out, and plaintiff showed that she had received at least some injury. Defendant offered little or no evidence to rebut the inference of negligence. The fact that the jury found for the defendant is therefore significant. Taking the record as a whole, we have concluded that the charge was so misleading that the plaintiff should have a new trial.

Order reversed.

The Application of the Doctrine of Res Ipsa Loquitur in creating presumptions of negligence is discussed in the note to Cincinnati Traction Co. v. Holzenkamp, 113 Am. St. Rep. 999. At page 1010 of this note is a discussion of the presumption of negligence from the falling of buildings or parts thereof. The question of when care will be presumed is considered in the note to Chicago etc. Ry. Co. v. Wilson, 115 Am. St. Rep. 108.

LINDAHL v. SUPREME COURT, INDEPENDENT ORDER OF FORESTERS.

[100 Minn. 87, 110 N. W. 358.]

INSURANCE—Benefit Societies—Validity of By-laws—Resort to Courts.—The constitution and by-laws of an insurance benefit society denying the right of resort to the civil courts until after all remedies within the order are exhausted, if reasonable, are valid and binding upon assenting members and upon their beneficiaries, but if they are of such a nature as to nullify the contract by rendering its enforcement so difficult and uncertain as to destroy its value, they will not be enforced by the courts. (pp. 668, 669.)

INSURANCE—Benefit Societies—Unreasonable By-laws.—By-laws or provisions of an insurance benefit society which require a

beneficiary to submit his claim to an appellate tribunal of the society, which will hold its next session three years in the future in a foreign country, are unreasonable and nonenforceable, and the beneficiary is entitled to bring his action in the civil courts without reference to such by-laws, although the member had assented to them when he became a member of the society. (p. 672.)

SUICIDE—Presumption—Burden of Proof.—The presumption is against suicide, and the burden of proof is upon the one who asserts it as a fact to prove it by a fair preponderance of the evidence. (p. 673.)

SUICIDE—Evidence.—When the facts proved with reference to a death admit equally of the inference that such death resulted from accident or suicide, the presumption is that the death was accidental. (p. 673.)

SUICIDE—When Circumstantial Evidence is Relied upon to establish a death by suicide, the party asserting the fact must prove it by facts which exclude every reasonable hypothesis of natural or accidental death. (p. 674.)

O. H. O'Neill, for the appellant.

C. G. Laybourn, for the respondent.

§§ ELLIOTT, J. The Independent Order of Foresters is a fraternal benevolent association incorporated under the laws of the Dominion of Canada. It does business under the lodge system, with a supreme body styled ^{§§} the "Supreme Court," intermediate bodies called "High Courts," and local lodges called "Subordinate Courts." All the members receive benefit certificates which entitle them to death benefits, which are payable by and through the supreme court. The money to make these payments is raised by regular monthly assessments levied on all the members through the subordinate courts. The entire body is incorporated under the name of the "Supreme Court of the Independent Order of Foresters," and this is also the name of the supreme legislative and judicial body, which meets once in three years. All the business in reference to benefits is transacted by the subordinate courts and the supreme court. When the supreme court is not in session, the supreme authority in the order is vested in an executive council, composed of seven executive officers of the order. The headquarters of the supreme court is at Toronto, Canada.

In 1899, Swan Malcolm Lindahl became a member of this order, and there was issued to him the usual benefit certificate, under which the beneficiary therein named became entitled, upon the death of Lindahl while in good standing, to receive from the order the sum of one thousand dollars. The provi-

sions of the constitution and by-laws of the order were made a part of the contract between the order and the member, and certain sections of the constitution, including that which provides that any member of the order who may commit suicide shall ipso facto forfeit all benefits under his certificate, were set out in full in the certificate. The laws of the order, thus made a part of the contract, also provided for appeals from one authority to another within the order, and that a member or beneficiary with a claim against the order should exhaust all the remedies by appeal within the order before resorting to the civil courts. About March 24, 1905, Lindahl, while in good standing in the order, disappeared, and a few days thereafter what was claimed to be his body was found in the Mississippi river. The beneficiary named in the certificate made formal proof of death and demanded payment of the amount of the certificate. The local court or lodge to which he belonged certified these formal proofs of death to the supreme chief ranger, who disallowed the claim on the ground that, if Lindahl was dead, he had committed suicide. The plaintiff then brought this action, and recovered a verdict for the full amount payable under the certificate. The defendant appealed from ^{so} an order denying a motion for a judgment notwithstanding the verdict or for a new trial.

The appellant contends (1) that the finding of the jury that the dead body taken from the river was that of Lindahl is not justified by the evidence; (2) that the right to maintain an action on the certificate is contingent upon first exhausting the remedies on appeal within the order; (3) that the court improperly excluded evidence of a certain letter claimed to have been written by Lindahl to his wife; and (4) that the court erred in giving certain instructions in reference to the presumptions and the burden of proof on the issue of suicide.

1. The appellant has made a very careful analysis of the evidence, which it claims is insufficient to prove that the body found in the river was that of Lindahl. We do not find it necessary, or think it desirable, to review the evidence upon this issue. The trial court properly held that there was evidence sufficient to carry the question to the jury and to sustain its conclusion.

2. Associations of the character of the appellant very generally provide by their by-laws and contracts for the adjudication of controversies arising between members, or between members and the association, by tribunals within the order.

Such provisions differ in form and scope, but all seek to prohibit or restrict the right of the member or his beneficiary to sue the order in the civil courts. In some instances it is provided that the determination of the controversies by such tribunals shall be final and conclusive, but more commonly that the member shall not resort to the civil courts until he has exhausted all the remedies, by appeal or otherwise, which are provided for him within the order. It is generally conceded that, in so far as such requirements relate to the internal government, doctrine, and discipline of the association or order, they are binding upon the members, and no right exists to resort to the courts, unless the rules of the order have been observed. In some cases the restrictions are held valid and effective as between the association and its members, but as not determining the rights of third persons, who claim benefits under contracts between members and the association: *Baltimore & O. R. Co. v. Stankard*, 56 Ohio St. 224, 60 Am. St. Rep. 745, 46 N. E. 577, 49 L. E. A. 382, note, where the cases are collected.

The conflict of authority is due largely to the adoption of different theories as to the nature and purpose of the requirements. The conclusion ⁹¹ depends somewhat upon whether the provisions are regarded as rules for the government of charitable and benevolent associations in matters relating to discipline and government, as provisions for the arbitration of disputes, or as regulations for the presentment and allowance or disallowance of claims against the association. Many of the so-called benevolent and fraternal associations which are largely engaged in the life insurance business can no longer be treated as charitable organizations. Their insurance features are but remotely connected with the charitable and benevolent work of the orders. Their certificates are simply insurance contracts, and the benefits to which the members are entitled thereunder result from the payment of full and adequate consideration. If the provisions are treated as providing for arbitration, they are subject to the objection that parties cannot be permitted to bind themselves in advance to submit claims which may arise in the future to arbitration, and thus oust the courts of their jurisdiction. There is also the further objection that the association is made the arbitrator in its own case.

But there is no valid objection to treating such requirements as provisions for the presentation of claims against the associa-

tions, in order that they may be fully examined and passed upon by the proper officers before the association is subjected to the expense and annoyance of litigation. The right to require a claim to be presented to designated officers cannot be questioned. It seems equally clear that the association may prescribe a mode of procedure for securing the acceptance or rejection of claims, provided it is not such as to deprive the parties of their substantial contract rights. Requiring claims for benefits to be first presented to the officers of the association certainly violates no property rights. Nor can it be unreasonable to require that the member or his beneficiary shall appeal to the governing body of the order and thus secure the approval or rejection of his claim by the final action of those who are entitled to speak with conclusive effect for the order. Until the highest authority in the order has rejected the claim, it may reasonably be said that the debtor has not refused to pay. If follows that, if the requirements are reasonable and not of such a nature as to nullify the contract by rendering its enforcement so difficult and uncertain as to destroy its value, they will be enforced by the courts.

⁹² The laws of the appellant contain the following provisions:

"1. No member of the order, nor his beneficiary, nor his legal representative, nor other person in any way interested in any of his benefits, nor anyone deriving legal rights from him, shall be entitled to bring any civil action or other legal proceedings against the supreme court or against any other court or branch of the supreme court until he shall have exhausted all the remedies provided in the constitution and laws, by appeals and otherwise; and any member of the order or his beneficiary or his legal personal representative or other person in any way interested in any of his benefits or deriving legal rights from, through, by or under him or them or any of them who shall bring any civil action or other legal proceedings against the supreme court or against any other court or any other branch of the supreme court before he shall have exhausted all remedies within the order, by appeals and otherwise, shall ipso facto forfeit all benefits and all rights, claims and demands therein and thereto to which he or they or any of them might otherwise have been entitled, and if a member of the order he shall stand suspended from the order.

"2. All civil actions or other legal proceedings to be brought or instituted against the supreme court or against any other

court or branch of the supreme court shall be brought or instituted within six months after notice of the final action of the supreme court in the matter has been served in accordance with the provisions of sections 42, 98, and 165 of the constitution and laws."

The right of appeal is vested in the member or beneficiary and also in the order by the following provisions:

"1. Unless otherwise specifically provided in the constitution and laws, the right of appeal shall be vested in every member of the order, and, in case of the death or disability of a member, the right of appeal shall be vested in his beneficiary or personal representative.

"2. Unless otherwise specifically provided in the constitution and laws, the right of appeal shall also be vested in every court; ⁹³ and an appeal shall lie against the action or decision of any officer or of any court, except the action or decision of the supreme court. The action or decision of the supreme court shall be final and conclusive in all cases.

"3. Any aggrieved party failing to take an appeal from any action or decision in the manner and within the time laid down in the constitution and laws shall be bound by such action or decision, and shall have no further recourse, whether in law or equity, in respect of the subject matter of such action or decision.

"4. A decision of the supreme chief ranger, unless altered or reversed on appeal, shall be final and binding."

The sequence of appeals is as follows:

"Direct to the supreme court or supreme chief ranger.

"1. All appeals arising in any of the courts in connection with the insurance or mortuary benefit and in connection with the sick and funeral benefits and in all matters relating to the general laws shall be direct from the court deputy to the supreme chief ranger. . . .

"3. From the supreme chief ranger to the executive council.

"4. From the executive council to the supreme court, whose decisions shall be final on all questions."

We do not construe these provisions as attempting to deprive the holder of the certificate of the right to appeal to the civil courts after he has exhausted the remedies provided by the constitution and by-laws of the order. But the restrictions which they impose are so unnecessary and unreasonable as to deny substantial relief to the beneficiary, and are therefore unenforceable. Before an action can be brought an ap-

peal is required to be taken in the order and manner designated to the supreme court of the order. The by-laws provide that "the supreme court shall meet in regular session triennially or quadrennially in any country in which it has branches, at such time and place therein as may have been selected as provided in the constitution and laws.

84 "The selection of the time and place for holding the next regular session of the supreme court shall be determined immediately after the election of officers, . . . provided that the supreme court shall not meet, except with unanimous consent, more than twice in succession within the United States to once in Canada and once in countries other than the United States and Canada."

There is no provision for a reasonably prompt hearing of appeals. The evidence shows that the last regular meeting of the supreme court was held in January, 1905, at Atlantic City, New Jersey, and that the next meeting is to be held in 1908, at Toronto, Canada. The right to demand the payment of this certificate accrued in March, 1905. Had Mrs. Lindahl appealed from the decision of the supreme chief ranger to the executive council and it had decided against her, she could not have had her appeal heard by the supreme court until its meeting in Toronto, in 1908. Three years must have passed before she could have learned whether the order would recognize the validity of her claim, and, if it was then denied, there would follow the further delay necessarily resulting from litigation in the civil courts.

When we consider the character of these certificates, and remember that they are generally taken by persons in very moderate circumstances, for the protection of wives and children against the demands which arise upon the death of the insured, we are very clear that any by-laws or provisions which require the beneficiary to submit his claim to an appellate tribunal which will hold its next session three years in the future in a foreign country are unreasonable and nonenforceable. Within the terms of these provisions it is possible for the order to delay a final definite admission or denial of liability for so long a time as to deprive the contract of insurance of any value and render it practically optional with the order to admit or escape liability: *Kane v. Supreme Tent*, 113 Mo. App. 104, 87 S. W. 547; *Strasser v. Staats*, 59 Hun, 143, 13 N. Y. Supp. 167. The New York court of appeals has well said that this appellant "had no power under the circum-

stances of the case to deprive the relator of the right to resort to the civil court for relief or to compel him to seek his remedies by appeal to the various judicatories erected within the order. The manner in which these ⁹⁵ courts are organized, the expense and delay involved in procuring a hearing in another and very remote jurisdiction, were also facts which amounted almost to a denial of justice": *Brown v. Supreme Court I. O. F.*, 176 N. Y. 132, 68 N. E. 145. See, also, *Corregan v. Hay*, 94 App. Div. 71, 87 N. Y. Supp. 956.

It follows that the plaintiff was entitled to bring her action without reference to these unreasonable requirements of the defendant's constitution and by-laws, notwithstanding the fact that the member had assented to the same when he became a member of the order. Had the requirements been reasonable, and designed to enable the order, through its proper officers or governing bodies, to properly examine the claim, in order to give an intelligent and authoritative answer to the demand, they would have been enforceable, and until compliance therewith the beneficiary would have had no standing in a civil court: *Carey v. Switchmen's Union of North America*, 98 Minn. 28, 107 N. W. 129.

3. The defendant interposed the defense of suicide on the part of the deceased member, and if this fact had been established there could under the terms of the contract have been no recovery. It is settled that upon the issue of suicide the burden is upon the defendant, who asserts the fact, to prove the same by a fair preponderance of the evidence. In all legal discussion the existence of certain qualities in human nature are presumed. Common experience teaches that the love of life, the instinct of self-preservation, respect for the laws of the land, and the principles and teachings of religion are ordinarily sufficient to prevent a person from destroying his own life, and therefore, when the facts proved with reference to death admit equally of the inference that the death resulted from accident or suicide, the presumption is that death was accidental: *Hale v. Life Indemnity & Inv. Co.*, 61 Minn. 516, 52 Am. St. Rep. 616, 63 N. W. 1108; *Sartell v. Royal Neighbors of America*, 85 Minn. 369, 88 N. W. 985. The existence of a legal presumption against the fact of suicide is not denied by the appellant; but it is contended that the trial court so instructed the jury as to require the fact of suicide to be shown by the defendant by more than a fair preponderance of the evidence. The court told the jury that "In or-

der to sustain the defense of suicide, the burden is upon the defendant to establish by a preponderance of the evidence ⁹⁶ that Swan Malcolm Lindahl came to his death by his own effort and with the intention to take his own life."

It is admitted that this was a correct statement of the law; but the court also instructed the jury that "In this class of cases the rule is that every reasonable hypothesis for accounting for death other than by suicide should be excluded from the case before you can conclude it was suicide, and then only, of course, from evidence warranting that conclusion."

When these two instructions are considered together, they state the rule of law correctly: *Boynton v. Equitable L. A. Soc.*, 105 La. 202, 29 South. 490, 52 L. R. A. 687, and cases cited in note.

As long as the evidence is consistent with the theory of accidental death, the presumption against suicide is controlling. The issue being the fact of suicide, it is for the defendant to prove this ultimate fact by a fair preponderance of the evidence. It starts with the burden of overthrowing the presumption that a person does not voluntarily destroy what is commonly regarded as the most precious of all possessions, life itself. When the fact of death appears, the law presumes that it must have resulted from causes which were not voluntarily brought about by the deceased. Death may result from innumerable causes. The facts of a case may suggest accidental shooting, poisoning, or drowning. If the evidence is consistent with the theory of either, the presumption which the law raises from known and recognized controlling forces of human nature requires the conclusion that the death was accidental. If the known facts are consistent with a cause of death which does not involve self-destruction, that cause must be accepted. After all the hypotheses which are consistent with an innocent or accidental death are eliminated, the conclusion of suicide may then be drawn. The burden is upon the defendant to show that the circumstances and conditions are inconsistent with any other reasonable cause of death than that of suicide; that is, it must eliminate and disprove all other causes of death which are consistent with the evidence before the jury is justified in inferring that the deceased committed suicide. The ultimate fact of suicide is thus shown by the proof ⁹⁷ of certain evidentiary facts which are inconsistent with the theory of accident or natural death, or

by proof of the nonexistence of facts which would justify the inference of accident. But the ultimate fact is required to be proven by a preponderance of evidence only, and this rule is in no way affected by the subsidiary requirement that the defendant must by its evidence exclude every other reasonable theory for accounting for the death.

4. The wife of the deceased was permitted to testify that after the date of the death of her husband she received a letter which purported to have been written by her husband before his death. The record shows that while Mrs. Lindahl was on the stand the attorney for the appellant said:

"We propose to show by this witness that on the twenty-fifth day of March she took the communication which she has testified to—the note—to one Iver C. Nelson; that in this note Lindahl stated that he intended to kill himself by drowning himself in the river; and to follow this up by proving the contents of the note by the testimony of Nelson.

"Mr. Laybourn: I object to the offer as incompetent and calling for a communication between husband and wife which is prohibited by the statute; that all this examination with reference to that is contrary to the statute—that is, anything further that you would attempt to ask along this line, as long as it is apparent that this is the offer. Objection sustained. Exception by defendant."

The appellant assigns this ruling as error, and claims that his offer should be construed as being limited to showing merely that the witness gave the letter to Nelson, but the offer does not so read. It is clearly an offer to prove by the witness (1) that she took the note to Nelson (2) that in the note Lindahl stated that he intended to kill himself by drowning in the river, and (3) to follow this up by proving the contents of the note by the testimony of Nelson. After the witness had testified to taking the communication to Nelson, and that Lindahl stated therein that he intended to kill himself, the evidence was to be followed up by the testimony of Nelson as to the contents of the letter. However, if it was error to deny the right to show that the witness ⁹⁸ had placed the letter in the hands of Nelson, it was without prejudice, as Nelson was afterward allowed to testify that he had received it.

The court also properly refused to allow Nelson to testify to the contents of the letter, as it clearly appeared that Mrs. Lindahl placed the letter in his hands as her attorney, and

that it was therefore privileged. The copy of the "Minneapolis Tribune" which was claimed to contain a copy of the copy of the letter which had been furnished to the paper by Mr. Nelson was properly excluded.

We find no error in the record which would justify a reversal, and the order appealed from is therefore affirmed.

The Remedies of Members of Fraternal and Other Associations are discussed in the note to *Robinson v. Templar Lodge*, 59 Am. St. Rep. 198. And the jurisdiction of courts over unincorporated societies and associations is discussed in the notes to *Kearns v. Howley*, 68 Am. St. Rep. 856; *Morris St. Baptist Church v. Dart*, 100 Am. St. Rep. 734. A member of a beneficial association cannot bind himself by contract, in advance, to abide by the decisions of the tribunals of the organization and renounce his right to appeal to the civil courts for the redress of wrongs committed by such tribunals: *Myers v. Jenkins*, 63 Ohio St. 101, 81 Am. St. Rep. 613. See, further, *Robinson v. Templar Lodge*, 117 Cal. 370, 59 Am. St. Rep. 193; *Baltimore etc. R. R. Co. v. Stanrark*, 56 Ohio St. 224, 60 Am. St. Rep. 745; *Mitten-thal v. Mascagni*, 183 Mass. 19, 97 Am. St. Rep. 404; note to *Utter v. Travelers' Ins. Co.*, 8 Am. St. Rep. 922.

When the Defense of Suicide is set up in an action on a policy of life insurance, the burden of proving it is upon the defendant, for the law raises a presumption against self-destruction: See the note to *Supreme Conclave v. Miles*, 84 Am. St. Rep. 540.

OLSON v. COURT OF HONOR.

[100 Minn. 117, 110 N. W. 374.]

BENEFICIAL ASSOCIATIONS—Change in By-laws—Effect on Members.—The general consent and agreement of a member of a mutual fraternal benefit society in his application and certificate to be bound by any future changes in the constitution, by-laws and rules of the society that it may enact in the future are subject to the implied condition that they must be reasonable. Otherwise the member is not bound thereby. (p. 679.)

BENEFICIAL ASSOCIATIONS—Unreasonable Change in the By-laws.—If an insurance benefit association, reserving the right to change its by-laws, provides by by-laws at the time of issuing a benefit certificate to an assenting member, that it will not pay the benefit to a member who commits suicide, whether sane or insane, unless he is at the time under treatment for insanity, and thereafter and before the death of such member in good standing, it amends its by-laws, so as to limit the benefit in case of suicide to five per cent of the face of the certificate for each year a member "shall have been continuously a member of the society," such change in the by-laws is unreasonable and void as to such member. (p. 679.)

SUICIDE.—Burden of Proof that the death of a person was caused by suicide is upon the party who sets up that fact. (p. 681.)

EVIDENCE—Privileged Communication—Physician.—A statute providing that the testimony of a physician shall not be given without the consent of his patient is for the protection of the latter, and he may waive the privilege if he sees fit, and, as a general rule, those who represent him after his death may also waive it for the protection of interests which they claim under him. (p. 683.)

W. B. Risse and C. G. Laybourn, for the appellant.

E. P. Peterson and Foster & Stites, for the respondents.

¹¹⁸ **START, C. J.** On October 3, 1901, the defendant, a mutual fraternal benefit association, issued its certificate of membership to Lena Olson, wife of the plaintiff herein and the mother of the other plaintiffs. This certificate provided for the payment from the benefit fund of the association, at the death of Mrs. Olson, of one thousand dollars to her husband and children. In and by the certificate it was expressly agreed that the application for membership, the medical examination, the constitution, laws, and rules of the association, and the certificate should constitute the complete and only contract between the parties, and, further, that the member should strictly comply with the constitution, laws, and rules then in force or thereafter to be enacted or adopted. When the certificate was delivered to and accepted by Mrs. Olson, a by-law of the association then in force provided that "This order will not pay the benefits of members who commit suicide, whether sane or insane, except it be committed in delirium resulting from illness, or while the member is under treatment for insanity, or has been judicially declared to be insane; but, in all cases not within said exceptions the amount of money contributed to the benefit fund by such members shall be returned and shall be paid to the beneficiaries out of said fund in lieu of the benefit."

The application for membership contained this provision: "I further understand and agree that the laws of the order now in force, or hereafter enacted, enter into and become a part of every contract of indemnity by and between the members of the order and govern all rights thereunder."

In place of the original by-law the association, on July 1, 1903, adopted the following:

"If a benefit member commits suicide, whether sane or insane, voluntary or involuntary, there shall be payable to the

beneficiaries entitled thereto five (5) per cent of the face of the certificate for each year he shall have been continuously a member of the society, and after twenty (20) years of continuous membership the certificate shall be payable in full."

¹¹⁹ Mrs. Olson died May 21, 1904. The benefit was not paid, and this action was brought to recover the amount thereof. The defense was that she committed suicide and that the last by-law adopted ruled the case. The trial court held that the by-law in force when the certificate was issued governed the case, and instructed the jury that the plaintiffs were entitled to recover the full amount, unless Mrs. Olson committed suicide; but, if she did, then the defendant was entitled to a verdict, unless the jury further found that she was at the time under treatment for insanity. The jury returned a general verdict for the plaintiffs for the full amount claimed. The defendant appealed from an order denying its motion for judgment, notwithstanding the verdict or for a new trial.

1. The first question is whether the by-law which was in force when the certificate was issued or the one in force at the time of Mrs. Olson's death is to be taken as the basis for determining the rights of the parties. The certificate, in connection with the by-laws in force at its date, in legal effect insured the member against death by suicide while under treatment for insanity; that is, in case of death caused by unintentional self-destruction by the insured while under treatment for insanity, the beneficiary was entitled to receive the full face of the certificate, but under the new by-law, in case of the death of the insured from such cause, the right of the beneficiary to recover was limited "to five (5) per cent of the face of the certificate for each year [the insured] shall have been continuously a member of the society." Was this change authorized by the provisions of the contract providing for a change in the by-laws?

It is the contention of the defendant that it was by virtue of the provisions of the original contract that the society might change its by-laws and that the members should be bound thereby. It is obvious that such a provision must receive a reasonable construction. It would be unreasonable to construe it as giving the society plenary power to change its by-laws in any manner it might elect; for, if such construction were to obtain, then the original contract would be simply one to the effect that the society would pay the bene-

ficiary, in case of the death of the member, in accordance with the terms of the contract or in accordance with such new, other, or further contract as it might elect thereafter to make for the parties. It seems clear that when the ¹²⁰ member—that is, the insured—gives in advance his general consent to a change in the by-laws, and agrees in his certificate to abide by all the laws thereafter enacted by the society, he does not intend thereby that the society shall have the power to impair in essential particulars the contract for the payment of a specific sum to his beneficiary which it agrees by its certificate to pay; or, in other words, he does not consent that the society may make, without consulting him, a new contract for both parties. It has accordingly been held by this court, in accordance with the weight of judicial authority, that the general consent and agreement of a member of a mutual fraternal benefit society in his application and certificate to be bound by any future changes in the constitution, by-laws, and rules of the society that it may enact in the future are subject to the implied condition that they must be reasonable: *Thibert v. Supreme Lodge*, 78 Minn. 448, 79 Am. St. Rep. 412, 81 N. W. 220, 47 L. R. A. 136; *Tebo v. Supreme Council*, 89 Minn. 3, 93 N. W. 513.

2. This brings us to the pivotal question: Was the change in the by-law in this particular case reasonable? In the first case cited the insured, at the time he became a member of the order, was entitled to written notice of the number and amount of his assessments. The by-law providing for such notice was, without his knowledge or consent, thereafter amended so as to require the payment of the assessment without such notice, and, if not paid within the time limited, the defaulting member should stand suspended. In the other case the member, at the time he became such, had the right to engage in the occupation of freight brakeman; but by an amendment to the by-laws of the society, without his knowledge or consent, this right was taken from him. It was held in each case that the amendment to the by-laws was unreasonable and void as to the insured.

The precise question in this case is whether the change in the by-laws of the society was reasonable whereby it attempted to relieve itself from liability to pay the stipulated benefit when the death of the member resulted from suicide while under treatment for insanity which it contracted for by its

certificate and original by-laws. There are a number of cases which hold, in effect, that a mutual benefit society may legally make such a change in its by-laws, where a general power to change its by-laws has been reserved: See *Supreme Commandery* ¹²¹ *v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Hughes v. Wisconsin etc. L. I. Co.*, 98 Wis. 292, 73 N. W. 1015; and *Daughtry v. Knights of Pythias*, 48 La. Ann. 1203, 55 Am. St. Rep. 310, 20 South. 712. The change, however, in the by-laws in the case at bar, is quite as fundamental as the respective changes in the cases of *Thibert v. Supreme Lodge*, 78 Minn. 448, 79 Am. St. Rep. 412, 81 N. W. 220, 47 L. R. A. 136, and *Tebo v. Supreme Council*, 89 Minn. 3, 93 N. W. 513; and, unless we overrule those cases, we must hold that the change in the by-law in this case was also unreasonable.

In determining whether the new by-law was unreasonable or not the question is not, as counsel for defendant seems to assume, whether there could be any change in the by-laws in respect to the right to commit suicide, or in the effect thereof upon the certificate. The simple question is whether the defendant, having agreed with a member to pay his beneficiary a stated sum of money in the event that his death should ensue from any cause, except certain specified causes or diseases, may change the contract by amending its by-laws so as to add to the excepted causes. If it may lawfully do so as to one cause or disease, it may as to several, and the rights of the member and his beneficiary are at the mercy of the society; for by repeated amendments of its by-laws it may exempt from the operation of the certificate so many causes or diseases as to make it practically worthless.

In this connection the case of *Weber v. Supreme Tent*, 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258, is an interesting one. It was held in that case that a mutual benefit society, which had insured a member against unintentional self-destruction after one year, could not by a subsequent amendment of its by-laws extend the time limit to five years. It does not appear from the report of the case whether or not the order had reserved the right to change its by-laws; but the question in that case, as here, was as to the reasonableness of the change, and it was held that the amendment was unreasonable and ineffectual to change the rights of a member. Mr. Chief Justice Parker, speaking for the court, said:

"Unintentional self-destruction, whether due to insanity or accidental, after the lapse of a year from the making of the contract, was as much insured against as death from typhoid fever or consumption, and an amendment to its by-laws, providing that the death of an existing member from any of these causes should render the policy void, would deprive the party of vested contract rights. An amendment which produced such a result, we have recently held, may not be ¹²² made, because it is an unreasonable amendment, destroying contract rights, instead of regulating the administration of the corporation and its membership within reasonable bounds": *Parish v. New York Produce Exchange*, 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149; *Weber v. Supreme Tent*, 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258; *Beach v. Supreme Tent*, 177 N. Y. 100, 101 Am. St. Rep. 814, 69 N. E. 281; *Gaut v. American Legion*, 107 Tenn. 603, 64 S. W. 1070, 55 L. R. A. 465; *Morton v. Supreme Council*, 100 Mo. App. 76, 73 S. W. 259.

In the last case cited, the certificate bound the insured to comply with all the laws and usages of the society then in force or which might thereafter be enacted. A by-law then in force provided that, if any member committed suicide within two years, the order should be liable for only one-half of the face of the certificate. Thereafter the by-law was amended by providing that, if any member should die by suicide at any time, his beneficiary should receive only one-half of the face of the certificate. It was held that such member was not bound by the amendment. Upon principle and the decisions of our own court, we hold that the change in the by-law in question was an unreasonable one, and void.

3. The burden of establishing that Mrs. Olson committed suicide was upon the defendant, and on the plaintiff to show that, if she did, she was then under treatment for insanity. Both issues were properly submitted to the jury. But, inasmuch as there was only a general verdict for the plaintiff, there is no way of ascertaining whether the jury based their verdict on a finding that Mrs. Olson did not commit suicide or on a finding that she did so while she was under treatment for insanity. It follows that, unless there was competent evidence to sustain a finding by the jury that she was under treatment for insanity at the time of her death, the verdict cannot be sustained; for there was evidence sufficient to sus-

tain a finding that she committed suicide. The presumption and evidence as to suicide would support a finding either way on this issue: *Peterson v. Chicago Ry. Co.*, 36 Minn. 399, 31 N. W. 515.

There was sufficient evidence, if competent, to sustain a finding by the jury that she was under treatment for insanity at the time of her death. Her attending physician was called as a witness and testified to that effect. But the evidence was received over the objection of the ¹²³ defendant that the testimony of the physician was prohibited by General Statutes of 1894, section 5662, subdivision 4, which provides that: "A regular physician or surgeon cannot, without the consent of his patient, be examined, in a civil action, as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient": See R. L. 1905, sec. 4660, subd. 4.

If this objection was well taken, the evidence was not competent. It is manifest that the purpose of the statute is to protect the patient, and not his adversary; for the evidence may be received with the consent of the patient.

Does this privilege become absolute on the death of the patient, or may those who represent him or claim an interest under him after death waive the privilege for the protection of such interest? This is an important question; for if they cannot waive the privilege given by the statute, and their adversary may invoke it to suppress the truth and defeat the enforcement of rights the deceased provided for them in his lifetime, then the statute may be made an instrument for cheating justice. If such be the proper construction of the statute, then, if an executor or legatee presents a will for probate, which is contested on the ground that the testator was of unsound mind when the will was made, the executor or legatee may not, if the contestant objects, call the physician who was attending the testator at the time to testify as to his knowledge of the patient's mental condition, acquired in attending him. Nor could the personal representatives of a party, in an action to recover damages on account of the death of his intestate by the alleged negligence of the defendant, call the physician who attended the intestate after his injury to testify as to the nature of the injuries and the cause of death, if such information was acquired in attending him.

Again, the case under consideration illustrates the unreasonableness of such a construction. The defendant insured the deceased for the benefit of her husband and children against death by unintentional self-destruction while under treatment for insanity. The best, and perhaps the only, evidence to prove that the deceased was under treatment for insanity at the time of her death is the testimony of the physician. Yet, ¹²⁴ if the statute is to be construed as the defendant claims, then the plaintiffs, who are asserting a right under the deceased which she provided for them in her lifetime, may not waive the privilege; but the defendant may invoke it to defeat the enforcement of their right. It cannot be that such is the proper construction of the statute, for it is unreasonable and unjust.

The adjudged cases, however, relevant to this question, are not in entire harmony, due, perhaps, to a difference in the wording of the several statutes construed. This court in the case of *Pitzl v. Winter*, 96 Minn. 499, 105 N. W. 673, 5 L. R. A., N. S., 1009, held that General Statutes of 1894, section 5660, relating to a conversation between an interested party and a deceased person, was not enacted for the sole benefit of the representatives of decedents, and that they could not waive it. The language of the statute construed in that case differs so essentially from the statute here under consideration that the decision is not in point. Upon principle and what seems to be the weight of judicial authority, we hold that the statute in question is for the protection of the patient, and he may waive the privilege if he sees fit, and that, as a general rule, those who represent him after his death may also waive the privilege, for the protection of interests which they claim under him: *In re Layman's Will*, 40 Minn. 371, 42 N. W. 286; *Winters v. Winters*, 102 Iowa, 53, 63 Am. St. Rep. 428, 71 N. W. 184; *Am. & Eng. Ency. of Law*, 2d ed., 90; *Denning v. Butcher*, 91 Iowa, 425, 59 N. W. 69; *Grand Rapids etc. Ry. Co. v. Martin*, 41 Mich. 667, 3 N. W. 173; *Scripps v. Foster*, 41 Mich. 742, 3 N. W. 216; *Fraser v. Jennison*, 42 Mich. 207, 3 N. W. 882; *Groll v. Tower*, 85 Mo. 249, 55 Am. Rep. 358.

It follows that the evidence of the physician in this case was competent, and that the verdict, no matter on which issue it was based, is sustained by the evidence.

4. The defendant assigns a number of other alleged errors of the court in its rulings on the admission of evidence. We

have considered each of them, and find no reversible errors in such rulings.

Order affirmed.

The Effect of Changes in the By-laws of Beneficial Associations as against pre-existing members is discussed in the note to *Strauss v. Mutual Reserve etc. Assn.*, 83 Am. St. Rep. 706. The general rule is, that members of an association who have stipulated in their contract of membership to comply with the laws of the society then in force, or thereafter adopted, are bound by subsequent reasonable amendments to a by-law in force when they became members. However, the power reserved by an association to make changes in its by-laws warrants only reasonable variances in its contracts with members, and not such as are destructive of vested rights: *Gilmore v. Knights of Columbus*, 77 Conn. 58, 107 Am. St. Rep. 17, and cases cited in the cross-reference note thereto.

Suicide as a Defense to an Action on a Policy of life insurance is discussed in the note to *Supreme Conclave v. Miles*, 84 Am. St. Rep. 539.

STATE v. PIONEER PRESS COMPANY.

[100 Minn. 173, 110 N. W. 867.]

CONSTITUTIONAL LAW—Liberty of Press.—A statute providing, among other things, that no account of the details of an execution of a convict, beyond the statement of the fact that such convict was on the day in question duly executed according to law, shall be published in any newspaper, and making a violation of the statute a misdemeanor, is in all respects constitutional and does not violate the right of liberty of the press. (p. 685.)

CONSTITUTIONAL LAW—Title of Act.—A statute entitled, "An act providing the mode of inflicting the punishment of death, the manner in which the same shall be carried into effect, and declaring a violation of any of the provisions of this act to be a misdemeanor," and providing in the body of the act that "no account of the details of such execution, beyond the statement of the fact that such convict was, on the day in question, duly executed according to law shall be published in any newspaper," is not unconstitutional as embracing more than one subject, not expressed in its title. (p. 685.)

T. R. Kane and O. H. O'Neill, for the state.

F. G. Ingersoll, C. A. Hart, Munn & Thygeson and J. R. Hickey, for the defendant.

¹⁷⁴ LEWIS, J. Appellant was indicted for publishing an account of the execution of William Williams, in violation of the provisions of chapter 20, page 66 of the Laws of 1889.

The act requires that executions take place before the hour of sunrise on the day designated, in an inclosure from which the public are excluded, and in the presence of the following persons only: "Sec. 5. Besides the sheriff and his assistants, the following persons may be present at the execution, but none other: The clergyman, or priest, in attendance upon the prisoner, and such other persons as the prisoner may designate, not exceeding three in number, a physician or surgeon, to be selected by the sheriff, and such other persons as the sheriff may designate, not exceeding six in number, but no person so admitted shall be a newspaper reporter or representative. No account of the details of such execution beyond the statement of the fact that such convict was on the day in question duly executed according to law, shall be published in any newspaper."

Briefly stated, the indictment charged that appellant, on February 13, 1906, did print and publish the details of the execution by setting out the movements of the officers and the convict from the time they left the jail until they reached the scaffold, the last statement of the prisoner, the manner in which he was prepared for execution, the adjustment of the noose and the black cap, the springing of the trap, the pronouncement of death, the removal of the body to the undertaker's rooms, and the autopsy performed under the supervision of the coroner. The indictment was demurred to upon the ground that the facts stated herein do not constitute a public offense. The demurrer was overruled by the trial court, and, in view of their importance, certain questions were certified to this court.

1. Chapter 20, page 66 of the Laws of 1889 is not in violation of section 27, article 4 of the constitution, which requires that no law shall embrace more than one subject, which shall be expressed in its title. The title of the act reads: "An act providing the mode of inflicting the punishment of death, the manner in which the same shall be carried into effect,"¹⁷⁵ and declaring a violation of any of the provisions of this act to be a misdemeanor."

It is asserted on behalf of appellant that there is nothing in the title which reasonably suggests that the act contains a provision making it a criminal offense for a newspaper to publish an account of an execution; that the title is restrictive, being limited solely to the manner of inflicting the punish-

ment of death, and the means of carrying such punishment into effect. It is true that the constitution has made the title of an act the exclusive index to the legislative intent, and that the courts cannot enlarge the scope of the title; but in our judgment the provision in the body of this act with reference to the publication of facts by a newspaper concerning an execution is fairly and reasonably embraced in the general heading of the title. The evident purpose of the act was to surround the execution of criminals with as much secrecy as possible, in order to avoid exciting an unwholesome effect on the public mind. For that reason it must take place before dawn, while the masses are at rest, and within an inclosure, so as to debar the morbidly curious. The number of witnesses is limited to the minimum, and, to give further effect to the purpose of avoiding publicity, newspaper reporters and representatives of the press are prohibited, and the publication of the event is limited to a mere statement of the fact that the execution took place. Publication of the facts in a newspaper would tend to offset all the benefits of secrecy provided for, and therefore the restriction as to publication has direct relation to and connection with the other matters embraced within the act. The title does not set out the whole of the statute, nor is it essential that it should; but it does not serve as a cloak for legislating upon dissimilar matters, or subjects not naturally connected with the one embraced in the title, as suggested in *Winters v. City of Duluth*, 82 Minn. 127, 84 N. W. 788.

A reasonable and liberal construction of the constitutional inhibition is the one accepted by this court in many decisions, and it is sufficient if the title is fairly suggestive of the enactments which follow: *City of Duluth v. Abrahamson*, 96 Minn. 39, 104 N. W. 682; *Merchants' Nat. Bank of St. Paul v. City of East Grand Forks*, 94 Minn. 246, 102 N. W. 703, and many other cases therein cited.

176 2. It is again submitted that the act violates the provision of section 3, article 1 of the constitution: "The liberty of the press shall forever remain inviolate and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right."

Mr. Cooley traces the history of this provision, and shows that, although it was directly aimed at the removal of previous restraints upon public speech and freedom of the press, yet it

does not follow that there is a constitutional right to publish every fact or statement which may be true. "We understand liberty of speech and of the press to imply, not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords": Cooley's Constitutional Limitations, 7th ed., 605. But he also states: "If the nature of the case is such as to make it improper that the proceedings should be spread before the public, because of their immoral tendency, or of the blasphemous or indecent character of the evidence exhibited, the publication, though impartial and full, will be a public offense, punishable accordingly": Page 637. Chancellor Kent defined the liberty of the press under the constitution as follows: "The liberty of the press consists in the right to publish with impunity truth with good motives and for justifiable ends, whether it respects government, magistracy, or individuals": *People v. Croswell*, 3 Johns. Cas. 337. Mr. Story states that the constitutional prohibition "places no restraint upon the power of the legislature to punish for the publication of matter which is injurious to society according to the standard of the common law. It does not deprive the state of the primary right of self-preservation."

Appellant, citing *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624, 76 S. W. 79, argues that there are no constitutional limitations upon the liberty of the press, unless the subject matter be blasphemous, obscene, seditious, or scandalous in its character. This is altogether too restricted a view. The principle is the same, whether the subject matter of the publication is distinctly blasphemous, seditious, or scandalous, or of such character as naturally tends to excite the public mind and thus indirectly affect the public good. If the constitutional provision has ¹⁷⁷ reference to restricting the publication by newspapers of unwholesome matter, as in *State v. McKee*, 73 Conn. 18, 84 Am. St. Rep. 124, 46 Atl. 409, 49 L. R. A. 542, and *In re Banks*, 56 Kan. 242, 42 Pac. 693, or the use of the United States mails for the distribution of obscene literature, as in *United States v. Harmon* (D. C.), 45 Fed. 414, or the publishing of anarchistic doctrines, as in *People v. Most*, 75 N. Y. Supp. 591, upon the ground that it is in the interest of public morals, then for the same reason the right of restriction applies to publishing details of criminal executions.

The article in question is moderate, and does not resort to any unusual language, or exhibit cartoons for the purpose of emphasizing the horrors of executing the death penalty; but if, in the opinion of the legislature, it is detrimental to public morals to publish anything more than the mere fact that the execution has taken place, then, under the authorities and upon principle, the appellant was not deprived of any constitutional right in being so limited.

3. Section 6, article 1 of the constitution, which requires that in all criminal prosecutions the accused shall enjoy the right of a speedy and public trial, has no application to this question. "Public trial" means trial by jury, perhaps including the rendition of judgment; but, after the accused is convicted and sentenced, the trial is over. In *Holden v. Minnesota*, 137 U. S. 483, 11 Sup. Ct. Rep. 143, 34 L. ed. 734, in considering the provisions of chapter 20, page 66 of the Laws of 1889, the court says: "Whether a convict sentenced to death shall be executed before or after sunrise, or within or without the walls of the jail, or within or outside of some other inclosure, and whether the inclosure within which he is executed shall be higher than the gallows, thus excluding the view of persons outside, are regulations that do not affect his substantial rights. The same observation may be made touching the restriction in section 5 as to the number and character of those who may witness the execution and the exclusion altogether of reporters or representatives of newspapers. These are regulations which the legislature, in its wisdom and for the public good, could legally prescribe in respect to executions occurring after the passage of the act, and cannot, even when applied to offenses previously committed, be regarded as *ex post facto* within the meaning of the constitution."

¹⁷⁸ Although the court then had under consideration whether certain provisions were *ex post facto*, the language applies also with reference to the constitutional restrictions referred to. The extent of the limitation must be left to the wisdom of the legislature, and in this instance we find no infringement upon any rights guaranteed by the constitution.

Affirmed.

A Statute Making It a Crime to Sell Publications principally devoted to criminal news, stories of deeds of bloodshed, and the like, does not violate constitutional guaranties that every person may freely speak, write, and publish his sentiments on all subjects, and that no

law shall be enacted to restrain the liberty of speech or of the press: *State v. McKee*, 73 Conn. 18, 84 Am. St. Rep. 124.

The Sufficiency of the Title to Statutes within constitutional requirements is discussed in the notes to *Crookston v. County Commissioners*, 79 Am. St. Rep. 456; *Lewis v. Dunn*, 86 Am. St. Rep. 267; *Bobel v. People*, 64 Am. St. Rep. 70.

McKIBBIN v. WISCONSIN CENTRAL RAILWAY COMPANY.

[100 Minn. 270, 110 N. W. 964.]

CARRIERS—Sample Trunks as Baggage—Knowledge of Contents.—Courts take judicial notice of the fact that it is the general custom of common carriers by rail to carry sample trunks with their contents of merchandise as the baggage of traveling salesmen, but not of the conditions or limitations, if any there be, under which this is done, and it is not necessary to prove knowledge on the part of the carrier or his agent of the contents of such trunks by evidence of a direct statement made by the traveling salesman, or by other direct evidence. Such fact may be inferred from the circumstances of the transaction. (p. 690.)

CARRIERS—Baggage—Gratuitous Bailee.—A railway carrier is not, as a matter of law, liable only as a gratuitous bailee of baggage regularly checked, although the passenger owning it does not go on the same train with it. (p. 692.)

CARRIERS—Baggage—Loss of Merchandise.—If a traveling salesman regularly checks his sample trunks as baggage to a certain point by railway, where they are destroyed through the carrier's negligence while in his station-house, the salesman may recover for their loss, although he did not go on the same train with them, if he, in good faith, intended to follow them on a later train. (pp. 692, 693.)

J. D. Armstrong, for the appellant.

A. Tighe, for the respondents.

271 START, C. J. On the afternoon of December 30, 1905, a traveling salesman of the plaintiffs checked four trunks containing samples of merchandise belonging to them over the defendant's railroad from St. Paul to Glenwood, Wisconsin. The trunks got to Glenwood late in the evening of the same day and were placed in the baggage-room of the station-house, which with the trunks and their contents was completely destroyed by fire, some twenty hours afterward. This action was brought to recover the value of the trunks and their contents on the ground that they were destroyed by reason of the defendant's alleged negligence. It was admitted on the trial

that the defendant's liability as a common carrier had terminated before the fire. At the close of the evidence the defendant moved the court to direct a verdict in its favor, for the reason that upon all the evidence the plaintiffs were not entitled to recover. Motion denied, exception by the defendant, cause submitted to the jury, and a verdict returned for the plaintiffs for the admitted value of their property. The defendant made a motion for judgment in its favor notwithstanding the verdict, or for a new trial, and appealed from an order denying its motion.

The important question raised by the assignments of error is whether upon any reasonable view of the evidence the plaintiffs are legally entitled to recover from the defendant for the loss of their property.

1. The first contention of the defendant to be considered is to the effect that there was no evidence sufficient to sustain a finding by the jury that the defendant had notice or knowledge that the trunks contained merchandise when it checked them as baggage; hence the trial ²⁷² court erred in submitting that question to the jury. We held in *McKibbin v. Great Northern Ry. Co.*, 78 Minn. 232, 80 N. W. 1052, that courts will take judicial notice of the fact that it is the general custom of common carriers by railroads to carry sample trunks with their contents of merchandise as the baggage of traveling salesmen, but not of the conditions or limitations, if any there be, under which this is done. Conceding that it was necessary for the plaintiffs to show in this case that the defendant's baggage agent knew that the trunks contained merchandise when he checked them, we are of the opinion that the evidence was ample to sustain a finding that he did so know, and that it was not error to submit the question to the jury. It was not necessary to prove such knowledge on the part of the baggage agent by evidence of a direct statement to that effect made to him by the commercial traveler, or by other direct evidence, for such fact may be inferred from the circumstances of the transaction: *Trimble v. New York etc. Ry. Co.*, 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115.

In the case at bar the evidence tends to show that there were four sample trunks, three of which were each approximately forty-six and a half inches in length, twenty-eight and a half inches in width, and seven inches in height, while the fourth one was somewhat smaller; that their aggregate weight was some eight hundred pounds, and that they were of the form

and pattern of trunks used for the transportation of merchandise samples; and that it was the custom of the defendant to check such trunks as baggage, without limitation or condition, even where it had knowledge of their contents. In view of this evidence and the general custom to check sample trunks with their contents of merchandise, it would be an imputation upon the intelligence of the baggage agent to suggest that he did not understand that the four large sample trunks contained merchandise, or to suggest that he was so silly as to believe that the four trunks contained only the personal wearing apparel of a merry knight of commerce. In the case of *Trimble v. New York etc. Ry. Co.*, 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 119, the evidence which was held sufficient to show knowledge of the contents of the sample trunk by the agent checking it was of the same general character as in this case, but not so conclusive; for there was only one trunk in that case, while here there were four, all checked at the same time and by the same traveling salesman.

273 2. The defendant further claims that the plaintiffs' salesman checked the trunks without any intention of going with them over its line of railway and paying the stipulated compensation therefor; hence the defendant was only a gratuitous bailee of the trunks. It is an admitted fact in this case that the salesman did not go to Glenwood on the same train which carried his trunks, and, further, that he did not intend so to do; but the evidence is to the effect that he intended to go to his home in Hudson, Wisconsin, remain there over Sunday and New Year's Day, then return to St. Paul Tuesday morning and go direct to Glenwood over the defendant's line; that when he checked the trunks he produced a mileage-book good over the defendant's line, which consisted of a strip of two thousand ruled spaces or coupons, each evidencing the right of the passenger to travel on the line one mile, and have his baggage, not exceeding one hundred and fifty pounds, carried, the mileage coupons being on the left side of the ticket and the corresponding baggage coupons on the right; that the baggage agent detached baggage coupons from the ticket for the number of miles to Glenwood, and returned the ticket to the salesman with corresponding mileage coupons intact; that the agent was then paid by the salesman for the transportation of all of his baggage, the four trunks, in excess of one hundred and fifty pounds, with coupons from a separate baggage coupon book which the plaintiffs had bought and paid for; that one of

the conditions of the mileage-book was that, where baggage had been checked and baggage coupons detached, no further baggage could be checked on the mileage until the corresponding mileage coupons had been used for passage, thereby indicating that there might be cases where the passenger and his baggage would not go on the same train; and, further, that the salesman learned on Monday that the trunks had been burned at Glenwood the evening before, and returned to St. Paul, Tuesday morning, as he intended to, but was delayed in making up other sample trunks until evening, when he went to Glenwood over the defendant's line. Whether he used the same mileage-book as that by which he checked the burned trunks does not definitely appear from the record.

The defendant's contention is that the passenger must go on the same train with his baggage; otherwise, the carrier is only a gratuitous bailee of the baggage. This claim has the support of some respectable ²⁷⁴ authorities: 3 Am. & Eng. Ency. of Law, 2d ed., 553; *Marshall v. Pontiac & O. N. Ry. Co.*, 126 Mich. 45, 85 N. W. 242, 55 L. R. A. 650, and notes, in which the soundness of the principal case is vigorously challenged. In view of the modern methods of checking baggage and the custom of regularly checking it on the presentation of a ticket at stations, general ticket offices, and the homes of passengers, we are of the opinion that there is now no good reason for the rule claimed, if ever there were, and hold that a railway carrier is not, as a matter of law, liable only as a gratuitous bailee of baggage which it has regularly checked if the passenger does not go on the same train with it. The learned trial judge instructed the jury in this connection to the effect that if it was the bona fide intention of the plaintiffs' salesman when he checked the trunks to return to St. Paul Tuesday morning and go over the defendant's line to Glenwood, the defendant would not be a gratuitous bailee, but would be bound to use ordinary care, after the trunks were in the station-house at Glenwood, to see that they were not lost or destroyed; but, on the other hand, if his intention was to defraud the defendant by getting it to carry his baggage without any intention of becoming a passenger over its line, it would be liable for the baggage only as a gratuitous bailee, and bound to exercise slight care for its safety, and only liable for gross neglect. This instruction was quite as favorable to the defendant as it was entitled to have it. The evidence is ample to sustain

a finding that the salesman intended to follow his baggage and that the defendant was not a gratuitous bailee.

The evidence is practically conclusive that the defendant in any event received some compensation for the transportation of the trunks by the excess coupons surrendered, and that no fraud was committed upon the defendant. Such being the case, the instruction of the court as to the degree of care required of a gratuitous bailee was harmless error, of which the defendant cannot complain, even if it be conceded that the evidence would not sustain a charge of gross negligence.

3. The last contention of the defendant is that the evidence is not sufficient to sustain a finding that the defendant was guilty of negligence in caring for the trunks after they arrived at Glenwood. The evidence tends to show that the trunks on their arrival were placed in the freight-room of the station-house, which was a frame building; in one corner of the room, near the door, was a bench on which switch ²⁷⁵ lamps were placed and filled with oil; near by was an oil tank and waste; the bench and floor around it were saturated with oil; a young boy some twelve years old filled the lamps from the tank and wiped them with waste; that as he lighted the fourth lamp he discovered that the bunch of waste which he had used in wiping the first one had caught on the lamp and was on fire; an alarm was given, and an attempt made to put the fire out; that there was no water or fire-extinguisher of any kind; that the sparks were scattered about; that at about 4 o'clock the fire was apparently out, but at 8 o'clock of the same evening the freight-room was again discovered to be on fire, which gained such headway that it could not be extinguished by the means at hand, and the building and trunks were consumed; that when the fire was discovered the second time it was at a point four or five feet from where it started in the afternoon, but no indications of fire were observed during the time between the first and second fire; and, further, that the fire originated each time within the room, and not from without. There was also evidence of other circumstances of more or less weight to show negligence on the part of the defendant's employes. The defendant specially urges that the evidence does not show any connection between the first and second fire. There was no direct evidence of this fact, but the circumstances disclosed by the evidence tend to show that the second fire originated from the first one, especially so in the absence of any evidence tend-

ing to show any other origin of the fire. We have considered the evidence with care, and are of the opinion that it is sufficient to support the verdict. It follows that the trial court did not err in denying the defendant's motion.

Order affirmed.

The Liability of a Carrier for Baggage where it is not accompanied by the passenger is considered in the note to *Wood v. Maine Cent. R. R. Co.*, 99 Am. St. Rep. 384. If a railroad station agent knows that property checked as baggage is in fact a sample case of goods, and the railroad company has formerly accepted and carried such case as baggage, it is liable for the value of the case and contents if they are lost in transit: *New Orleans etc. R. R. Co. v. Shackelford*, 87 Miss. 610, 112 Am. St. Rep. 461. The general rule is, that where a carrier accepts a package or trunk of merchandise for transportation as baggage, with knowledge of its contents, it is answerable therefor as for baggage: *Illinois Cent. Ry. Co. v. Matthews*, 114 Ky. 973, 102 Am. St. Rep. 316.

VARLEY v. SIMS.

[100 Minn. 331, 111 N. W. 269.]

GIFTS CAUSA MORTIS may be Effected by a delivery to a third person in trust for the donee, though the gift does not come to the knowledge of the donee until after the donor's death. (p. 696.)

GIFTS CAUSA MORTIS—Presumption.—It is presumed that the person to whom delivery of a gift causa mortis is made takes as a trustee for the donee. (p. 697.)

GIFTS CAUSA MORTIS—Bank Check—Delivery.—A bank check delivered as a gift causa mortis to a third person for the use and benefit of the donee, with instructions to deliver it to the latter, is a sufficient delivery, though it does not reach the hands of the donee until after the donor's death. (p. 697.)

GIFTS CAUSA MORTIS—Presumption of Acceptance.—If a gift causa mortis is beneficial to the donee and imposes no burden upon him, acceptance is presumed as matter of law. (p. 697.)

GIFTS CAUSA MORTIS—Bank Checks.—A bank check for the entire amount of the drawer's credit in the bank, delivered to a person as a gift of the money, though unaccepted by the bank, operates as an assignment of the fund, sufficient to sustain a gift causa mortis, when the intention to make such gift is free from doubt, and no question of fraud or the rights of creditors is involved, although the check is not presented for payment until after the death of the donor. (p. 697.)

GIFTS CAUSA MORTIS Require No Consideration to support them. (p. 700.)

GIFTS CAUSA MORTIS—Bank Check.—A bank check which is the subject of a gift causa mortis need not disclose on its face that it covers the entire bank credit of the donor. That fact may be shown by evidence dehors the instrument. (p. 700.)

G. H. Spear, for the appellant.

A. L. Thwing, for the respondent.

³³⁵ BROWN, J. The facts in this case are as follows: On November 29, 1904, Mrs. C. H. Brown, the mother of plaintiff, had on deposit in the First National Bank of Grand Rapids, this state, subject to check, the sum of eleven hundred and sixty-eight dollars and thirty cents. She was on that date at the home of her sister, a Mrs. Wright, at West Allis, Wisconsin, and about to undergo a serious surgical operation. In view of the operation and the probability of death resulting therefrom, she drew her check on the Grand Rapids bank for the entire amount of her deposit therein, payable absolutely to plaintiff, and left the same with Mrs. Wright, instructing her to deliver it to plaintiff, who was not then present, in the event the operation resulted fatally. She also stated to her sister that, if she survived the operation, the check should be returned to her. Thereafter the operation was performed, and Mrs. Brown never regained consciousness, but died. Plaintiff was notified of the facts, but was unable to reach his mother before her death, and the check was not delivered to him until after that event. He subsequently presented it to the bank, but payment was refused. Defendant was appointed administrator of Mrs. Brown's estate, and the bank paid the money to him. Plaintiff thereafter brought this action to recover the same from the administrator, on the ground that the delivery of the check, under the circumstances stated, constituted a valid gift causa mortis to him of the funds in the bank. The cause was tried below without a jury, resulting in judgment for plaintiff, from which defendant appealed.

The only question presented is the validity of the alleged gift on which plaintiff relies for recovery. The cause was presented in this court on the oral argument and in the briefs with much ability by counsel, and the court has been aided very materially in the consideration of the question.

³³⁶ The essentials to a valid gift causa mortis are: 1. The gift must be made in view of approaching death from some existing sickness or peril; 2. The donor must die from that sickness or peril; and 3. There must be a delivery of the subject of the gift to the donee with the intention of passing title thereto, subject to revocation in the event of recovery

from the pending illness, and an acceptance by the donee: *Winslow v. McHenry*, 93 Minn. 507, 106 Am. St. Rep. 448, 101 N. W. 799. The first two requisites are established in this case, viz., the delivery of the check with the intention of passing title to the money to plaintiff, the donee, and the death of Mrs. Brown. She was about to undergo a serious operation, and, in anticipation that death might result therefrom, made and delivered the check to her sister in trust, intending to give the money represented thereby to her son. She died from the peril with which she was then confronted, and the check was subsequently delivered in accordance with her instructions. That the delivery of the check to Mrs. Wright, to be by her in turn delivered to plaintiff on the occurrence of death, was a sufficient delivery, under the law applicable to such cases, the authorities fully sustain. Mrs. Wright was, in contemplation of law, the agent or trustee of the donee, and the delivery to her was as effectual as though it had been made personally to the donee.

In *Hogan v. Sullivan*, 114 Iowa, 456, 87 N. W. 447, it appeared that the donor deposited certain money in a bank, causing a certificate of deposit to be issued by the bank in the name of his son in law, to whom it was delivered. Two years later, in anticipation of death, he gave the son in law a written memorandum directing the disposition of the funds among certain beneficiaries after his death. In disposing of the question whether the delivery to the son in law of the certificate of deposit payable to him, and the subsequent directions by the donor for the disposition of the money among the beneficiaries, was a sufficient delivery to constitute a valid gift causa mortis, the court held that the son in law occupied the position of trustee for those to whom the donor intended the money as a gift, and that the delivery was sufficient and effectual. The court, in the course of the discussion of the question, remarked that it was well settled by the authorities that a gift causa mortis may be effected by a delivery to a third person in trust for the donee, though the gift does not come to the knowledge³³⁷ of the donee, and is not accepted by him, until after the donor's death. Of course, if the person to whom the delivery is made be the agent of the donor, and no delivery is made to the donee until after the donor's death, it is ineffectual for any purpose. The reason for this is found in the fact that to give legal effect to

such a gift the present title to the property must pass to the donee, and it does not pass so long as the donor or his agent retains possession or control of it. The agent has no authority to deliver after the donor's death, for his authority as such ceases when his principal dies: *Hart v. Ketchum*, 121 Cal. 426, 53 Pac. 931; *Daniel v. Smith*, 75 Cal. 548, 17 Pac. 683; *Taylor v. Harmison*, 79 Ill. App. 380; *Smith v. Ferguson*, 90 Ind. 229, 46 Am. Rep. 216; *Dunn v. German-American Bank*, 109 Mo. 90, 18 S. W. 1139.

But, unless the contrary appears, it will be presumed that the person to whom delivery is made takes as the trustee of the donee: *Devol v. Dye*, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439; *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 884, 44 S. E. 721; 14 Am. & Eng. Ency. of Law, 2d ed., 1061.

In the case at bar it is beyond controversy that Mrs. Wright received the check in question as the trustee of plaintiff, and for all practical purposes the delivery was to him. The matter of acceptance by the donee is of slight importance. Where the gift is beneficial, and imposes no burdens upon the donee, acceptance will be presumed as a matter of law: *Barnard v. Thurston*, 86 Minn. 343, 90 N. W. 574; *Ammon v. Martin*, 59 Ark. 191, 26 S. W. 826; *De Levillain v. Evans*, 39 Cal. 120; *Forbes v. Jason*, 6 Ill. App. 395; *Darland v. Taylor*, 52 Iowa, 503, 35 Am. Rep. 285, 4 N. W. 510; 20 Cyc. 1235.

This brings us to the principal question in the case, viz., whether a bank check, unaccepted by the bank, constitutes a transfer to the payee of either the legal or equitable title to the funds to which it is subject, sufficient to sustain a gift causa mortis. The validity of gifts of bank deposits, evidenced by check, or by the delivery of passbooks or certificates of deposit, has been before the courts in numerous cases. It is held in a majority of the states of this country, and perhaps the same rule prevails in England, that an ordinary check upon a bank for a part only of the drawer's deposit, unaccepted by the bank before the death of the donor, is ineffectual as a gift causa mortis, for the reason, among others, that the check does not operate to pass to the donee²²⁸ either the legal or the equitable title to the funds in the bank; in other words, that the unaccepted check is not, either in law or equity, an assignment of the funds.

But a strong and vigorous minority hold that where the intention to make a gift is free from doubt, and no question

of fraud or the rights of creditors is involved, the delivery of a check for a part or the whole of the deposit is sufficient, though not presented for payment until after the death of the donor. The courts so holding proceed upon the theory that the passing of a present legal title is not essential to a valid gift, that an equitable title is sufficient, and that such a title becomes vested in the donee at the time the check is delivered and becomes absolute on the death of the donor. That an equitable title is sufficient in such cases is supported by a long list of authorities: *Druke v. Heiken*, 61 Cal. 346, 44 Am. Rep. 553; *Stephenson's Admr. v. King*, 81 Ky. 425, 50 Am. Rep. 173; *Ellis v. Secor*, 31 Mich. 185, 18 Am. Rep. 178; *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758, 26 N. E. 627, 11 L. R. A. 684; *Meach v. Meach*, 24 Vt. 591; *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. Rep. 415, 27 L. ed. 500.

An examination of some of the reported decisions where gifts of money on deposit in banks have been made by delivery of a passbook or unindorsed certificate of deposit, discloses a disposition on the part of the courts generally to sustain them, where the intention of the donor is clear, there is no fraud, and the rights of creditors are not involved. In the case of *Sheedy v. Roach*, 124 Mass. 472, 26 Am. Rep. 680, the court held that a deposit in a savings bank might be the subject matter of a gift *causa mortis*, and the gift established by proof of the delivery of the passbook, accompanied by an assignment to the donee, though the bank was not informed of the gift until after the death of the donor. In *Conner v. Root*, 11 Colo. 183, 17 Pac. 773, the court held that a certificate of deposit might be the subject of a gift *causa mortis*, and, if delivered to a third person for the use of the donee, the title passed upon the occurrence of death, though the certificate was payable to the donor's order and was not indorsed by her. In *McGuire v. Murphy*, 94 N. Y. Supp. 1005, 107 App. Div. 104, the court held that there was a sufficient delivery of a bank deposit where the passbook and an order on the bank for the payment of the amount to the donee is delivered to him, though the donor die before presentation ³³⁹ to the bank. In the case of *Polley v. Hicks*, 58 Ohio St. 218, 50 N. E. 809, 41 L. R. A. 858, the court held that the delivery of a deposit book issued by a savings bank, accompanied by words of gift, is sufficient to constitute

a gift causa mortis. Other cases along this same line might be cited without number, but it is unnecessary.

The courts holding that the delivery of a passbook or certificate of deposit is sufficient distinguish that class of cases from those where a mere check is delivered to the donee for a part of the fund: *McGuire v. Murphy*, 107 App. Div. 104, 94 N. Y. Supp. 1005. The substantial element of distinction, as we gather from reading the cases, is that in the case of a check there is no legal or equitable transfer or assignment of the bank funds to the donee. Whether the distinction has any logical foundation is, we think, an open question. Of course, as already suggested, to render a gift of this sort valid, title to the thing given must pass to the donee. Whether any title passed to plaintiff by the check in question depends upon the further inquiry whether the check operated, unaccepted by the bank, as an assignment. Upon the general proposition whether such is the legal effect of a check, considered generally and not with reference to gifts, the authorities are in hopeless conflict. The great majority of courts maintain the doctrine that such a check, unaccepted by the bank, does not operate either as a legal or an equitable assignment, because there is no privity of contract between the holder or payee and the bank: 4 Cyc. 49, and cases cited. Other courts insist, and upon broad grounds, that a check is in equity an assignment, and operates, as between the drawer and payee, as a transfer pro tanto. This view of the law is sustained by the courts of Illinois, Iowa, Kentucky, Nebraska, Pennsylvania, South Carolina, and Wisconsin. The privity of relation between the payee and the bank is found in the implied obligation of the latter to pay the funds deposited to whomsoever and whenever the depositor may direct. The authorities, as well as the merits of the question, are thoroughly discussed in a valuable note to *Loan v. Farmers*, 63 Cent. L. J. 451, 74 S. C. 210, 114 Am. St. Rep. 991, 54 S. E. 364, and referred to in a general way in *Northern Trust Co. v. Rogers*, 60 Minn. 208, 51 Am. St. Rep. 526, 62 N. W. 273. The precise question has never been determined by this court, and its solution is not necessary in this case. It is probable that the reasoning of those courts holding to the position that a check operates, between the parties, as an assignment, ³⁴⁰ pro tanto, is the better law and should be adopted, yet the question is not free from doubt, and, not being involved, we pass it without discussion.

In the case at bar, the check relied upon by plaintiff was for the entire amount of the deposit, and in such cases the authorities are nearly uniform that an assignment of the whole fund results therefrom: *Brady v. Chadbourne*, 68 Minn. 117, 70 N. W. 981; *Hill v. Escort* (Tex. Civ. App.), 86 S. W. 367; *May v. Jones*, 87 Iowa, 188, 54 N. W. 231; *Kimball v. Leland*, 110 Mass. 325; *Hawes v. Blackwell*, 107 N. C. 196, 22 Am. St. Rep. 870, 12 S. E. 245; *Pease v. Landauer*, 63 Wis. 20, 53 Am. Rep. 247, 22 N. W. 847; *Mandeville v. Welch*, 5 Wheat. 277, 5 L. ed. 87; *Walker v. Mauro*, 18 Mo. 564.

This principle is conceded by counsel for appellant, but he contended on the argument with much earnestness that it has no application to a check made the basis of a gift causa mortis; that the rule that an ordinary check for the whole of a fund operates as an assignment from the drawer to the payee applies only to checks given for a valuable consideration. There is authority for this contention: *Pullen v. Placer Co. Bank*, 138 Cal. 169, 94 Am. St. Rep. 19, 66 Pac. 740, 71 Pac. 83. But the reasoning upon which the decisions so holding are founded is not sound. Gifts in anticipation of death require no consideration to support them. They are sustained by the courts upon the same principle that all intentional gratuities are upheld. The law supplies a consideration by intendment, and gives force to the intention of the donor, and a gift stands upon an equality with a contract founded upon a valuable consideration. The same legal principle surrounds and upholds the check designed as a gift and that given for value received. Recent authorities sustain this view of the law: *Phinney v. State*, 36 Wash. 236, 78 Pac. 927, 68 L. R. A. 119; *In re Taylor's Estate*, 154 Pa. 183, 25 Atl. 1061, 18 L. R. A. 855. See, also, a valuable discussion of the general question in 60 Cent. L. J. 244, and *Murphy v. Bordwell*, 83 Minn. 54, 85 Am. St. Rep. 454, 85 N. W. 915, 52 L. R. A. 849. It is unnecessary that the check in such cases distinctly state on its face that it covers the entire fund. The fact that it does may be shown by proof on the trial: 4 Cyc. 53, and cases cited; 2 Daniel on Negotiable Instruments, 1643.

⁸⁴¹ It follows from what has been said that the conclusion reached by the learned trial court was in harmony with the legal rights of the parties, and the judgment appealed from is affirmed.

Whether a Gift Causa Mortis can be effected by the donor drawing and delivering his check is discussed in the note to *Johnson v. Colley*, 99 Am. St. Rep. 911. It has been held that the mere delivery of an unindorsed certificate of deposit payable to the donor's order does not vest title so as to constitute a gift: *Shugart v. Shugart*, 111 Tenn. 179, 102 Am. St. Rep. 777. See, too, *Winslow v. McHenry*, 93 Minn. 507, 106 Am. St. Rep. 448.

ROBERTS v. WALLACE.

[100 Minn. 359, 111 N. W. 289.]

PARTITION—Waiver of Right of.—The right of partition may be waived or suspended for a limited period by the parties in interest. (p. 702.)

W. G. Bonham, for the appellant.

Davis & Hollister, for the respondents.

³⁵⁹ JAGGARD, J. The respondents and defendants, owning certain lands in St. Louis county, signed a contract which recited that the defendants sold and conveyed to the plaintiff and appellant an undivided one-third interest therein for ten thousand dollars. The contract set forth, for the further consideration of one dollar, the agreement "That said sum of ten thousand dollars, with interest thereon at the rate of five per cent per annum from this date till paid, is and shall be a charge and lien upon the whole of said land and premises in favor of said party [said plaintiff] for the term of five years from date hereof and not longer, and the same shall be paid to her . . . as hereinafter set forth."

The means of payment enumerated were a sale of said land of premises, or any part thereof, the sale of iron ore therein. or of timber thereon, rents and profits accruing under any lease of the land, bonuses bargained for in exploration contracts or leases, and all royalties accruing under leases for the mining and removal of ore therein ³⁶⁰ or thereon. The ten thousand dollars and interest did not become a personal claim against any of the parties, but only a charge and encumbrance on the land for the period of five years for the said sum of ten thousand dollars and interest, if not sooner paid. The contract was dated on the tenth day of February, 1903.

An action was brought by the plaintiff afterward, alleging the parties were owners of undivided one-third interests in the land, she had a lien or encumbrance by virtue of the contract, the cash valuation was forty thousand dollars and the land could not be partitioned without great prejudice to the owners. The prayer was that the property be sold and a receiver appointed to apply the proceeds of sale to the payment of the encumbrance and afterward equally between the owners. On March 14, 1906, defendants interposed a demurrer, which was sustained, with leave to the plaintiff to amend. From that order this appeal was taken.

The determination of whether or not the plaintiff is entitled to a partition depends, in the first place, on the construction of the contract which was attached to the complaint. The trial court held, in sustaining the demurrer, that the parties expressed an intention that no statutory action for partition should be brought within five years. Enough of the contract has been quoted to indicate such an intention. Construed as a whole, it leaves no reasonable doubt that such was the agreement. It is true, as the appellant contends, that such interpretation involves distress and leaves this cotenant in a most unfortunate position (Freeman on Cotenancy and Partition, 400), and that the more reasonable and probable of two constructions, of which an ambiguous contract is susceptible, will be adopted. We are of the opinion, however, that this was the agreement which the parties made. They are bound by it.

The only other question in the case is whether or not a contract that the statutory action of partition should not be brought within a specified time is legal. It is clear on authority that the right of partition may be waived or suspended for a limited period by the parties in interest: *Avery v. Payne*, 12 Mich. 540; *Coleman v. Coleman*, 19 Pa. 100, 57 Am. Dec. 641; *Brown v. Coddington*, 72 Hun, 147, 25 N. Y. Supp. 649; *Eberts v. Fisher*, 54 Mich. 294, 20 N. W. 80; *Hunt v. Wright*, 47 N. H. 396, 93 Am. Dec. 451; 21 Am. & Eng. Ency. of Law, ³⁶¹ 2d ed., 1158, note 3. This does not mean that the plaintiff is remediless. Her remedy is not, however, in law by an action for partition. It is in equity for a foreclosure of the lien.

Order affirmed.

A *Tenant in Common* may become estopped to demand partition by his covenant that the land shall be held in common: *Martin v. Martin*, 170 Ill. 639, 62 Am. St. Rep. 411. See, further, the note to *Wakefield v. Van Tassell*, 95 Am. St. Rep. 218.

WHITTAKER v. STANGVICK.

[100 Minn. 386, 111 N. W. 295.]

TRESPASS—Extent of Damage.—To constitute trespass to land, neither the extent of the damage nor the form of the instrumentality by which the close is broken is material. (p. 705.)

INJUNCTION Against Shooting—Increased Hazard—Nuisance. As the hazard from the use, or threatened use, of dangerous instrumentalities, such as shotguns, to land owners increases, the responsibility of the persons employing them becomes stricter and may amount to an insurance of safety, and all remedial resources of law and equity may be exercised to prevent such peril to person or property, or to prevent conduct likely also to result in a breach of the peace. (p. 707.)

INJUNCTION Against Use of Shotguns.—Shooting shotguns over another's land, so as to cause considerable damage, and impair the value of the land owner's shooting privileges, is such a wrong as may be restrained by injunction. (p. 707.)

Parsons & Brown, for the appellant.

N. T. Moen and F. H. Peterson, for the respondents.

387 JAGGARD, J. The plaintiff and appellant sought to perpetually enjoin defendants and respondents from constructing covers or blinds on the surface of a lake in front of a strip of land, to which plaintiff claimed ownership, separating two navigable lakes; from hunting or shooting ducks or other water fowl therefrom; and from shooting across or over the strip of land. The court ordered judgment for the defendants, after trial. This appeal was taken from the order denying a motion for a new trial. The essential question here is whether the decision was justified by the evidence and was consistent with law.

The court found the facts as follows: The plaintiff owned the long, narrow strip, and accretions, extending to a creek connecting the waters of the lakes, which formed what is known as a "duck pass." Although there was a public highway over the duck pass, by virtue of an agreement with the supervisors of the township the plaintiff had the right of

fishing and hunting thereon to the same extent as though the road had not been laid out. The defendants and other persons wrongfully had previously gone on plaintiff's land at the highway and shot ducks and water fowl, and now threaten to continue to do so. The effect of the acts was to practically monopolize the shooting privileges and to largely impair the value of the privileges to the plaintiff and her guests. The defendants had been previously restrained by an order of the district court from going upon the highway for the ³⁸⁸ purpose of hunting, and from hunting or shooting ducks or other water fowl upon the highway. "That the said defendants have heretofore erected, and intend and threaten to hereafter erect, upon the surface of Upper Ten Mile lake, directly in front of the said pass, and at a distance of about three hundred and twenty-five feet from the shore line thereof, certain covers or blinds, with the purpose and intention of shooting therefrom the wild ducks and other water fowl flying over said pass, and that in hunting said game defendants are liable to shoot over plaintiff's said land. That said lake is of large extent, and it is not necessary for the mere purpose of hunting or shooting the said wild fowl, that said defendants should locate such cover or blinds at the place above mentioned. That the probable result of such acts on the part of the defendants will be to injuriously affect the facilities for shooting wild fowl afforded by said pass; and as a consequence thereof the value of said shooting privileges will be to a considerable extent impaired."

There was testimony to the effect that a shotgun would carry shot "probably four hundred feet, maybe more than that." In consequence, when persons in the blind would shoot toward plaintiff's place, "the shot could not help but drop around [plaintiff's] place, on the point, in the woods, or in the timber, or across this point here. A certain amount of the shot would go over the pass. . . . From thirty to fifty per cent of the shot would go over the land and on the pass. It depends on the winds, and which way the ducks fly. . . . In shooting ducks flying from the north, south, some of these ducks in the ordinary course of shooting naturally would fall when they were killed, on this pass."

1. The first question is whether the facts found show a trespass. Defendants urge that the falling of the shot and of ducks on plaintiff's land not having been shown to "become a nuisance to her, certainly could not be sufficient to

constitute a trespass on the part of the defendants. The old maxim that the law does not concern itself with trifles might well be invoked here." This contention involves a misapprehension of the law of trespass.

With respect to damages as an essential, the common law recognizes two kinds of actions. In the first class, there is a direct invasion of another's person or property without permission, which is actionable ³⁸⁹ per se, or which gives rise to a presumption of at least some damage, without proof of any actual damage. Unpermitted contact with the person constitutes assault and battery. Unpermitted invasion of premises constitutes a trespass quare clausum fregit. In the second class, actions on the case, in which the damages are indirect and consequential, there can be no recovery unless the plaintiff shows, as an essential part of his case, that damages, pecuniary in kind, proximate in sequence, and substantial in extent have resulted. In trespass quare clausum fregit, it is immaterial whether the quantum of harm suffered be great, little, or inappreciable. It is true that in *McConico v. Singleton* (S. C. 1818), 2 Mill's Const. 244, Mr. Justice Johnson held that the owner cannot prevent others from hunting wild game on uninclosed and uncultivated lands, because to recover in trespass you must prove some actual injury. One quaint reason assigned was the public concern that there should be hunters to form a competent militia to oppose that great danger to free institutions, a standing army. It is elementary that the general rule is otherwise. For example, in *Patrick v. Greenway* (see *Mellor v. Spateman*, 1 Saund. 346b), the defendant angled in plaintiff's several fishery, but caught nothing. Plaintiff had a verdict, which was sustained because of the infringement of the right which could hereafter be evidence of the exercise of the right by the defendants. And see, as to fisheries, 13 Am. & Eng. Ency. of Law, 2d ed., 584. As to general rule, *Cooper v. Crabtree*, per Jessel, M. R., 20 Ch. D. 592; *Feize v. Thompson*, 1 Taunt. 121; 1 Street on Foundation of Liability for Tort, p. 19; 46 Century Digest, "Trespass," sec. 15, col. 271, sec. 141, col. 480. Nowhere is the doctrine better expressed than by Lord Holt, in *Ashby v. White*, 2 Ld. Raym. 938, 1 Smith's Lead. Cas. 268: "If a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action; for it is a personal injury. So a man shall have an action against another for driving over his

ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there."

It is also entirely immaterial by means of what instrumentality the trespass is committed: See 46 Century Digest, "Trespass," sec. 8, col. 256. One maliciously annoying another by means even of loud noises, consisting of pounding on tin pans, etc., and thereby injuring the health ^{and} and business of the latter, is guilty of trespass and liable for the injuries sustained: *Shellabarger v. Morris*, 115 Mo. App. 566, 91 S. W. 1005. To the same effect, see *Donahue v. Keystone*, 181 N. Y. 313, 317, 106 Am. St. Rep. 549, 73 N. E. 1108. 70 L. R. A. 761 (holding specifically that escape of gas from street mains may constitute a trespass), and *Adams v. Rivers*, 11 Barb. 390. "No doubt," said Landon, Jr., in *Forbell v. City of New York*, 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644, 646, 51 L. R. A. 695, "trespass may be committed by the projection of force beyond the boundary of the lot where the projecting instrument is operated. Injuries caused by explosion are familiar instances."

More specifically, in the celebrated case of *Pickering v. Rudd*, 1 Stark. 56, 1 Ames' Cases on Torts, 42, Lord Ellenborough said: "I recollect a case where I held that firing a gun loaded with shot into a field was a breaking of the close. The learned judge on the circuit with me doubted upon the point, but many with whom I afterward conversed on the subject thought I was right, and the judge himself who at first differed with me was afterward of the same opinion; but I never yet heard that firing in vacuo could be considered as a trespass. No doubt, if you could prove any inconvenience to have been sustained, an action might be maintained; but it may be questionable whether an action on the case would not be the proper form." To the same effect, see *Prewitt v. Clayton*, 5 T. B. Mon. 4. If a hunter shoot where he has a right to kill a bird in the air, and step upon the land of another to pick up the dead bird, the act of going onto the land to pick up the bird relates to the act of shooting, and the whole act one transaction, constituting a trespass at common law apart from the statute: *Earl, C. J.*, in *Osbond v. Meadows*, 12 Com. B., N. S., 10. And see *Mayhew v. Wardley*, 14 Com. B., N. S., 550; *State v. Shannon*, 36 Ohio St. 423, 38 Am. Rep. 599.

It is true that in some of the cases referred to, and in *L. Realty Co. v. Johnson*, 92 Minn. 363, 104 Am. St. Rep. 677,

100 N. W. 94, 66 L. R. A. 439, the holding that trespass or some other enjoicable wrong existed was based upon an abuse of the highway. And see *Harrison v. Duke* [1893], 1 Q. B. 142; *Hickman v. Maisey* [1900], 1 Q. B. 752; *Queen v. Pratt*, 4 El. & Bl. 865.

Such cases are, however, at least significant illustrations of the extent to which the strictness of the law of trespass to realty, greater ³⁹¹ than in cases of trespass to the person. has been carried: 1 Street on Foundation of Liability for Tort, 24.

Moreover, here the defendants proposed to inclose and make several to themselves that which belonged to the many. Did not the blind amount to "a clandestine encroachment and appropriation of navigable waters, which should be common to the public"? The precise nature, however, of defendants' act, whether it amounted to a purpresture (23 Am. & Eng. Ency. of Law, 2d ed., 528; 7 Words and Phrases, 5867), or to nuisance (see *People v. Park & O. R. Co.*, 76 Cal. 156, 18 Pac. 141), or to both (see *People v. Vanderbilt*, 26 N. Y. 287; *People v. Gold Run D. & M. Co.*, 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152; *The Idlewild*, 64 Fed. 603, 12 C. C. A. 328), or to neither, need not be here determined. The defendants' right to properly use the navigable lakes did not give them any more right to shoot over plaintiff's land than a neighboring proprietor would have had to so shoot from his own premises. It has been definitely determined in this court that the neighboring proprietor may not lawfully do so: *Lamprey v. Danz*, 86 Minn. 317, 90 N. W. 578.

The mere fact that damage from falling shot or birds would be insignificant, as has been shown, has no logical bearing at all upon the question. The record, besides, conclusively shows substantial damage to the premises. At common law, trespass or case would have lain. The inherent danger to land owners from guns in the hands of hunters, often irresponsible and reckless, and sometimes malicious, must be adequately guarded against if the law is to be more than a name. As the hazard from the use or threatened use of dangerous instrumentalities increases, in all branches of the law, the responsibility of the person employing them becomes stricter and may amount to insurance of safety. All remedial resources of law and equity may be exercised to prevent such peril to person or property, or conduct likely also to result in breach of peace.

2. The second question is whether or not an injunction will lie under the circumstances. It is elementary that equity will grant that relief to prevent a threatened trespass, especially where there can be no adequate pecuniary compensation, because it would be difficult or impossible to ascertain the damage resulting from such an act, and where otherwise a multiplicity of suits cannot be prevented: 1 High on ³⁹² Injunctions, 4th ed., 697; 27 Century Digest, "Injunction," sec. 86, cols. 1626, 1627, sec. 101, col. 1663. There has been a material modification in such cases of the requirements that the injury should be irreparable and the legal remedy inadequate. The tendency of American authorities is to extend the application of the remedy, and to grant it "in many instances and under many circumstances where Chancellor Kent would probably have refused to interfere": 3 Pomeroy's Equity Jurisprudence, 1357. In cases of continuing trespass "there can be no question that by all the better class of authorities he [the land owner] is entitled to an injunction, even though the damages are merely nominal in a pecuniary point of view": Wood on Nuisance, 3d ed., p. 1156, sec. 789. On general principles, accordingly, and in view of the specific rule of this court in the duck pass cases (*Lamprey v. Danz*, 86 Minn. 317, 90 N. W. 578; *L. Realty Co. v. Johnson*, 92 Minn. 363, 104 Am. St. Rep. 677, 100 N. W. 94, 66 L. R. A. 439), there can be no doubt as to the propriety of granting an injunction in such a case as is here presented.

3. The remaining question concerns the propriety of the exclusion by the trial court of testimony tending to show that the defendants were acting from "unmixed malice." We think that in this case, which involves the express findings of the court, the plaintiff was entitled to an injunction from danger of trespass. But he was called upon to face the contention that the proposed blinds were not three hundred and twenty-five feet from the land, as the court found, but six hundred feet from his land, as the defendants' evidence tended to prove. Plaintiff accordingly found it desirable or necessary to show that the defendants' proposed act was malicious, would constitute a nuisance, or would make the use of his own property imminently dangerous. He should have been allowed to show everything relevant under his pleadings reasonably tending to entitle him to an injunction. He was entitled to invoke the general principle that "intentionally to do that which is calculated in the ordinary course of events

to damage, and which does, in fact damage, another, in that other person's property or trade, is actionable, if done without just cause or excuse": Bowen, L. J., in *Mogul v. McGregor*, L. R. 23 Q. B. D. 598, [1892] App. Cas. 25. And see *Walker v. Cronin*, 107 Mass. 555.

Plaintiff has cited us, in this connection, to cases which tend more or less to apply this general principle to this particular class of cases, ³⁹³ namely: *Young v. Hichens*, 6 Q. B. 606 (disturbance of nets and waters by rival fishermen); *Keeble v. Hickeringill*, 11 East, 574 (willful discharge of guns on defendant's own land to drive away wild fowl from plaintiff's decoy pond); *Ibbotson v. Peat*, 34 L. J. Ex. 118 (similiter); *Carrington v. Taylor*, 11 East, 571 (similiter). We do not here determine that plaintiff could make out a specific cause of action under this somewhat general principle. That question should be determined only upon a record which would fairly present the relevant testimony.

Order reversed.

Any Wrongful Intrusion upon the Right is both an injury and a damage, and is a proper subject for legal redress: *Diana Shooting Club v. Lamoureux*, 114 Wis. 44, 91 Am. St. Rep. 898. A person who extends his arm over a division fence into the premises of another is a trespasser, though his body remains on his side of the fence: *Hannabalsen v. Sessions*, 116 Iowa, 457, 93 Am. St. Rep. 250.

Injunctions Against Hunting and other trespasses on land are considered in the note to *Moore v. Halliday*, 99 Am. St. Rep. 751; *L. Realty Co. v. Johnson*, 92 Minn. 363, 104 Am. St. Rep. 677.

APPLEBY v. APPLEBY.

[100 Minn. 408, 111 N. W. 305.]

CONTRACTS in Restraint of marriage, or which tend to bring about a separation of husband and wife, are opposed to public policy and utterly void. (p. 716.)

MARRIAGE—Antenuptial Contracts.—An antenuptial contract providing that, in consideration of the contemplated marriage, and the release and relinquishment by the intended husband of all his rights and interests in the property of his intended wife, she agrees to provide from her estate, after her death, an annual income to him so long as he should remain unmarried, is not in restraint of marriage, but only a limitation on the duration of the income at the election of the husband, and is therefore valid. (p. 716.)

MARRIAGE—Antenuptial Contracts.—An Antenuptial Contract providing that, in consideration of the contemplated marriage, and the release and relinquishment by the intended husband of all his rights and interests in the property of his intended wife, she agrees to provide, from her estate, an annual income to him so long as he shall remain unmarried, provided the parties were, at the time of the death of the wife, living and cohabiting together as husband and wife, does not tend to induce a separation between husband and wife, and is therefore valid. (p. 722.)

MARRIAGE—Antenuptial Contracts—Consideration.—An agreement to marry is a sufficient consideration to support an antenuptial contract definitely fixing the property rights of the parties. (p. 724.)

MARRIAGE—Antenuptial Contracts—Consideration.—Although an original engagement to marry is absolute and entered into some months before the execution of an antenuptial contract between the parties, the agreement to marry remains as a sufficient consideration to support such contract. (p. 724.)

MARRIAGE—Antenuptial Contract cutting off the homestead right of the husband and his statutory one-third interest in his wife's property is valid. (p. 725.)

MARRIAGE—Antenuptial Contracts in anticipation of marriage, equitably and fairly entered into, exclude the operation of law in respect to the property rights, so that so far as the contract extends, it, and not the law, furnishes the measure of such rights. (p. 725.)

MARRIAGE—Antenuptial Contracts.—A valid antenuptial contract respecting the property rights of the parties fully performed by one of them after the marriage and before her death, will not be declared void at the instance of the surviving husband merely because one of the provisions of the contract might be so construed as to have justified the one performing in adopting a course before her death that would have rendered the contract inoperative. (p. 726.)

MARRIAGE—Antenuptial Contracts—Wills.—A valid antenuptial contract definitely settling the property rights of the parties so far as the husband is concerned is a sufficient assent on his part to the provisions of the will of his wife, disposing of the remainder of her property in trust to a charity, especially when the terms of the will are in substantial compliance with the contract. (p. 726.)

MARRIAGE—Antenuptial Contracts—Wills.—If an antenuptial contract in favor of the contemplated husband definitely settling the property rights of the parties is fully performed after the marriage, the wife has the right to dispose of the remainder of her property by will in trust for a charity, and in so doing she does not violate the statutes against uses, and trusts. (p. 727.)

WILLS—Equitable Election.—If a testatrix devises to her husband certain property constituting the homestead of her mother, if at the time of the death of such testatrix she herself is the owner thereof, and then makes certain bequests to her mother which are accepted and received by the latter upon the death of the testatrix, the doctrine of equitable election does not apply against the mother, and the husband does not take the homestead under the will. (p. 728.)

WILLS—Lapsed Legacies.—If a will provides for an annual allowance for the care and maintenance of property so long as it

shall be rightfully occupied by a person, who, under the will, is to take it upon the happening of a certain contingency, and such contingency does not happen, such provision of the will lapses and becomes inoperative. (p. 729.)

T. D. O'Brien, A. E. Clark and H. Richardson, for the appellants.

F. B. Kellogg, C. A. Severance and R. E. Olds, for the respondents.

⁴¹⁴ BROWN, J. Cornelia Day Wilder Appleby died in January, 1903, leaving what purported to be her last will and testament. It was presented to the probate court of Ramsey county for allowance, was duly proved and allowed, and a final decree of distribution of her estate entered in accordance with its terms and provisions. Dr. T. E. W. Villiers Appleby, her surviving husband, appealed therefrom to the district court where the decree of the probate court was in all substantial respects affirmed. He then appealed to this court from an order of that court denying his motion for a new trial.

Amherst H. Wilder, with his wife, Fannie S. Wilder, and daughter, Cornelia Day Wilder, an only child, resided for many years in the city of St. Paul, where in numerous business enterprises he accumulated what would constitute, outside of modern railroad financiering, a vast fortune, aggregating over two million dollars. He determined in his lifetime to provide at his death from a large portion of his wealth a perpetual fund for the benefit of the worthy poor of St. Paul. To that end he created by his last will and testament the "Amherst H. Wilder Charity" and amply provided for carrying out his wishes in this respect. That his wife and daughter fully concurred and co-operated with him in his benevolent purposes is evidenced by the provisions contained in the last will of each. The will of Mr. Wilder, and that of his wife, Fannie S. Wilder, were before us in the case of *Watkins v. Bigelow*, 93 Minn. 210, 100 N. W. 1104, where the will of Mrs. Wilder, supplementing that of her husband, was construed and upheld. The will of Mr. Wilder, and also that of his wife, made numerous minor provisions to various persons, provided fully for the daughter, and left a large portion of the residue of their estate to the charity thereby created ⁴¹⁵ and provided for. Reference is here made to the opinion in the former case for a full statement of the facts relative to those wills and the charity thus established. In 1896 Miss Wilder and Dr. Appleby be-

came engaged to be married to each other, pursuant to which they were married in May, 1897, and continued thereafter to live and cohabit together as husband and wife until the time of her death on January 20, 1903. Prior to their marriage, in May, 1896, they entered into an antenuptial contract, the material portions of which are as follows:

"Whereas, it is agreed by and between the parties hereto, Cornelia Day Wilder, also called herein party of the first part, and T. E. W. Villiers Appleby, also called herein party of the second part, each of St. Paul, Minnesota, each of full age, that a marriage is shortly to be had and solemnized between the parties hereto; and

"Whereas, said party of the first part now has in her own name and right, and there is also held for her in trust under the last will of her father, Amherst H. Wilder, late of said St. Paul, a large amount of property, real and personal, and she expects to have and acquire hereafter from time to time a large amount of property; and

"Whereas, under the last will of her father a large amount of property is held in trust for any child or children born to said Cornelia Day Wilder, her surviving, and the parties hereto desire by this antenuptial agreement to arrange, and do hereby arrange, as to all and every part of the present and future property of every kind and character of said Cornelia Day Wilder, and of any child or children born to said Cornelia Day Wilder, who may her survive, and then die without becoming of full age, issue of said intended marriage:

"Now, in consideration of the premises and in consideration of one dollar to said party of the second part paid by said party of the first part at the time of making this instrument, and other good and satisfactory consideration received by said party of the second part from said party of the first part, the receipt of which said party of the second part hereby acknowledges, it is agreed by and between the parties hereto that said party of the first part shall at all times and on all occasions have full right, ⁴¹⁰liberty, and authority, and as fully and in all respects the same as she would have if not married, to use, enjoy, manage, convey, mortgage, grant, alienate, and dispose of all and every part of her present and also of her future property and estate, of every kind and character, including, also, the right and power to dispose of same, and all and every part of same, by last will and testament, all and each and every part thereof as she shall from time to time deem fit and proper.

Said party of the second part on his part further agrees, in consideration of the premises and foregoing, to disclaim and release, and does hereby disclaim and release, to said party of the first part, her heirs, legal representatives, assigns, legatees, and devisees, all and singular all and every right, claim, and estate, actual, inchoate, or contingent, and of every kind and character he might, would, or could have, hold, or acquire in, to, or upon all or any of said property by reason of said marriage, and by reason of being or by reason of having been the husband of said Cornelia Day Wilder."

Supplemental to this agreement, and as a part thereof, and for the purpose of definitely expressing the consideration left indefinite and unexpressed in the antenuptial contract proper, the parties entered into the following further agreement:

"Whereas, Cornelia Day Wilder, called herein party of the first part, and T. E. W. Villiers Appleby, called herein party of the second part, each of St. Paul, Minnesota, have under date of May 14, 1897, entered into an antenuptial agreement and in duplicate, of which Exhibit A hereto attached is a copy; and

"Whereas, it is thought it may be desirable to have said agreement, Exhibit A, recorded, and the parties hereto prefer that the full unexpressed consideration therefor should be shown by this another written agreement which need not necessarily at present be made public:

"Now, that said unexpressed consideration may be fully shown in writing, this instrument is executed and delivered, and at the time that said original Exhibit A is made and delivered, to wit:

417 "In consideration of the premises and of the making of said Exhibit A and the foregoing, I, said Cornelia Day Wilder, covenant and agree to and with said T. E. Villiers Appleby that by my last will I will (in case said marriage taking place, and he shall survive me) make provision and bequests by and through a trustee, or otherwise, of such ample form and magnitude as after my death will insure to said party of the second part, so long as he shall live (and remain unmarried), an annual income of ten thousand dollars, payable in equal semi-annual installments. In the event for any reason I shall omit so to do, or for any reason in law or otherwise said provisions in said last will shall be ineffectual for the purpose herein named, the said party of the second part shall, by reason of this instrument and the premises, have a good and valid

claim against such property and estate as I may have at the time of my death for the payment of the annuity hereby promised and guaranteed, and it is the intention hereof that any court having jurisdiction in such matters is in such event authorized and directed to set apart out of such property and estate as I have at the time of my death and place under the control of some suitable trustee or management sufficient property or estate as will insure the payment of said annuity for the time and purposes herein specified: Provided always, and this promise and covenant is made with the reservation, that in the event said marriage does not take place or said party of the second part shall not be my husband at the time of my death, or in the event at the time of my death the parties signing said Exhibit A are not living together as husband and wife, or in the event said party of the second part shall marry after my death, then all and every claim and right on the part of said party of the second part to demand or receive said annuity or take any benefit under this agreement or in my estate shall thereupon and forthwith cease and be of no force or effect."

Subsequent to the marriage Miss Wilder, then Mrs. Appleby, made and signed in due form of law her last will and testament, in which, after making provision therein for her husband as agreed upon, and ⁴¹⁸ other bequests, she left the residue of her estate, all coming to her through the will of her father, to the "Amherst H. Wilder Charity," precisely as her father had by his will provided. That she intended by this contract and her will to carry forward and consummate the wishes of her father in the creation of this charity is the only conclusion the facts before us will warrant, and a mutual understanding in this respect is disclosed between father, mother, and daughter. She made no provision in her own will for her offspring, should any come to her from her marriage with Dr. Appleby. They were amply provided for by the will of her father. But she died childless, leaving, her surviving, only her mother and appellant, her husband, and for the latter she made provision substantially in accordance with the terms of the antenuptial agreement. Subsequently to her death appellant presented the will to the probate court, where it was duly allowed and admitted to probate. He also submitted to that court the antenuptial agreement, and obtained from that tribunal an order upon the trustees for the payment to him of the allowance provided for, which he accepted and received

from time to time up to the trial of this cause in the court below; the last receipt given by him being marked without prejudice to his rights. The questions here presented arise from the decree of the probate court affirming the validity of the will and the antenuptial agreement.

The question at the threshold of the case, as we view the matter, is the alleged invalidity of the antenuptial contract; for, if the contract be valid, and, as we have heretofore observed, the will makes all the provisions for appellant thereby agreed upon, he has no further interest in the estate and no foundation upon which to predicate an attack upon the will. And while we shall, in the course of the opinion, for the purpose of ending for all time further strife and contention about the validity of the "Amherst H. Wilder Charity," dispose of the contention that the will is void, we first take up the objections to the antenuptial contract.

1. Marriage settlements of the general character of the one under consideration are matters of history, and have been upheld and sustained by the courts from the earliest times. They are not against public policy, but, on the contrary, are regarded with favor, as being conducive to the welfare of the parties and subservient to the best purposes ⁴¹⁹ of the marriage relation, and are uniformly sustained when free from fraud or not expressly prohibited by some statute: 19 Am. & Eng. Ency. of Law, 2d ed., 1225. The property rights of each party may be thus definitely fixed and determined in advance, each being left to control and manage his or her separate property as if unmarried; and this, notwithstanding the statutory provisions fixing the relative rights of each in and to the property of the other. The statutes upon that subject are superseded by the contract which becomes absolute upon consummation of the contemplated marriage: *Desnoyer v. Jordan*, 27 Minn. 295, 7 N. W. 140; *Hosford v. Rowe*, 41 Minn. 245, 42 N. W. 1018. There is in the case at bar no controversy over this general proposition.

The contention of appellant is that this contract is void (1) because an unreasonable restraint of marriage, and (2) because under its provisions, if the wife chose not to live with him, he would take no part of her property at her death, and her estate would thereby gain ten thousand dollars a year; that this fact tended to induce a separation of husband and wife, at the option of the latter, and is a violation of the principles of public policy; (3) that the contract was without considera-

tion; and (4) that an antenuptial contract cutting off the homestead right and the statutory one-third interest is not authorized by law and is void.

Taking up the points in the order stated, we come, first, to the contention that the contract is void as in restraint of marriage. On the general proposition that contracts in restraint of marriage are discountenanced by the law on broad grounds of public policy, and are consequently void and unenforceable, there is but one opinion. From the early case of *Low v. Peers*, [1770] Wilm. 364, to the present day, the courts both in England and this country, and no doubt of all civilized countries, have been and still are in complete harmony in so declaring. As remarked by Lord Mansfield in the case just referred to, matrimony was "one of the first commands given by God to mankind after the creation, repeated again after the deluge, and ever since echoed by the voice of nature to all mankind": See, upon the subject generally, *Baker v. White*, 2 Vern. 215; *Hartley v. Rice*, 10 East, 22; *White v. Equitable N. B. Union*, 76 Ala. 251, 52 Am. Rep. 325; *Chalfant v. Payton*, 91 Ind. 202, 46 Am. Rep. 586; *Sterling v. Sinnickson*, 5 N. J. L. 756.

⁴²⁰ So we proceed in the light of this general rule to inquire whether the contract in question comes within its prohibitions. In so far as this particular feature of the case is concerned, the contract and the will cannot be differentiated from a view point of legal principles. If the contract be in restraint of marriage, within the authorities, then must the will be so held also. The same language is incorporated in both, and the will was but a performance or compliance with the terms of the contract. So that the authorities sustaining or refusing to sustain similar wills are pertinent to the questions affecting the validity of the contract. The question must also be considered from the standpoint that the law makes no distinction between persons. What is law for the wife is also law for and governs the rights of the husband in such cases. They stand upon an equality, and, if the terms of this contract would be valid as to the wife, they are equally so as to appellant: *Bostick v. Blades*, 59 Md. 231, 43 Am. Rep. 548.

By the terms of the contract Miss Wilder was given, after marriage, full right, liberty, and authority, as fully and completely as though unmarried, to use, enjoy, convey, mortgage, grant, alienate, or dispose of all, or any part or portion, of her future property and estate, of every kind and character, and also the right to dispose of the same by last will and testament

in such manner and to whatever object or purpose she might choose; and appellant thereby, for the consideration granted by the contract, expressly disclaimed and released to her, her legal representatives, legatees, and devisees, all and singular every right, claim, or estate, actual, inchoate, or contingent, that might accrue to him by reason of the contemplated marriage. These stipulations were embodied by the parties in the principal contract. The principal consideration was the contemplated marriage, but an additional one was incorporated in the separate document above quoted at length. The reason for the separation of the two writings is set forth in the second, and is found in the recited fact that in the opinion of the parties it might become necessary to record the main contract, and, as it was not deemed essential to its validity that the full consideration therefor be made public, it was concluded advisable to separate the same. By this supplemental writing Miss Wilder expressly covenanted and agreed, in consideration of the release and surrender of his rights in and to her property, to make provision and bequests by and ⁴²¹ through a trustee or otherwise of such ample form and magnitude as after her death would insure to her husband, so long as he should live and remain unmarried, an annual income of ten thousand dollars; but, if he should remarry after her death, then and in that event the income should cease and all benefits under the contract should thereupon terminate. Provision was made in the will substantially as here agreed upon, with the further provision, not required by the contract, that, in the event appellant remarried after the death of his wife, he should have and receive from her estate, the income of ten thousand dollars a year being cut off by such remarriage, the sum of twenty-five thousand dollars in full of all claims to her estate.

The contention that the contract was void as in restraint of marriage was presented by exhaustive arguments of counsel, each supporting his view with voluminous citations of authorities, to all of which we have given a patient and thoughtful consideration. Our conclusion is that the contract did not tend to restrain marriage within the meaning of the law, at least not to such an extent as to make it obnoxious to legal principles, and therefore that it was and is valid and binding upon appellant. The parties to the contract had marriage in view at the time of its execution, and there was a total absence of any intention to prohibit appellant from consummat-

ing such other marriage or marriages, after the death of his first wife, as his inclinations might prompt. The provisions of the contract constituted a limitation, not upon the right to remarry, but upon the continuance of the annuity promised and secured. There is no stipulation that he shall not remarry. He is perfectly free to form new relations in that respect; but, if he does so, he relinquishes his right to his first wife's bounty. There is nothing unreasonable in this condition, especially as applied to this particular case. He, the intended husband, was not a person with wealth at the time of the transaction. His intended wife possessed the property, the wealth; and no sound reason can be advanced to sustain the view that she was under legal or moral obligation to provide him an income with which to support in comfort and luxury a new wife. If he deems it advisable or proper to remarry, he is at liberty to follow his personal inclinations, and, in the event he does so, is entitled to receive ⁴²² under the will the comfortable sum of twenty-five thousand dollars in lieu of the original income provided in case he remained unmarried.

Similar provisions are found in numerous instances in the reported cases, both with respect to antenuptial contracts and wills, and they have, with few exceptions, been sustained against the contention here made, namely, that they are void as in restraint of marriage.

In the case of *Jones v. Jones*, 1 Q. B. 279, it appeared that the testator left all his property to three women, to be shared equally, and, in event of the death of one, by the survivors, but, subject to the following condition as to one of them: "Provided the said Mary, daughter of the said Jemina, my sister, shall remain in her present state of single woman; otherwise, if she shall alter her present state of single woman, and bind herself in wedlock, she is liable to lose her share of the said property immediately, and her share to be possessed and enjoyed by the other mentioned parties, share and share alike." Justice Lush, in disposing of the contention that the bequest was in restraint of marriage, said: "I am of the same opinion. The question is whether we are to construe this devise as a provision for the testator's niece while she remains single, or as a condition that she shall remain in a state of celibacy under the penalty of losing her share. Now, there is nothing to lead me to suppose that any such condition was intended by the testator, and I rather think that to imply such a condition would be to defeat his inten-

tion. We ought to take the words in such a sense as to carry out the object of the testator, unless it is illegal; and, as I read the words, the testator only meant to provide for her while she was unmarried. I think that there is nothing in these words which compels us to think it was the testator's object that his niece should never marry at all."

Investigation does not confirm the suggestion of counsel for appellant that this case has been discredited or overruled. The rule there laid down and applied was treated as the settled law of England in *Morley v. Rennoldson*, 2 Hare, 571, where Vice-Chancellor Wigram said: "I am satisfied, from an examination of the authorities, that there is no reason to alter my opinion, that a gift until marriage, and when the party marries then over, is a valid limitation. In the case of a widow there is no question of the validity of such a limitation." ⁴²³ And also in *Jordan v. Holkham*, Amb. 209, in which the court held that, where an estate was given during widowhood, it was determined by a second marriage. Again, in *Barton v. Barton*, 2 Vern. 308, where an annuity during widowhood was upheld.

In *Allen v. Jackson*, L. R. 1 Ch. D. 399, the testatrix gave an income to her niece, an adopted daughter, and her husband, during their joint lives, and to the survivor after the death of either, with the provision that if the husband survived and married again, the income should cease. The contention that the bequest was in restraint of marriage was not sustained. The court said: "It seems to have been laid down by a great number of cases that what is called a general restraint upon marriage is against the policy of the law. That, of course, can be the only principle which can be the foundation of any rule at all on the subject. The general restraint of marriage, for some reason or other, probably a good reason, is to be discouraged, and a condition subsequently annexed by way of forfeiture to a marriage is therefore void. That is the law both as to man and woman. But it has been most distinctly settled that with regard to the second marriage of a woman that law does not apply; that, whether the gift be a gift to a widow by a husband or a gift to the widow by some other person, the law does not apply to that case; and that such a condition is perfectly valid."

The authorities are none the less harmonious in this country. In *Jones v. Jones*, 1 Colo. App. 28, 27 Pac. 85, it appeared that a husband had by contract agreed to pay his di-

voiced wife forty-five dollars a month so long as she should not marry again. The court held that the limitation was not a condition in restraint of marriage and that the contract was valid. The language of the court in that case is pertinent to the one at bar. The court said: "This is not a contract in restraint of marriage. No obligation is imposed upon the woman not to marry. She is at liberty at any time to marry whom and where she will. The condition is that he will pay the forty-five dollars per month, presumably for her maintenance and support, so long as she may remain an unmarried woman; and this was her situation, as averred in the complaint, at the time of the institution of the suit. There is nothing in the agreement, so far as we can discover, which in any way involves the question of morals or public policy." A contract ⁴²⁴ similar to the one in the case at bar was sustained in *Christy v. Marmon*, 163 Ill. 225, 45 N. E. 150, and in *Vincent v. Spooner*, 2 Cush. 467, though the precise point here before the court does not seem to have been raised: See, also, *Mann v. Jackson*, 84 Me. 400, 30 Am. St. Rep. 358, 24 Atl. 886, 16 L. R. A. 707; *Giles v. Little*, 104 U. S. 293, 26 L. ed. 745; *Summit v. Yount*, 109 Ind. 506, 9 N. E. 852; *Bennett v. Packer*, 70 Conn. 357, 66 Am. St. Rep. 112, 39 Atl. 739; *Knight v. Mahoney*, 152 Mass. 523, 25 N. E. 971, 9 L. R. A. 573; *Commonwealth v. Stauffer*, 10 Pa. 350, 51 Am. Dec. 489. The authorities are reviewed, and the distinction between conditions subsequent and conditional limitations, as applied to the subject in hand, is clearly pointed out in *Arthur v. Cole*, 56 Md. 100, 40 Am. Rep. 409. Within these authorities, as well as upon principle, we have no difficulty in reaching the conclusion that the conditions imposed by the antenuptial contract, and also by the will, limiting the duration of the annuity there provided, were not conditions subsequent, as those conditions are properly understood, but limitations terminable at the will and election of appellant. Further, even if construed as conditions subsequent, they are such as the law sanctions, and are not void. The general rule that contracts in restraint of marriage are void has no application to second marriages. The uniform trend of judicial decisions sustains this statement.

The reason for the rule as to first marriage has no substantial force when applied to a second marriage: Neither the conservation of morals nor public policy furnish a basis for the rule as applied to the right of a husband or wife to withhold

his or her estate from passing to the support of a second husband or second wife, as the case might be. And the authorities declare that the rule has never been extended to second marriages.

The precise question arose in *Allen v. Jackson*, L. R. 1 Ch. D. 399, referred to above, and the court distinctly held that the rule did not apply to a second marriage. The question was fully considered in *Bostick v. Blades*, 59 Md. 231, 43 Am. Rep. 548, a case involving a devise by the wife of certain property to the husband, so long as he should remain unmarried after her death. The court held the will valid on the ground that the rule referred to did not extend to second marriages. The court also considered at some length whether ⁴²⁵ the rule should be limited to the second marriage of the wife, or whether it included both husband and wife. Upon that subject the court said: "In the absence of any binding authority to the contrary, we are of the opinion that there is no good and substantial ground for maintaining a distinction between a condition imposed in restraint of a second marriage of a woman and a like condition in restraint of second marriage of a man. As the one is valid and effectual, so is the other." In *Knight v. Mahoney*, 152 Mass. 523, 25 N. E. 971, 9 L. R. A. 573, the testator gave his property to his wife, "so long as she remains my widow." She married again after her husband's death, and the controversy arose whether the provisions of the will were valid. The court said that the weight of authority sustained devises and bequests conditioned to terminate upon second marriage, citing, in support of the decision, 2 *Pomeroy's Equity Jurisprudence*, 933, *White v. Sawyer*, 13 Met. (Mass.) 546, *Loring v. Loring*, 100 Mass. 340, *Gibbens v. Gibbens*, 140 Mass. 102, 54 Am. Rep. 453, 3 N. E. 1, and some of the cases heretofore referred to.

It is unnecessary to discuss the reasons for the rule. The welfare of children by the first marriage is an element entering into consideration in determining the validity of such limitations, as well as the right of persons freely to enter into the marriage relation as their station in life and inclinations may justify and prompt. But no sound principle, founded upon either moral or legal obligation, extends the right of either husband or wife to retain the property of the other, in the face of lawful restrictions to the contrary, for the purpose of supporting and maintaining another spouse. The fact that appellant had no children by this marriage does not, as a mat-

ter of law, relate back and render the restrictions or limitations of the antenuptial contract unreasonable. We have examined fully all the authorities cited by appellant, and find in them nothing in substantial conflict with the conclusion indicated. Many of the cases so cited refer to and treat of contracts expressly providing against marriage at all, and are not in point. In some instances cases seemingly upholding their position have been overruled and do not now express the law of the states from which cited. Others have no reference to estates granted by husband to wife, or wife to husband terminable upon second marriage.

426 2. The second proposition of appellant is that the antenuptial contract was void, because it tended to induce a separation between husband and wife. This contention is founded upon that part of the contract, repeated in the will, wherein it was provided that if, at the death of Mrs. Appleby, appellant should not be her husband, or in the event they shall not then be "living together as husband and wife," any and all right to the annuity shall "cease and be of no force or effect."

It is elementary that contracts which tend to induce a separation of husband and wife are, upon the same principle of public policy which discountenances contracts in restraint of marriage, utterly void and of no force or effect. There is but one voice in the decisions upon this question: *Cartwright v. Cartwright*, 22 L. J. Ch. 841; *H. v. W.*, 3 Kay & J. 382; *Brown v. Peck*, 1 Eden, 140; *Randall v. Randall*, 37 Mich. 563; *Boland v. O'Neil*, 72 Conn. 217, 44 Atl. 15; *Hutton v. Hutton's Admr.*, 3 Pa. 100. But the contract under consideration does not bring the case within this principle. A broad view of its provisions will not justify or warrant the conclusion that its purpose was to facilitate, or that it tended in any measure to induce, a separation of the parties. On the contrary, it is clear that its purpose and tendency was to induce continued cohabitation as husband and wife. Appellant was firmly obligated to comply with the contract in this respect, and a failure forfeited the annuity. It was not incorporated in the contract to furnish the wife, upon some whimsical or capricious notion, induced, perhaps, by a condition of not unusual occurrence, a family jar, not ordinarily of long duration, an excuse to separate from her husband. The contract held out to her, as in many of the cases cited by appellant, no pecuniary or other inducement to bring about a separation. Causing

one would result in no benefit or advantage to her. The result would in such event only increase the charity fund to which she devoted her estate.

It is unnecessary to enter into an extended discussion of the authorities upon this subject. Many analogous cases are found in the books, but the decisions all turned, where the contracts were held void, upon the construction of the particular language and phraseology of each. The case of *In re Hope Johnstone*, [1904] L. R. 1 Ch. D. 470, is an instructive one, and may be referred to. In that ⁴²⁷ case, Hope Johnstone, the husband, conveyed certain property in trust for the benefit of his wife for life, "or so long as she shall continue the cohabiting wife, or the widow." It was there contended that this was an inducement to separation, and hence void; that a separation would result beneficially to the husband; and that he could by improper treatment of the wife bring about a separation and reap the benefit of his wrongful conduct. The court brushed these arguments aside and sustained the contract. The case is squarely in point.

Moreover, the contract in the case at bar has been fully performed by the wife. By her will she made the provision contemplated by the contract, which appellant has accepted, and he is in no position to claim that the contract was void, because, perchance, she might have so shaped her conduct before death as to have justified a neglect or refusal to perform; because if she had, for capricious reasons, as suggested, separated from appellant, compliance with the contract could not have been compelled. The fact that there was no separation, and the further fact that Mrs. Appleby fully performed the contract, eliminates from consideration conditions that "might have been."

The authorities cited by appellant in support of this feature of the case, aside from those upholding the elementary or general proposition that contracts which tend to induce a separation of husband and wife are void, are not in point. In *Neddo v. Neddo*, 56 Kan. 507, 44 Pac. 1, the antenuptial contract expressly provided that if the parties could not live amicably together, and should separate, either by abandonment or divorce, the property rights of each should remain as before the marriage; each thereby relinquishing all rights in the property of the other. The court held that the contract expressly contemplated a separation, invited disagreement and abandonment, and made the same productive of profit to the

husband, who was possessed of considerable property, the wife having none of any consequence, should he see fit to provoke a disagreement between them. Unlike the case at bar, he did in fact desert and abandon his wife without cause, and sought to enforce the contract against a claim by the wife for alimony in the action, which was for divorce, and the court held that it was void and declined to give force or validity to its provisions. There was no separation in the case at bar, and the contract held out to Mrs. Appleby no pecuniary or other inducement to bring ⁴²⁸ one about. On the contrary, she fully complied with all its provisions and made no effort to avoid compliance therewith. The case of *Randall v. Randall*, 37 Mich. 563, involved the validity of a contract made in consummation of an agreement for separation which the court sustained. In *Boland v. O'Neil*, 72 Conn. 217, 44 Atl. 15, the contract expressly stipulated for a separation of husband and wife until such time as the husband might deem proper to receive her again at his home. The court held that the contract was void. The case is not here in point.

3. It is next urged that the contract is void for want of consideration. This contention requires no extended mention. The marriage was a sufficient consideration: *Desnoyer v. Jordan*, 27 Minn. 295, 7 N. W. 140; *Hosford v. Rowe*, 41 Minn. 245, 42 N. W. 1018; *McNutt v. McNutt*, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372. There was no fraud in the execution of the contract; and the suggestion of counsel that appellant had no alternative but to sign, when it was presented to him a day or two prior to the marriage, is without special force. Appellant was at the time twenty-nine years of age, a man of education and intelligence, and must be taken to have acted freely and understandingly. The provision made for him, an annual income of ten thousand dollars, was generous and liberal. No undue influence or compulsion appears to have been exerted or employed to secure his assent, and the rule "in terrorem," invoked by appellant, does not apply. The fact that the engagement of marriage between the parties was entered into several months before the formal written marriage settlement was made and signed does not eliminate or exclude the marriage as a consideration for that agreement. Even though the original engagement was absolute, and not coupled with an express or implied understanding as to the marriage settlement, the parties by the subsequent written contract are taken as a matter of law to have entered into new promises, including the

engagement of marriage, and the original agreement must be treated as rescinded, or absorbed and embodied in the new: *Lattimore v. Harsen*, 14 Johns. 330. The supreme court of Indiana in *McNutt v. McNutt*, 116 Ind. 545, 19 N. E. 115, 2: L. R. A. 372, a case involving this identical point, said: "Turning from the main path to a point which counsel make, and which leads us aside, we affirm that the fact that a promise to marry was made ⁴²⁰ six years before the writing was drawn and signed does not impeach the consideration of the contract. The written instrument, as the authorities agree, merges mere oral negotiations, expresses the matured agreement of the parties, and supplies the best evidence upon the subject of property rights. If the parties put in writing their agreement concerning their property, and subsequently marry, the agreement, as written, is the source of evidence, and furnishes conclusive proof of the matured and final contract." This is in line with the authorities generally on the subject, and, as before remarked, the marriage was a sufficient consideration to support the contract: See, also, 7 *Columbia Law Review*, 203; 21 *Cyc.* 1246.

4. The fourth contention is that an antenuptial contract, cutting off the homestead right and the statutory one-third interest of a husband or wife, is unauthorized and void. If this position were sustained, very little would be left of the law authorizing contracts of this character. As we have heretofore stated, marriage settlements are uniformly sustained by the courts when not prohibited by statute. The law on the subject is correctly summed up in *Desnoyer v. Jordan*, 27 Minn. 295, 7 N. W. 140, where the court said: "In the absence of a valid agreement between the parties, the law fixes the rights which either the husband or the wife shall have in the property of the other, both during life and after the death of either. But it has always been permitted to the parties in contemplation of marriage to fix those rights by agreement, equitably and fairly made between them, and to exclude the operation of the law in respect to fixing such rights, so that, so far as the agreement extends, it, and not the law, furnishes the measure of such rights." The purpose and object of such settlements is to fix definitely the property rights of the parties, to the exclusion of those existing by virtue of statute or common law, and sound reason and policy sustain efforts in this direction. The contention of appellant on this branch of the case is based upon the provisions of sec-

tions 4470 and 4471 of the General Statutes of 1894. The first of these sections grants to the surviving husband or wife a life estate in the homestead. The second provides that the surviving husband or wife "Shall also be entitled to and shall hold in fee simple, or by such inferior tenure as the deceased was at any time during ⁴³⁰ coverture seised or possessed thereof, one equal undivided one-third of all other lands of which the deceased was at any time during coverture seised or possessed, free from any testamentary or other disposition thereof to which such survivor shall not have assented in writing."

It is urged that, because appellant did not assent to the terms of the contract, and the provisions of the will of his wife by which her property in the main was given to the Wilder Charity, after the marriage, the antenuptial contract is inoperative and void. We are wholly unable to adopt this view of the question. The antenuptial contract, being sanctioned by law, was a sufficient assent, within the meaning of the statute, to the power and right of Mrs. Appleby to dispose of her property in the manner shown by her will. Any other conclusion would result in limiting marriage settlements to property not disposed of by some statutory regulation.

5. It is further contended that in and by the provisions of her will Mrs. Appleby violated, or at least failed fully to carry out, the terms of the antenuptial contract, and thus released her husband therefrom. This is founded upon the theory that by the terms of the contract appellant was given a valid claim against the entire property of his wife for the purpose of securing payment of the annuity, and that by the terms of the will a part only thereof is directed to be set apart by the trustees for that purpose. The objection is clearly not well founded. The terms of the contract do not contemplate that the entire estate of Mrs. Appleby should be tied up for the sole purpose of insuring the payment of this annuity. The income of ten thousand dollars is provided for in express language, and by the terms of the will ample authority is conferred upon the court having charge of her estate, or the administration of the charity to which her estate was devoted, to protect the rights of appellant in this respect. Indeed, the order of the district court modifying the decree of the probate court fully provides for all contingencies that may arise in that regard. It provides that,

if the securities set apart shall at any time become insufficient to produce the annuity, nothing therein shall be construed as prejudicing his right by appropriate proceedings to resort to the body of the estate. This is all that appellant is in position to insist ⁴³¹ upon, and his income can cease only in the improbable event that the whole estate may at some time in the future be adequate to produce it. It follows that the terms of the will in this particular are in substantial compliance with the contract.

6. It is also contended that the will of Mrs. Appleby, in so far as it creates a trust for charity, is void, and that appellant takes the estate given thereby to the charity fund; for by the antenuptial contract he released his rights and interests in his wife's property to her heirs only, and he is her only heir. The latter part of this contention, in view of the conclusion we have reached as to the first, requires no consideration. In view of the earnestness with which counsel presented the claim that the will in the respect stated is invalid, we have re-examined the question with special reference to the particular features of the present will. The decision in *Watkins v. Bigelow*, 93 Minn. 361, 101 N. W. 497, wherein the will of Mrs. Wilder, to the same effect and purpose as that of Mrs. Appleby, and of which the latter is supplemental, sustains the general proposition that the wills are, if in substance the same, valid. It is unnecessary to enter into further discussion of that question. All features of the matter were fully covered by the opinion in the *Watkins* case, which we follow and apply. It is not contended that the former decision is erroneous, but it is strenuously urged that the will here under consideration differs in material respects from that of Mrs. Wilder and clearly violates the statutes against uses and trusts. A very thorough comparison of the two documents does not, in point of substance, sustain this view of the case. While the language of the two wills differs in many respects, the main object and purpose of each is clearly indicated to be identical, and, construed as a whole, we have no difficulty in reaching the conclusion that they are for all practical purposes of the same legal effect. It would serve no useful purpose as a precedent to set out the two wills for purposes of comparison, and we close this branch of the case with the remark that every reasonable intendment should be indulged in favor of the will. The rights of heirs having lawful claims upon the bounty of the deceased are not in-

volved, and her surviving husband, appellant, has been liberally provided for in accordance with the terms of the antenuptial contract. The charity founded arose from noble sentiments toward the worthy ⁴³² poor of St. Paul, and should not be defeated by an application of technical rules of law.

7. The last point presented assumes the validity of the will and involves the construction of the twelfth subdivision thereof. This part of the will, so far as here material, provides as follows: "In the event I am the owner of the same at the time of my death, and we are then living together as husband and wife, I will, devise and bequeath to my said husband, Dr. T. E. W. Villiers Appleby, the use and enjoyment, so long as he shall occupy the same and remain unmarried, the following property in St. Paul, Minnesota." Here follows a description of the property, which is known and referred to in the record as the "Wilder homestead." The will then directs the executors of the will, as soon after her death as convenient, to set apart from her estate an amount sufficient to produce an income of not less than five thousand dollars to be used in paying taxes and assessments upon the property and the cost and expense of maintaining the same as a residence so long as appellant should remain unmarried and continue to occupy the same.

It is a conceded fact that the property here attempted to be devised to appellant did not in fact belong to the testatrix, Mrs. Appleby, at the time the will was executed, nor at the time of her death. It was the property of her mother, Mrs. Wilder, who was living and in the possession of it when Mrs. Appleby died. Two questions are here presented: 1. It is claimed by appellant that this attempt to devise the Wilder homestead to appellant, title to which was in Mrs. Wilder, coupled with certain bequests to Mrs. Wilder, became effective upon the acceptance by her of such other bequests, under the doctrine of equitable election, applied in *Brown v. Brown*, 42 Minn. 270, 44 N. W. 250, and *Sorenson v. Carey*, 96 Minn. 202, 104 N. W. 958; and 2. That if this contention be not sustained, and the court should hold that appellant has no claim to that property, inasmuch as five thousand dollars a year was directed by the will to be expended in the maintenance of the property during appellant's rightful occupancy thereof, and because of the fact that without fault on his part and because of circumstances ⁴³³ over which he had no con-

trol and were unforeseen by the testatrix, the money so directed to be applied cannot be applied in the particular manner directed, it should go to appellant for his general use and benefit.

We are unable to sustain either of these contentions. To the first it is sufficient to say that Mrs. Appleby made no absolute devise of the homestead to appellant. The devise was expressly conditioned upon her ownership at the time of her death, and did not require of her mother, even though she accepted bequests made to her, to elect whether to take them or retain her own home. The conditional feature of the devise to appellant relieved her of this equitable obligation: *Sherman v. Lewis*, 44 Minn. 107, 46 N. W. 318; *Havens v. Sackett*, 15 N. Y. 365; *Charch v. Charch*, 57 Ohio St. 561, 49 N. E. 408. Mrs. Appleby, when executing her will, undoubtedly expected to outlive her mother, and that the homestead would in that event become her property. The possibility of such result not occurring, she conditioned the devise to her husband accordingly. As to the second contention, we need only say that it is evident from the will that the sole object and purpose of creating the five thousand dollar fund was to maintain the homestead in suitable condition for use and occupancy by appellant—to relieve him of that burden. It was clearly not intended for his personal benefit, and he is in no position to insist that it be paid him, to be devoted to purposes other than those intended by his wife: *Tilden v. Green*, 130 N. Y. 29, 27 Am. St. Rep. 487, 28 N. E. 880, 14 L. R. A. 33; *Levy v. Levy*, 33 N. Y. 97.

This covers all questions presented in the briefs requiring consideration, and, as our conclusions are in harmony with those reached by the learned trial judge, his order in the premises is affirmed.

JAGGARD, J., Dissenting. The antenuptial contract was, in my opinion, void because of the clause providing that the husband should have no part of the wife's estate at her death in case they were not then "living together as husband and wife."

The Validity of Conditions in Restraint of Marriage is discussed in the notes to *Wakefield v. Van Tassell*, 95 Am. St. Rep. 214; *Chapin v. Cooke*, 84 Am. St. Rep. 147.

The Assignment or Release of Expectant Estates is discussed in the note to *McCall v. Hampton*, 56 Am. St. Rep. 339. If a husband and

wife execute an agreement of separation whereby each releases all claim to the property of the other and all right of inheritance thereto, and the agreement is lived up to by both during her lifetime, he will not be heard to say, after her death, that the contract is unfair: *Estate of Edelman*, 148 Cal. 233, 113 Am. St. Rep. 231.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

GANONG v. BROWN.

[88 Miss. 53, 40 South. 556.]

CONTRACTS—Entire or Divisible.—Whether a contract is entire or divisible cannot be determined by a single term, phrase, or sentence, though it be large enough to include such meaning, unless throughout the whole agreement and from the surrounding circumstances it definitely appears that it was the intention of the parties that the contract should be entire and indivisible. (p. 732.)

CONTRACTS—Entire or Divisible—Partial Performance.—If a person contracts to paint and paper a house for a fixed sum, "to be completed in good, workmanlike style, work to begin and be finished as soon as possible," and before the completion of such work the house is accidentally destroyed by fire, such person can recover the value of his materials and labor put upon the house before its destruction, especially when he gave an order for a partial payment on the owner before the fire, and the latter collected fire insurance to the full value of the building as a completed and finished building. (p. 732.)

Suit on a contract made by Ganong & Chenoweth, a partnership, with Brown to paint and paper his house, the contract providing that the work was "to be completed in good, workmanlike style for the amount set opposite: . . . Work to begin and to be finished as soon as possible." The remaining facts appear from the opinion.

S. A. Morrison, for the appellant.

W. C. McLean, for the appellee.

⁶² **WHITFIELD, C. J.** We do not think the contract in this case was an entire one. We approve the statement of the law on this subject announced in *Baily v. DeCrespany*, L. R. 4 Q. B. 180, which is as follows: "Whether a contract

is entire or divisible cannot be determined by a single term, phrase or sentence, though the same be large enough to include such meaning, unless throughout the whole agreement, the surrounding circumstances, and good sense and justice of the case it definitely appears that it was the intention of the parties to the contract that it should be entire and indivisible." Applying this principle to the writing in the case, to all the circumstances surrounding the making of the contract, we do not think that this contract can be properly held to be an entire contract. It was well said by counsel for appellant that the word "completed," in the phrase ⁶³ "to be completed in a workmanlike style for the sum set opposite," does not mean that nothing is to be paid until the job is finished, does not refer to a limit of time with regard to payment, but means that the work throughout is to be done in a workmanlike manner. After the appellant had put great value into the building by his labor and materials, the building without his fault was destroyed by fire. The day before the fire Ganong gave an order on Brown in favor of Guy & Pressgrove for material in the sum of seventy dollars. While it is true that Brown did not pay this, it is a very pregnant circumstance, showing Ganong's construction of the contract and conduct under it. A few days before the fire Brown insured the property "as a finished building" for his own benefit. This was equivalent to a declaration that the entire property was his, and he received five thousand dollars insurance, full payment on the whole loss, the property being treated as a finished building: Partridge v. Forsythe, 29 Ala. 200.

It would be in the highest degree inequitable to permit Brown, with the full value of the building, treated as a completed and finished building, in his pocket, to refuse payment to appellant for the labor and materials which put the building into a condition so far finished as that Brown and the insurance company dealt with it as completely finished: Cook v. McCabe, 53 Wis. 250, 40 Am. Rep. 765, 10 N. W. 507. The authorities are so well collected in the brief of counsel for appellant that we will content ourselves with a simple reference to them. We think the plaintiff is entitled to recover.

The judgment is reversed, and the cause remanded.

The Entirety of Contracts is discussed in the note to Huyett & Smith Co. v. Chicago Edison Co., 59 Am. St. Rep. 277. One engaged to make repairs or do other work on the house of another under a special contract may recover for what he has done when the comple-

tion of his contract becomes impossible on account of the destruction of the building without his fault: *Angus v. Scully*, 176 Mass. 357, 79 Am. St. Rep. 318. See, too, *Faisey v. Waukesha Springs etc. Co.*, 125 Wis. 311, 110 Am. St. Rep. 838; *Krause v. Board of School Trustees*, 162 Ind. 278, 102 Am. St. Rep. 203; *Middlesex Water Co. v. Knappmann-Whiting Co.*, 64 N. J. L. 248, 81 Am. St. Rep. 467; *Nicol v. Fitch*, 115 Mich. 15, 69 Am. St. Rep. 542.

RODGE v. KELLY.

[88 Miss. 209, 40 South. 552.]

CONSTITUTIONAL LAW—Class Legislation—Due Process of Law.—A statute and city ordinance imposing a privilege tax on each person loaning money secured by bill of sale or mortgage on designated kinds of personal property, but not imposing such tax on lenders otherwise securing their loans, are unconstitutional and void as class legislation, and as depriving persons of their property without due process of law. (pp. 735, 736.)

Anderson & Voller, for the appellant.

Dabney & McCabe, for the appellees.

215 *WHITFIELD, C. J.* This is a suit brought by John F. Rodge, appellant here, against Robert M. Kelly, assessor and tax collector of the city of Vicksburg and the mayor and aldermen of the city of Vicksburg, to recover the sum of two hundred and fifty dollars, paid by the said Rodge into the treasury of said city under protest; said amount being required of him by the said city tax collector as a privilege tax, under an ordinance of said city which is claimed by appellant to be unconstitutional and void. The history of said ordinance is as follows: The legislature, during its session of 1904, under "An act creating privilege taxes on certain industries in the state of Mississippi," passed the following statute:

"Section 1. Be it enacted by the legislature of the state of Mississippi, That a privilege tax is hereby created on the following industries of the state of Mississippi:

• • • • •
"Sec. 57. *Money lending.*—On each individual, firm or corporation doing a money lending business on personal securities, such as household and kitchen furniture, or wearing apparel, pianos, sewing-machines, jewelry, silver, glass, plate or

ware, whether such loan is secured to the lender by bill of sale of such personal property, or whether such loan is secured by mortgage or deed of trust, \$500.00": Laws 1904, c. 76, p. 71.

Thereupon, and in pursuance of this statute, on the eighteenth day of April, 1904, the city council of the city of Vicksburg passed the following ordinance, which was approved April 20, 1904, and which was to take effect from and after May 1, 1904, to wit:

"*Privilege tax ordinance.*—An ordinance imposing a privilege ²¹⁶ tax on certain trades, business professions and callings, to provide revenue for the city of Vicksburg.

"(1) Article 11. On each individual, firm or corporation doing a money lending business on personal securities, such as household and kitchen furniture, wearing apparel, pianos, sewing-machines, jewelry, glass, plate or ware, whether such loan is secured to the lender by a bill of sale of such personal property, or whether the loan is secured by mortgage or deed of trust, \$250.00."

It will be observed that this ordinance is in the exact language of the statute, except as to the amount, which is two hundred and fifty dollars, being fifty per centum of the state tax, the statutory (Code 1892, sec. 3412) maximum limit. The appellant, John F. Rodge, and others, at the time of the passage of said statute and ordinance, were engaged in the city of Vicksburg in the business of money lending on the securities denounced by said statute and ordinance, and were required by the respective tax collectors of Warren county and the city of Vicksburg to pay said privilege tax of five hundred dollars and two hundred and fifty dollars. These taxes were paid under protest, on the announcement and claim that said statute and ordinance are unconstitutional and void; and suits have been brought against these officers to recover back said amounts. The declaration in the case at bar, as will be seen by inspection, set out this statute and ordinance, alleges that plaintiff is a money lender dealing in the securities denounced by said acts; that no others of the class of money lenders are required by said statute and ordinance to pay any privilege tax, and that the said acts amount to class legislation, and are therefore unconstitutional and void. To this declaration a demurrer was interposed, calling in question the legality of plaintiff's contention, which was sus-

tained by the lower court, and from this decision plaintiff appeals.

Appellant's contention is that this statute and ordinance are ²¹⁷ void because (1) they are in conflict with that part of section 1 of the fourteenth amendment to the constitution of the United States, which says: "Neither shall any state deprive any person of life, liberty or property without due process of law; nor to deny to any person within its jurisdiction the equal protection of the law." Appellant says that this is true (a) as to the money lender embraced in these acts; and (b) as to the borrower who borrows money on the securities denounced by said acts. (2) They are in conflict with that part of section 1 of the fourteenth amendment to the constitution of the United States, and section 14 of the state constitution, which say: "No person shall be deprived of life, liberty or property except by due process of law," in that both the statute and the ordinance purport on their face to be for the levying and collection of a license tax, but in reality they are clearly and palpably an attempt to destroy and prohibit a legitimate business.

The purpose of this act seems to have been to provide this high license in the case of the money-lending sharks, well known in some of the cities of this state, who are in the habit of lending small sums of money at most iniquitous and exorbitant rates to servants in families and other necessitous persons, and securing from such persons bills of sale of household and kitchen furniture, plate, ware, etc., which articles are at the time of such loan in the actual personal use of such persons so securing such loan. The purpose of preventing this infamous system of robbery under the guise of money lending, which sought to subject to quick sale, within a week's time often, the articles which constitute, in such actual personal use of those securing the loan, the necessities of decent existence, is a justly righteous purpose. Money-lending concerns, so called, which would sell the piano on which the daughter is learning music, the small and plain jewelry upon the person, the sewing-machine on which are made the clothing worn in humble households, and the plain plate and glass in customary use amongst the humble and needy, in the ²¹⁸ enforcement of contracts of loans at such rates of interest as were referred to and condemned in *Woodson v. Hopkins*, 85 Miss. 171, 107 Am. St. Rep. 278, 37 South. 1000, 38 South. 298, 70 L. R. A. 645, as making such contracts void as against

public policy, are engaged in transactions simply and utterly infamous, and which cannot be enforced in any court. But the trouble with this statute, as drawn, is that it prohibits loans on personal securities of the kind named, without reference to any rate of interest. If only the securities be of the kind named in this statute, no loan could be made, except upon payment of this high license, not exacted of any other money lender, at even six per cent, or five per cent, or any per cent whatever. Again, under this statute, money lenders on personal securities of this kind would have to pay this high license in order to loan at any rate of interest, however low, on jewelry worth one hundred thousand dollars in a store, or silverware worth one hundred thousand dollars in a store, or on all the pianos in a factory. As written, the statute is unfortunately class legislation, falling within the inhibition of the constitutional provisions named.

It may well be that no statute is needed to prohibit the kind of contracts condemned in *Woodson v. Hopkins*, 85 Miss. 171, 107 Am. St. Rep. 278, 37 South. 1000, 38 South. 298, 70 L. R. A. 645, since the contracts condemned in that case were not contracts condemned because of usury, but contracts condemned, as clearly stated in that opinion, because they were so grossly exorbitant and iniquitous in all their features as to be void as against public policy. There is no need of a statute to prohibit contracts and businesses which the courts have declared void as against public policy. If, however, it was the purpose of the legislature to withdraw such contracts from the condemnation of being against public policy upon the condition of the payment by persons and corporations engaged in them of a very high license, it would still remain true that the statute enacted in that view must conform to the provisions of the constitution of this state and the United States referred to.

The judgment is reversed, the demurrer overruled, and the cause remanded.

Class Legislation is not Unconstitutional, provided the class is composed of individuals possessing in common some disability, attribute, or qualification, or in some condition marking them as proper objects for legislation: *Horwich v. Walker-Gordon Laboratory Co.*, 205 Ill. 497 98 Am. St. Rep. 254; *Deyoe v. Superior Court*, 140 Cal. 476, 98 Am. St. Rep. 73; *O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 115 Am. St. Rep. 495. It is only when persons engaged in the same business are subjected to different restrictions, or are granted different privileges under like conditions, that the discrimination is

open to objection, or can be said to impair the equal right and protection which all may claim under the law: *Butte v. Paltrovich*, 30 Mont. 18, 104 Am. St. Rep. 698; *Douglas v. People*, 225 Ill. 536, 116 Am. St. Rep. 162.

AVANT v. STATE.

[88 Miss. 226, 40 South. 483.]

MURDER—Verdict Begging Mercy—Sentence.—A verdict in murder case that "We, the jury, find the defendant guilty as charged and beg the mercy of the court," followed by a sentence of death, the court being silent as to the plea for mercy, cannot be sustained. (p. 737.)

MURDER—Clouded Verdict.—The legal effect of a verdict in a murder case that "We, the jury, find the defendant guilty as charged and beg the mercy of the court," is to impose the death sentence; but, in such case, the court should require the jury to remove the cloud from the finding and make the meaning of the verdict plain. (p. 737.)

G. W. Lindsey and W. J. East, for the appellants.

R. V. Fletcher, assistant attorney general, for the appellee.

227 CALHOON, J. The verdict in this murder case is: "We, the jury, find the defendant guilty as charged and beg the mercy of the court." The court did nothing and said nothing, but pronounced the sentence of death. In the light of authority no verdict of guilty with such a petition for mercy, and the court silent, can be sustained, however horrible the case may be. In *Smith v. State*, 75 Miss. 558, 23 South. 260, the court said: "Of course, the legal effect of the verdict in this case in the words used is by legal construction death. But the words employed in a verdict are the mere vehicles for conveying the jury's will; and where there are words in the verdict raising an 'apparent cloud' as to what the actual intent and finding of the jury is, the court, whether asked or not, should 'dispel that cloud' and have the jury make plain their meaning. And the court, of course, had the amplest power to do this, and, if necessary, to send them back to the jury-room to render a clear and unambiguous verdict; and most especially should this ample power be exercised in a capital case."

We can only pronounce the law, and this case must be reversed and remanded.

A Finding of a Jury in a case involving a charge of murder that they find the defendants guilty as charged, but recommend one of them named to the mercy of the court, is a nullity, and cannot be considered by the court as a verdict of murder in any degree: *Jenkins v. State*, 35 Fla. 737, 48 Am. St. Rep. 267.

LAWSON v. BONNER.

[88 Miss. 235, 40 South. 488.]

PARTITION—Reversions and Remainders.—Under the Mississippi statute, rights in reversion and remainder cannot be affected by partition proceedings, and it is improper to make reversioners or remaindermen parties thereto. (p. 739.)

PARTITION—Specific Allotment by Decree.—In partition proceedings, it is error for the court to direct, of its own motion, the commissioners to so partition the land as to give to one of the parties a designated portion of the land. The division of the property should be left to the commissioners without instruction. (p. 739.)

PARTITION—Appeal—Decrees in Partition are Entireties, and cannot be reversed in part. (p. 739.)

Mrs. L. Allen, by her will, devised an undivided one-half interest in her lands to Laura V. Bonner, and to her sister, Emily N. Lawson, the remaining undivided one-half interest in such lands for the period of her natural life and at her death such interest to go, share and share alike, to the children of testatrix's two brothers, Charles and Richard Lawson.

After the will was probated, Mrs. Bonner commenced proceedings for the partition of the land, making parties thereto the life tenant, the remaindermen and the children of Charles and Richard Lawson, the latter being dead. A decree was rendered appointing commissioners to partition the land in two equal parts, with instructions to them to assign to Mrs. Bonner without ballot that part of the land as divided by them on which the dwelling-house was situated, the remaining half to be assigned to Emily N. Lawson for life, remainder to the children mentioned above. Partition was made and confirmed as directed.

Watkins & Watkins, for the appellants.

Williamson, Wells & Peyton, for the appellee.

²⁵⁶ WHITFIELD, C. J. Our statutes (Code 1892, sec. 3097 et seq.) make it plainly improper to partition any

rights in reversion or remainder, or to make reversioners or remaindermen parties to any partition proceeding. The writ and all the proceedings are possessory purely. It was, therefore, manifest error for the court to attempt to deal in any way with the rights of the children of Charles and Richard Lawson. The extent of its power was to have partitioned the land on the west side of the road between Emily N. Lawson and Laura V. Bonner, leaving a new partition to be made at the death of the life tenant, Emily N. Lawson. Our decisions on our statutes have made all this exceedingly plain.

It was manifest error for the court to direct, of its own motion, the commissioners to so partition the land as to give to Mrs. Bonner the part on which the residence was situated. That was for the commissioners. It was also gross error to tax the interests in remainder with any of the costs of the proceedings, and to decree the partition originally as here ordered, or the sale subsequently made of the remainder interests for sixty-two dollars and thirty cents. The decree in this case is in its very nature an entirety, inseparable²⁵⁷ and indivisible. The proceedings throughout are a comedy of errors. We cite no authorities, for the reason that all our own authorities, and the authorities elsewhere pertinent to the subject matter, have been most discriminately collected and analyzed in the very able brief of the learned counsel for the appellant, which we direct to be printed in full.

Reversed and remanded.

The Partition of Estates Held in Reversion or Remainder is the subject of a note to Fitts v. Craddock, 113 Am. St. Rep. 55.

HAMPTON v. STATE.

[88 Miss. 257, 40 South. 545.]

TRIAL—Misconduct of Counsel—Abuse of Accused.—It is reversible error for prosecuting counsel in a trial against a mulatto for murder to be allowed to state in his argument to the jury, as true, a material fact not based upon nor warranted by the evidence, and to further greatly abuse the character of the accused on the sole ground that he was a mulatto. (p. 740.)

G. J. Rancher and G. H. Ethridge, for the appellant.

R. V. Fletcher, assistant attorney general, for the appellee.

259 CALHOON, J. It appears that the district attorney was permitted by the court to use the following language over objection: "The shirt was cut and fixed in the jail with Charley Stuart's knife." This is without support in the evidence. The district attorney further said to the jury these words: "Not a negro in that great concourse of negroes who threaten to be respectable has dared to come here and testify in behalf of this mulatto" (at the same time pointing to the defendant). He further said to the jury that: "In any other commonwealth in this Union [pointing to the defendant] he would be hung without benefit of clergy." He further said to the jury, referring to the evils of miscegenation, the defendant being a mulatto, that "mulattoes should be kicked out by the white race and spurned by the negroes; that the defendant was whiter than himself, the counsel of defendant, or the judge, or any of the jury, but that they were negroes, and that as long as one drop of the accursed blood was in their veins they have to bear it; that these negroes [referring to the defendant and his brother] thought they were better than other negroes, but in fact they were worse than negroes; that they were negritoes [pointing at the defendant], a race hated by the white race and despised by the negroes, accursed by every white man who loves his race, and despised by every negro who respects his race."

Mulattoes, negroes, Malays, whites, millionaires, paupers, princes, and kings, in the courts of Mississippi are on precisely the same exactly equal footing. All must be tried on facts, and not on abuse. Only impartial trials can pass the Red Sea of this court without drowning. Trials are to vindicate

cate innocence or ascertain guilt, and are not to be vehicles for denunciation.

Reversed and remanded.

Misconduct of Counsel in Argument is discussed in the notes to McDonald v. People, 9 Am. St. Rep. 559; Cleveland etc. R. R. Co. v. Pritschau, 100 Am. St. Rep. 689. A prosecuting attorney represents the majesty of the people; and, having no responsibility except fairly to discharge his duty, should put himself under proper restraint, and not go beyond the evidence or the bounds of reasonable moderation. If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to secure a conviction at all hazards, he ceases properly to represent the public interest: Fielding v. People, 158 N. Y. 542, 70 Am. St. Rep. 493; Rhodes v. Commonwealth, 107 Ky. 354, 92 Am. St. Rep. 360. See the illustrations of this doctrine in the recent cases of Smith v. State, 44 Tex. Cr. Rep. 137, 100 Am. St. Rep. 849; State v. Blackman, 108 La. 121, 92 Am. St. Rep. 377; Miller v. Nuckolls, 77 Ark. 64, 113 Am. St. Rep. 122.

SEARLES v. WESTERN ASSURANCE COMPANY.

[88 Miss. 260, 40 South. 866.]

INSURANCE, MARINE—Constructive Total Loss.—Under a policy of marine insurance stipulating that there shall be no abandonment of the vessel insured as for a "constructive total loss" unless the cost of the necessary repairs required solely by the disaster, exclusive of the cost of raising or rescuing the vessel and taking her to the dock, be equivalent to seventy-five per cent her agreed value, the words "constructive total loss" mean such a loss as that the repairs made necessary thereby, exclusive of raising or rescuing and taking her to the dock, would be equivalent to seventy-five per cent of her value, and when the cost to repair the vessel is less than that, the insured cannot abandon her and recover as for a constructive total loss. (p. 747.)

INSURANCE, MARINE—Constructive Total Loss—Abandonment of Vessel.—Under a policy of marine insurance stipulating that there shall be no abandonment of the vessel insured as for a "constructive total loss," unless the cost of the necessary repairs required solely by the disaster, exclusive of the cost of raising or rescuing the vessel and taking her to the dock, be equivalent to seventy-five per cent of her agreed value, the insured cannot justify an abandonment of the vessel, as for a "constructive total loss" by proof that there were no facilities where she sank for raising her, and by making the expense of bringing her to a dock an element of damage, showing that as to him she was worthless. (p. 747.)

INSURANCE, MARINE.—A provision in a marine insurance policy giving the insurer the right to recover and repair the insured vessel if at any time he believes that his interests demand

such action, does not defeat his right to resist any claim for damage made by the insured. (p. 748.)

INSURANCE, MARINE—Acceptance of Premium After Loss. If the insurer, in a policy of marine insurance, accepts the balance of the premium due after disaster to the insured vessel, he does not thereby waive the defense that no such loss has occurred as that sued for. (pp. 748, 749.)

McLaurin, Armistead & Brien, for the appellant.

Smith, Hirsh & Landau, for the appellee.

²⁶⁵ **MAYES, J.** On the twenty-fourth day of February, 1903, Searles insured a certain barge owned by him and used in transporting freight and merchandise on the Mississippi river. The insurance began at noon on the twenty-fourth day of February, 1903, and ended at noon on the twenty-fourth day of February, 1904, and was taken out in the Western Assurance Company, appellee. The amount insured for was not to exceed two thousand dollars. The policy of insurance is made an exhibit ²⁶⁶ to the bill; but, as the suit is predicated of only one clause of the insurance policy, we do not deem it necessary to set out any clause but this. The clause referred to is clause 8, which is as follows, viz.:

"There shall be no abandonment as for a constructive total loss in consequence of any loss or damage, unless the cost of the necessary repairs required solely by the disaster, exclusive of cost of raising or rescuing the vessel and taking her to the dock and any general average charge, be equivalent to seventy-five per cent of the agreed value of the vessel as specified herein; nor shall there be any right to abandon on account of said vessel grounding or being otherwise detained."

This same clause also provides that, where the right to abandon exists, it shall not be held to be valid, or allowed as effectual, unless it be in writing, and signed by the assured, and delivered to the company or its authorized agent. In October, 1903, Searles filed a declaration in the circuit court of Warren county to recover the full amount of the insurance granted by the policy; that is to say, two thousand dollars. The declaration alleges that on the twenty-ninth day of July, 1903, the barge was totally destroyed by the unavoidable dangers of the Mississippi river, and that by reason of violent winds, etc., though every effort was made to save the vessel, she became thereby a constructive total loss within the terms of the policy under which it was insured. The declaration also alleges that the plaintiff performed all the condi-

tions of the policy, and demanded payment of the company for the loss; but the insurance company declined and refused to pay, wherefore the plaintiff sues for the sum of two thousand dollars for the total constructive loss of the vessel. The declaration contains but one count, and is for the total constructive loss of the barge. There are quite a number of pleas filed by the defendant, but the single question presented to this court is, Has the plaintiff made out such a case ²⁶⁷ as entitles him to recover the full amount of the policy as for a total constructive loss of the vessel?

The testimony of Mr. Searles is that he placed the insurance with the Western Assurance Company on the twenty-fourth day of February, 1903, expiring on the twenty-fourth day of February, 1904, at noon; that the barge was sunk on the twenty-ninth day of July, 1903, by a violent windstorm; that the premium paid for the insurance was one hundred and eighty dollars, ninety dollars of which was paid soon after the policy was taken out, and the balance about one month after the accident to the barge. When the boat was sunk he was sick in bed, but came down the next day to see what could be done about it, and, finding that nothing could be done, notified R. C. Wilkerson, the agent of the company at Vicksburg, that he had abandoned the vessel. The notice was a written notice. A day or so after the vessel was sunk he went up and looked at the vessel, and about one-half of it was in the river, and the other end sticking up on the bank, with considerable water in the lower end; the water being up to the lower deck, or cargo box. He had no facilities for raising the vessel, and could not get any, though he tried to do so, and there were no facilities available at Vicksburg, and he therefore abandoned the vessel, and notified R. C. Wilkerson, the agent of the assurance company, in writing. This notification was to Mr. Wilkerson at Vicksburg on the thirty-first day of July, and on the second day of August following the assurance company by telegram declined to accept the abandonment and notified him to raise the vessel. On the third day of August he telegraphed the assurance company that there were no facilities in Vicksburg for raising the vessel, and that the company ought to take charge of it. He afterward wrote the company, again insisting that they take charge of the vessel; but they declined to do so, insisting that it was Searles' duty to raise the vessel, and that they did not intend to take any further action in the matter. The agreed

value of the boat was three thousand dollars, and the full amount of insurance was for an amount not to exceed two thousand dollars. In the then condition of the vessel, he deemed it of no value to him, and after the notification ²⁶⁸ of abandonment to Mr. Wilkerson, paid no more attention to it. He spoke to six or a dozen men to go and raise it, but could not get them to do it, but did not have anyone go and look at the barge to see what could be done, as all the men whom he spoke to knew all about the condition of the barge and the river. Dennis Scott said that he had been the night watchman on the boat, and, though it had been leaking a little before the storm came, the storm was what caused it to sink; that the water dashing against the boat during the storm washed out the chinking and caused the boat to sink; that the storm lasted about twenty-four hours, and the boat was sunk about 11 o'clock on the morning after the evening when the storm began.

On these facts the plaintiff rested his case, and the defense introduced T. C. Sweeney, steamboat inspector for the board of underwriters in New Orleans. Mr. Sweeney stated that it was his duty to make examination of all vessels and crafts insured by the board of underwriters, and to make a report of their condition and value, and that he has been engaged in this occupation for the past eight years. That he was formerly engaged in superintending the building of vessels. Had inspected the boat in question some time in February, 1903, and recommended her acceptance as an insurance risk after certain repairs were made on the vessel, so that she would be put in a riverworthy condition. Three days before the vessel sunk he saw her in the river, and at the time he saw her there was a man pumping water out of her; that a few days afterward he received notice that the vessel had sunk, and came up to Vicksburg, reaching there on the morning of the thirty-first day of July, 1903. The boat was lying with the head on the bank and the stern in the river, with about fourteen feet of water in rear end. More than two-thirds of the frame part of the boat was out of the water. The water was not very high, but he does not recollect what the stage of it was. Mr. Searles was at home sick, but he talked to his clerk and asked for a protest, which was forwarded in a day or so. He returned to New Orleans, and there received the protest. He examined the ²⁶⁹ boat, and she could have been raised. It would have required a pump, siphon, and steamboat.

Captain Miller agreed to go up and make the effort to raise the boat for one hundred dollars, and it could have been easily raised; that the "Edna," owned by Captain Miller, could easily have raised the boat, and when raised it would only have been necessary to calk the seams to the water line, if she did not leak below the water line, and if she did, then to dock her and put it in good condition. It would only have cost about three hundred dollars to repair her, and if it only cost one hundred dollars to raise her, then the total expense would not have exceeded four hundred dollars. He stated of his personal knowledge he knew of no apparatus for raising vessels at Vicksburg, and that, if it had been necessary to dock the vessel, she would have to be sent to New Orleans as the nearest place; that four hundred dollars would have put her in the same condition as she was in at first. Donovan stated that he saw the barge two days after it was sunk; she lay with head on bank and stern in the water; that he was willing to undertake to raise the boat for seventy-five dollars a day, or to do the job for one hundred and fifty dollars or one hundred and seventy-five dollars. He stated that he did not know what the repairs would cost after the boat was raised, as he was not a ship carpenter. Miller stated that he was a steamboat-man, and had been engaged in the business for thirty years; that he went up to see Captain Searles about pumping out the boat, but Captain Searles said it was in the hands of the assurance company. J. W. Johnson stated that he went up to examine the boat at the request of Captain Searles for the purpose of repairing, and made the examination, and all the boat needed was calking and a few planks to set her afloat again. This would have cost five hundred dollars or six hundred dollars. The examination was made in the latter part of November or first of December, 1903, after the boat had sunk. Captain Searles denies that he sent Johnson to examine the boat, but does not dispute the fact that Johnson did examine her.

This was all the material testimony, whereupon defendants asked for a peremptory instruction, which was granted by the court, and Searles appeals to this court, and assigns that "the court erred in granting the peremptory instruction for the defendant." ²⁷⁰ There were several other assignments of error; but, since the discussion of this one brings into review the whole case, we do not deem it necessary to set out the others in full.

The insurance policy expressly provides that there shall be no abandonment as for a constructive total loss, in consequence of any loss or damage, unless the cost of the necessary repairs required solely by the disaster, exclusive of cost of raising or rescuing the vessel and taking her to the dock and any other general average charges, be equivalent to seventy-five per cent of the agreed value as specified in the contract of insurance. There are many definitions as to what constitutes a constructive total loss, and, when a constructive total loss is claimed because of damage done the vessel by the perils insured against, the English and American authorities are not in accord as to the extent of the damage required before the insured is justified in abandoning the vessel, and claiming the amount insured for as being due him on account of a constructive total loss. But we have no concern with the conflict of decisions, since the insurance company by express stipulation in the contract of insurance has removed that question from the controversy by stipulating what amount of damage shall constitute a constructive total loss, since it is provided in clause 8 of the policy that "there shall be no abandonment as for a constructive total loss in consequence of any loss or damage, unless the cost of the necessary repairs required solely by the disaster (exclusive of the cost of raising or rescuing the vessel and taking her to the dock and any other general average charges) be equivalent to seventy-five per cent of the agreed value of the vessel as specified herein." Therefore, as the facts in this case show that the damage to the vessel was caused by a storm on the river, one of the perils insured against under the policy, we may define a constructive total loss, as applied to this case, to be such a loss as that the repairs made necessary thereby, exclusive of raising or rescuing the vessel and taking her to the dock, would be equivalent to seventy-five per cent of her value: 14 Encyclopedia of ²⁷¹ Law, 1st ed., 390, and authorities there cited; Vance on Insurance, 557.

It was incumbent on appellant to make this proof in the court below, and we think that he utterly failed to do so. The defendants were entitled to the peremptory instruction on appellant's own testimony. It is manifest that appellant's barge was damaged by the storm, and there is a partial loss clause in the policy of insurance, and it may be that he could have maintained his suit for the damage sustained under the partial loss clause, but no suit is sought to be maintained

on that ground; appellant declaring solely on the abandonment clause of the policy, claiming a constructive total loss. Appellant not only fails to make out a case, but the defendants show beyond dispute, putting the testimony most strongly for appellant, that to repair the damage caused solely by the disaster, the only damage that appellees had undertaken to insure against, would cost less than twenty-five per cent of three thousand dollars, the agreed value of the vessel. Under these conditions the appellant undertakes to abandon the property under clause 8 of the policy, in violation of the stipulation in said policy that he shall only have the right to do so when the damage done shall be equivalent to seventy-five per cent of the agreed value. The clause in the insurance policy which enables him to make an abandonment in a proper case, and determining the conditions under which the abandonment may be made, is just as much a part of the insurance policy as any other stipulation or condition contained in the policy.

Appellant undertakes to show his right to abandon the vessel as for a constructive total loss by showing that there were no facilities at Vicksburg for raising a vessel, and it was therefore impossible for him to do so, and that the nearest dock where the vessel could have been docked was New Orleans, some four hundred miles away by river, and makes this an element of damage, showing as to him the boat was worthless, and therefore he had the right, under his policy, to abandon and sue for a constructive total loss. According to the testimony in this case, when even ²⁷² this is conceded, the whole damage, including this, does not amount to seventy-five per cent of the agreed value. But the insurance company has not undertaken to guarantee facilities at Vicksburg for raising vessels, nor cost of carrying them to the dock. The policy was given by the insurers and accepted by the insured under such conditions and with such facilities as Vicksburg possessed. The policy states that it insures against the "unavoidable dangers of rivers," etc., not against lack of facility or expense in carrying a damaged vessel to the dock. The policy expressly stipulates against cost of raising or rescuing the vessel and taking her to dock. Therefore, in determining whether appellant had the right to abandon the vessel and sue for a constructive total loss, we consider only the cost of necessary repair, caused solely by the disaster, which in this case is shown to be much less than seventy-five per cent of the

agreed value. We do not say that appellant was compelled to make an effort to save the vessel before he could abandon and sue, but we do say that the conditions warranting him in abandoning it must have existed, and must have been proven by him to exist: *Soelberg v. Western Assur. Co.*, 119 Fed. 23, 55 C. C. A. 601.

Appellant complains because he says that the court below stated that it was the opinion of that court that a constructive total loss had to be proven, and that proof of a total loss would not prove a constructive total or partial loss, and in support of the contention cite *Mayo v. India Mut. Ins. Co.*, 152 Mass. 172, 23 Am. St. Rep. 814, 25 N. E. 80, 9 L. R. A. 831, *Heebner v. Eagle Ins. Co.*, 10 Gray, 131, 69 Am. Dec. 308, and *Orient Mut. Ins. Co. v. Adams*, 123 U. S. 67, 8 Sup. Ct. Rep. 68, 31 L. ed. 63. In view of the testimony in this case, which conclusively shows that, if appellant had any right to recover for a total loss, it could only have been for a constructive total loss, and the further fact that in his declaration he has declared for a constructive total loss, and all his testimony is addressed to this kind of a loss, we do not deem it necessary to pass on this action of the court; nor can we conceive how appellant could have been prejudiced in any way ²⁷³ by it in this case, even if the court was in error, which we do not say under the pleadings here. Under clause 5 of the insurance policy—what is known as the “sue and labor clause”—the insurance company merely contracted for the right to have the vessel recovered and repaired themselves, if they should believe that their interests demanded it at any time, without thereby defeating their right to any defense that they might have to any claim for damage interposed by the insured; but by this clause no obligation is imposed on them to do this. It is merely a provision in the insurance policy inserted for the purpose of protecting the insurer in case it should undertake to assist in the rescue of the vessel: *Soelberg v. Western Assur. Co.*, 119 Fed. 23, 55 C. C. A. 601.

It is further argued by counsel for appellant that the acceptance of the balance of the premium of ninety dollars, after the disaster to the vessel, estops the appellees from now asserting the defense that there was no loss under the policy, and in support of his contention he cites *Home Insurance Co. v. Dobbins*, 81 Miss. 623, 33 South. 504. The *Dobbins* case has no application to the facts in this case. In the *Dobbins* case there was an attempt to set up a forfeiture of the policy

of insurance, after a loss had occurred, claiming that there had been a breach of the conditions of the policy in that there had been an additional insurance placed on the property without the knowledge and consent of the insurance company and in violation of the terms of the policy of insurance. The insurance company attempted to claim the forfeiture, though it accepted the premium after the loss had occurred, and did not return or offer to return any part of the premium yet unearned. In that case the court held that they could not do it: *Home Insurance Co. v. Dobbins*, 81 Miss. 623, 33 South. 504. But that is not this case. The insurance company is not asserting any forfeiture of the policy, but their defense is that no such loss has occurred as that sued for by appellant. The acceptance of the balance of the premium after the loss occurred in no way affected their right to controvert this: See *Soelberg v. Western Assur. Co.*, 119 Fed. 23, 55 C. C. A. 601.

Let the case be affirmed.

Under a Policy Insuring a Ship against "total loss only," a recovery may be had for a constructive total loss: *Heebner v. Eagle Ins. Co.*, 10 Gray, 131, 69 Am. Dec. 308. And insurance "free of partial loss" covers a constructive total loss exceeding one-half the insured value, though the property arrives in port in specie without considerable diminution in quantity: *Mayo v. India Mut. Ins. Co.*, 152 Mass. 172, 23 Am. St. Rep. 814. A vessel is deemed to be a total loss if a prudent uninsured owner would not undertake to rebuild it: *Royal Ins. Co. v. McIntyre*, 90 Tex. 170, 59 Am. St. Rep. 797, and see the note thereto. As to what is a valid abandonment of a ship as for a total loss, see *Louisville Underwriters v. Pence*, 93 Ky. 96, 40 Am. St. Rep. 176.

KING v. VICKSBURG RAILWAY AND LIGHT COMPANY.

[88 Miss. 456, 42 South. 204.]

EMINENT DOMAIN—Damage to Property Taken for Public Use.—A constitutional provision forbidding the taking or damaging of private property for a public use except on due compensation being made to the owner, while primarily intended for formal condemnation proceedings, is equally protective of the owner of private property, when no condemnation is had and his property is taken or damaged by a public use. (p. 752.)

EMINENT DOMAIN—Public Use.—Due Compensation for private property taken or damaged by a public use is such as will make the owner whole pecuniarily for appropriating or injuring his property by any invasion of it cognizable by the senses, or by in-

terference with some right in relation to property whereby its market value is lessened by the direct result of the public use. (p. 752.)

NUISANCE—Smoke, Cinders, and Soot.—People residing in cities are entitled to enjoy their homes free from the damaging results of smoke, soot and cinders, if sufficient to depreciate the value of their property and render its occupancy uncomfortable. (pp. 752, 753.)

NUISANCE—Damages—Ownership.—If damage to private property, resulting from noise, smoke and cinders, was done by an electric plant before it was acquired by the owner against whom suit is brought, and there has been no continuing cause of damage maintaining a depreciation of value, such owner is not liable, but he is liable if the damage was done during a former ownership, and the cause of it is continuing and a restoration of value prevented. (p. 753.)

Hudson & Fox, for the appellant.

McWillie & Thompson and Smith, Hirsh & Landau, for the appellee.

485 CAMPBELL, S. J. The appellant is the owner of a piece of land in Vicksburg, on the north side of Pine street, on which are five dwelling-houses, one occupied by her and the others by tenants. The appellee owns and operates a plant on its land on the south side of that street for generating electrical power to furnish light for the city and its inhabitants and a street railway system, under a franchise granted by the city, with which it has a contract to furnish lights. Immediately south of the land of appellee are the tracks of the Alabama and Vicksburg Railway Company. The plant of the appellee consists of three engines and boilers and batteries, etc., and two smokestacks one hundred feet high. Its machinery is of the best kind, its employes skillful and careful, and its management above criticism. The appellant sued for depreciation in the value of her property, caused by noise, smoke, soot, cinders and vibration alleged to be caused by the plant of the appellee. She has a like suit against the Alabama and Vicksburg Railway Company. The evidence tends to show considerable depreciation in the value of the appellant's property, manifesting itself in reduced rents and inability to sell, except at a low price, because of the manner in which the property is affected by the causes complained of, arising from the plant of the appellee and the operations of the Alabama and Vicksburg Railway. The appellee denied that it damaged the property of the plaintiff, claimed that whatever depreciation of her property had occurred was before the appellee acquired its property, and that it is exempt

from liability for any damage, because it is operating under public authority conferring the right to do what it does. The court instructed the jury to find for the defendant, refusing all instructions asked by the plaintiff.

The evidence shows that the property of the plaintiff was damaged by physical invasion of deleterious agents produced by the plant of the defendant and the Alabama and Vicksburg Railway, ⁴⁸⁶ and it should have been left to the jury to say from which and to what extent. Considered as if between two private owners of the two properties, without reference to the public franchise, the right of the plaintiff to recover damages to the extent that it may be shown that they proceed from a physical invasion of her property by hurtful agents proceeding from the plant of the defendant is clear. No owner of property may set in motion agencies which physically invade the home of another without liability for the damage done. Surely no citation of authority for this proposition can be necessary. An elaborate discussion of the subject is contained in a note under the first case in volume 1 L. R. A. (new series). Public authority may confer the right to operate a public work, and thus make it lawful, but cannot confer a right to take or damage private property without compensating the owner for its value as taken or damaged—that is, diminished in its market value as property—by some physical invasion of it or by affecting some right of the owner in relation to it. Were an act passed by the legislature for the exercise of the right of eminent domain declaring that no liability should arise for noise, smoke, soot, cinders, vibration, and the like, whatever their hurtful effect on the property of others might be, it would be void, because the elements or factors of damage to property depend upon facts, and are to be ascertained by evidence in judicial proceedings.

Constitution of 1890, section 17, makes the right of the owner of private property superior to that of the public, reversing the former rule that the individual might be made to suffer loss for the public. He may still be compelled to part with his property for public use, but only on full payment for it or any right in relation to it. Before the constitution of 1890 it was held that a municipality might cut down a street to the injury of abutting owners, without any liability to them (*White v. Yazoo City*, 27 Miss. 357), and a river might be turned away from a plantation fronting on it without compensating the owner (*Homochitto River Commrs. v. Withers*, 29

Miss. 21, 64 Am. Dec. 126), and ⁴⁹⁷ damage could be done to the property from constructing a levee without any right of the owner to be indemnified: *Richardson v. Board of Levee Commrs.*, 68 Miss. 539, 9 South. 351. This was because of the rule that the right of the public was superior to that of the individual. The decisions of this court since the constitution of 1890 give full effect to the just rule established by its seventeenth section, by maintaining the right of the owner to be fully compensated for any loss of the value sustained from any physical injury to his property or disturbance of any right in relation to it, whereby its market value is diminished: *Alabama etc. Ry. Co. v. Bloom*, 71 Miss. 247, 15 South. 72; *City of Vicksburg v. Herman*, 72 Miss. 211, 16 South. 434; *Richardson v. Board of Levee Commrs.*, 77 Miss. 518, 26 South. 963; *Rainey v. Hinds County*, 78 Miss. 308, 28 South. 875; *City of Laurel v. Rowell*, 84 Miss. 435, 36 South. 543. Many decisions of the courts of other states, with constitutions like ours, are cited and discussed in *Lewis on Eminent Domain*, sections 230-236.

It is worthy of observation that the instruction prescribed to be given the jury in eminent domain proceedings is that "the defendant is entitled to due compensation, not only for the value of the property to be actually taken, . . . but also for damages, if any, which may result to him as a consequence of the taking": Code 1892, sec. 1690; Code 1906, sec. 1865. It is true that the language of section 17 of the constitution was intended for formal condemnation proceedings, wherein it provides for compensation to be first made in a manner to be prescribed by law; but it is equally protective of the owner of private property, when no condemnation is had and his property is taken or damaged by public use. Due compensation is what ought to be made—that is, what will make the owner whole pecuniarily for appropriating or injuring his property by any invasion of it cognizable by the senses, or by interference with some right in relation to property whereby its market value is lessened as the direct result of the public use.

⁴⁸⁸ We recognize as true that when people live in cities they, in the language of counsel, "surrender some of those privileges so dear to them when the air is rendered fragrant and healthful by the exhalations of the pine, musical with the gurgling currents of running water, and cooled by the unobstructed breezes from summer seas," but think they are entitled to enjoy their homes free from damaging results from

invasion by smoke, soot, cinders, etc., sufficient to depreciate their value as property, in addition to rendering their occupancy uncomfortable. This for the surrender of which counsel speaks. We are unwilling to give license to destroy or annoy those engaged in any public employment useful to society, and favor protecting them in all their rights; but it is equally important to enforce the mandate of the constitution and protect the owner of private property, which is the purpose of this decision.

If the damage to the plaintiff's property was not caused by the plant of the defendant since it acquired it, but before, and there has been no continuing cause of damage, whereby depreciation of value has been maintained, there is no liability on it; but if damage was done during former ownership, and the cause is continued, whereby restoration of value has been prevented, the fact of the former damage would not avail the defendant.

We decline to pass on the instructions asked by the plaintiff and refused, assuming that in another trial instructions framed in conformity to this opinion will be given. We would not be understood to intimate any opinion as to the effect of the evidence. We merely hold that it should have been submitted to the jury, with proper instructions by the court.

Reversed and remanded.

For Authorities upon the questions involved in the principal case, see the note to Smith v. St. Paul etc. Ry. Co., 109 Am. St. Rep. 904, on the meaning of the word "damaged" in the constitutional guaranty that private property shall not be taken or damaged for public use without just compensation.

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STURGES v. JACKSON.

[88 Miss. 508, 40 South. 547.]

EXEMPTIONS—Garnishment—Injunction.—A person whose wages are garnished to satisfy a judgment against him, and who desires to claim such wages as exempt, must contest the garnishment and claim his exemption in the court in which the garnishment proceedings are pending. Otherwise he waives his legal right to do so, and a court of equity is without jurisdiction to aid him by injunction restraining the issue of the garnishment. (pp. 754, 755.)

GARNISHMENT—Exemptions—Injunction.—A court of equity cannot restrain a creditor from the exercise of the right granted him by law to issue a writ of garnishment seeking to subject the exempt wages of his debtor to the payment of a just debt, and the fact that the corporation for whom the debtor works has promulgated a rule that its employes will be discharged if their wages are garnished, cannot aid such debtor. (p. 755.)

Bill in equity for an injunction restraining the issuance of a writ of garnishment. Sturges, the defendant, held a judgment against Jackson, the complainant, and after its rendition caused a writ of garnishment to issue, which was levied upon complainants' wages, although the latter notified the judgment creditor that such wages were exempt from garnishment.

J. D. McInnis, Jr., for the appellant.

T. G. Fewell, for the appellee.

⁵¹¹ **TRULY, J.** The demurrer to the bill of complaint should have been sustained. The bill states no ground authorizing the interposition of a court of chancery to restrain the defendant from the exercise ⁵¹² of his legal rights in his attempt to collect in the manner permitted by the statute an indebtedness admittedly due and owing to him by the complainant. Chapter 55 of the Code of 1892 permits every person holding a judgment or decree of any court to have a writ of garnishment issued against his debtor by complying with certain conditions set forth in the statute. It is true that, if the indebtedness or money in the hands of the garnishee be exempt, it is the duty of the garnishee to suggest such exemption. But it is likewise true that it is the duty of the defendant to appear and contest the claim of the plaintiff to the property or debt and assert his right of exemption, if he desires to claim it. The exemption of wages is a benefit of which

the debtor may, if he pleases, avail himself; but he can, if he desires, voluntarily waive his legal right, and will do so, by operation of law, by failure to contest the garnishment. The debtor is not without adequate remedy provided by law for his protection. If the property be exempt from garnishment and other legal process, the sheriff or other officer may demand a bond of indemnity before proceeding to execute the process. If this bond be furnished, it is for the benefit of the defendant, and he may sue and recover double damages for any loss he has sustained by the seizure or sale. If the officer fail to demand an indemnifying bond, then he and the sureties on his official bond are liable to the defendant in damages. A court of chancery cannot restrain a creditor from the exercise of any of the rights granted him by the law. If the issuance of a writ of garnishment, seeking to subject money exempted by the beneficence of the law to the payment of a debt, constituted a wrong or trespass, an injunction would properly lie to restrain the trespasser or prevent the wrong. But such is not the case under our law.

The fact that the corporation for whom appellee works has promulgated a rule that its employes would be discharged if their wages were garnished can certainly not be more potent than the plain mandate of the statute. Let us cherish the hope that the rule in question was intended to induce all employes promptly ⁵¹³ to pay their debts and to inculcate the advisability of prudently living within their income, and was not devised as a scheme to assist or encourage them to defraud their creditors. At any rate, we decline to hold that it operates so as to deprive a creditor of any rights granted by the law, or that the fear of its strict enforcement is such a threatened danger as authorized a court to interpose with the most gracious writ of injunction. If the contrary view was sound, a corporation might just as well enact a rule that no employe should have bills sent to him or accounts presented for payment under penalty of losing his position, thus depriving the creditor of all chance of enforcing the payment of just demands. In this case it must be noted, also, that no question arises as to the legality of the debt. The amount is admittedly just and due by the appellee to the appellant, and no reason is given in the bill of complaint why the same should not be paid.

Conceding the truth of every specific allegation in the bill of complaint, together with all inferences which can be logi-

cally deduced from the averments to strengthen the claim of the complaint, we do not think that a writ of injunction was properly issuable. There are several other interesting legal questions growing out of the practice attempted to be introduced by this proceeding into the jurisprudence of our state; but, as the above finally disposes of the matter, we deem it unnecessary to elaborate the other propositions.

The decree is reversed, cause remanded, and bill dismissed.

The Right to an Injunction to protect exemption rights is discussed in Parsons v. Hartman, 25 Or. 547, 42 Am. St. Rep. 803; Driggs Bank v. Norwood, 49 Ark. 136, 4 Am. St. Rep. 30; National Tube Co. v. Smith, 57 W. Va. 210, 110 Am. St. Rep. 771. Mandamus lies to compel a sheriff to release property exempt from attachment: State v. Gardner, 32 Wash. 550, 98 Am. St. Rep. 858.

INSURANCE COMPANY v. PITTS.

[88 Miss. 587, 41 South. 5.]

INSURANCE—Interest of Owner.—A vendee in possession of land under a conveyance in fee simple, although part of the purchase money, secured by vendor's lien, is unpaid, is the sole and unconditional owner, within the meaning of an insurance policy providing that it shall be void unless the insured shall be such owner of the property. (p. 757.)

INSURANCE, FIRE—Occupancy of Premises.—Under an insurance policy providing that it shall be void if the insured premises shall become vacant and remain unoccupied for ten days, the insurer is liable if the premises are occupied at the time they are burned, although they may have become vacant and remained unoccupied for ten days during the life of the policy. The insurance is revived by occupancy, though suspended during the vacancy. (p. 757.)

Williamson, Wells & Peyton, for the appellant.

Dudley & Boatner and Hanis & Powell, for the appellees.

590 CALHOON, J. The insurance company sought to defeat recovery of a fire loss because of two clauses in the policy, declaring that it should be void (1) "if the interest of the insured be other than unconditional and sole ownership": (2) if the building "be or become vacant or unoccupied, and so remain for ten days."

As to the first, the facts are that at the date of the policy Pitts was in possession under a conveyance of title in fee

simple. But the conveyance recites a cash payment of two hundred dollars and four deferred annual payments of two hundred dollars each. It does not expressly reserve a vendor's lien to secure the deferred payments, but our law gives that. It is to be noted in this record that there was no written application for the insurance, nor any representations made. The policy was issued pursuant to telephonic request to an agent, and so the reliance of the company is on the terms of the policy itself, with no pretense of any misrepresentations.. We have no ⁵⁹¹ trouble in taking alignment with those decisions holding that Mr. Pitts was sole and unconditional owner in the purview of the law, notwithstanding there was a debt for purchase price: *Union Ins. Co. v. Nalls*, 101 Va. 613, 99 Am. St. Rep. 923, 44 S. E. 896; *Milwaukee Ins. Co. v. Rhea*, 123 Fed. 9, 60 C. C. A. 103; *Ellis v. Insurance Co. (C. C.)*, 32 Fed. 646, 19 Cyc. 693; *Morotock Ins. Co. v. Roderfer*, 92 Va. 747, 53 Am. St. Rep. 846, 24 S. E. 393, and notes. Strict construction as against the insurer is the rule, and the clause relates to the legal character of the title. In *Liverpool & L. & G. Ins. Co. v. Cochran*, 77 Miss. 348, 26 South. 932, there was a written application for the insurance, and in it a deliberate misstatement that the applicants were the sole and unconditional owners, whereas, in fact, they owned only an undivided one-half interest. This case can have no influence on that at bar. The decision was clearly correct. In *Rosenstock v. Mississippi H. Ins. Co.*, 82 Miss. 674, 35 South. 309, *Rosenstock*, the insured, was the vendor of the property, not in his possession, but of which he had put his vendee in possession, to whom he was under written agreement to convey on payment of a purchase price of which he had actually received much more than one-half. He could not be regarded as unconditional owner. He was owner only on the express condition to convey. This decision does not affect the case before us, as its reasoning demonstrates.

On the second contention the facts are that, pending the policy, the premises were at one time vacant for more than ten days, but actual possession was resumed, and some time afterward, and while occupied, the fire occurred. If the loss had occurred during the prohibited vacancy, there could be no recovery. This is everywhere held, and so decided by our own court in *Insurance Co. v. Scales*, 71 Miss. 975, 15 South. 134. Authorities are not wanting to sustain the views of learned counsel for appellant, and they are sustained also.

by Mr. Ostrander on Fire Insurance, second edition, 1897, section 145, and the numerical weight of the decisions he cites in note 5. We prefer to stand on the manifest ⁵⁰² trend and weight of modern authority, *Born v. Home Ins. Co.*, 110 Iowa, 379, 81 N. W. 676, and on Freeman's note to that case in 80 Am. St. Rep. 310; Elliott on Insurance, sec. 205, and the other citations of the briefs for appellee. If the insurance had been for three years or more, and the premium paid, and the vacancy during the first month, and the fire afterward and during occupancy, it would be very unfair to deprive the insured of protection. The common people who insure should not be entrapped by a harsh construction of a technical word. The insurance is revived by occupancy, though suspended during the vacancy.

Affirmed.

A Vendee of Land in Possession, exercising acts of ownership under an executory contract of purchase, and holding the bond of the vendor to make title upon full payment of the purchase money, a portion of which remains unpaid, is the unconditional and sole owner of the land in fee, within the meaning of these words as used in contracts of fire insurance: *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 57 Am. St. Rep. 17; *Baker v. State Ins. Co.*, 31 Or. 41, 65 Am. St. Rep. 807; *Johannes v. Standard Fire Ins. Co.*, 70 Wis. 196, 5 Am. St. Rep. 159; *Insurance Co. v. Erickson*, 50 Fla. 419, 111 Am. St. Rep. 121.

A Policy of Fire Insurance, the conditions of which have been broken by the premises becoming vacant and unoccupied may be revived upon their subsequent reoccupancy: See the note to *Born v. Home Ins. Co.*, 80 Am. St. Rep. 310.

MCDONALD v. SANFORD.

[88 Miss. 633, 41 South. 369.]

HOMESTEADS—Encumbrances—Nonjoinder of Wife.—A deed or mortgage of a homestead without the wife joining is an absolute nullity. (p. 759.)

HOMESTEADS — Encumbrances — Foreclosure—Nonjoinder of Wife—Injunction.—A mortgage of a homestead executed by a husband alone and the foreclosure thereof by the mortgagee without making the wife a party to the suit, are nullities, and the husband and wife may enjoin the sale under the foreclosure by showing that the land was their homestead and occupied by them as such at the time of the execution of the mortgage. (p. 760.)

HOMESTEADS—Encumbrances—Nonjoinder of Wife.—No conveyance or mortgage of a homestead without the wife joining in the conveyance is anything less than utterly void, and a foreclosure of such mortgage without making her a party, if it shall result in a decree of sale, results in a decree which is void, for the reason that she was an essentially necessary party thereto. (p. 761.)

McDonald, one of the appellants, alone executed a mortgage on the homestead property of himself and his wife, and after its maturity the mortgagee filed a bill against such husband alone to foreclose such mortgage, alleging that the land at the date of the mortgage and note was not a homestead. A decree was rendered against McDonald alone, and a commissioner appointed to sell the land for the satisfaction of the indebtedness. McDonald and his wife then filed this suit to cancel the decree, charging that the land was a homestead at the time that the mortgage was given and the decree rendered.

McIntosh Brothers, for the appellants.

R. L. and E. L. Dent, for the appellee.

637 WHITFIELD, C. J. This was an original bill, not a bill for review, and, if its allegations are sustained, the grossest possible fraud on the part of appellee will be shown. There was no *res adjudicata* as to the rights of the wife in the homestead, growing out of the decree in the original suit, since she was not made a party to that suit. The authorities cited by learned counsel for appellee on this point have no application. The case of *Pounds v. Clarke*, 70 ⁶³⁸ Miss. 263, 14 South. 22, announces a wholly unsound proposition, and it is hereby overruled. Whatever name may be given to the wife's interest in the homestead, whether it be called an estate, or an interest, or a claim, or a right, or a veto power merely, it is such interest or right as the statute requires to be conveyed by a deed, and a deed to the homestead without the wife joining in the conveyance has been correctly held, in the case of *Gulf etc. R. R. Co. v. Singleterry*, 78 Miss. 772, 29 South. 754, to be an absolute nullity. And it was further held in that case that the husband himself was not concluded, as to his own interest, from bringing the action of trespass to recover damages from the railroad company for laying its right of way over the land to which the husband had executed a conveyance without the joinder of the wife, the land being homestead property. The same doctrine precisely was held in *Re-*

valk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 304. There Revalk had given a mortgage upon the homestead, which was not signed by the wife, and a bill to foreclose was filed against Revalk, without making the wife a party, and a decree was rendered against him alone, subjecting the property to sale. Afterward Revalk and his wife filed a bill for an injunction to restrain the sale, and the court said: "The wife was not a party to the suit, and could not in any way be affected thereby, nor could the rights of the husband as to the homestead be affected by the proceedings in that case. When the husband appears alone and defends the suit, his right to the homestead is no more concluded by the decision than by his separate execution of the deed or mortgage. The legal proceedings, to be conclusive against either, must embrace both."

In the case of *Larson v. Reynolds & Packard*, 13 Iowa, 579, 81 Am. Dec. 444, it is also expressly held that the wife is not estopped by a decree foreclosing a mortgage on a homestead executed by the husband alone, and that she cannot be ousted from possession by sale made under such a decree. And the ~~680~~ court said, on page 582 of 13 Iowa, 81 Am. Dec. 447: "The right of the wife to the homestead differs from that of dower, and the provisions of the statute as to its conveyance or encumbrance are also different. But the difference arises necessarily from the rights and privileges reserved to the wife during and after the life of the husband. Thus the husband may fail to select, plat, mark out, and record the homestead; and, if so, the privilege then devolves upon the wife. So the deed passes nothing, not even his interest, if she does not join. Upon his death she has the right to continue its occupation, and it cannot be taken from her by his will or devise. And if she does not survive the husband, her issue may upon a certain contingency take the whole homestead. From which premises it is reasonably clear that the wife's right or interest in the homestead is not merely an inchoate one, to become vested after his death, and which after assignment may be disposed of by a judicial sale for the debt of the husband; but that the occupation of it as a home gives her a right therein, without any further act on her part, or anyone for her, which cannot, without her consent, be divested. The homestead belongs, as it were, to the family. ^{It} is for the benefit of the family—parents and children. As to conveyance, the law contemplates that there shall be a

concurrence of both minds, of the two heads, so to speak, before the dwelling place of the family shall be encumbered, or the rights of either one be divested or affected. It is seen, therefore, that the will of the wife is in theory as supreme as that of the husband." And in the case of *Sargent v. Wilson*, 5 Cal. 504, it is held: "Where an action is brought to foreclose the mortgage upon property claimed as a homestead, the wife of the mortgagor is a necessary party to a full adjustment of the controversy, and should be allowed to intervene." And the case was reversed in order to permit her to intervene. This same doctrine is held in many other cases not necessary to cite.

The plain purpose of our statute on this subject was to protect ⁶⁴⁰ the wife in the shelter and refuge of a homestead, unless she has herself joined in conveying away the homestead, and by whatsoever name her right may be designated. It is perfectly manifest that no conveyance or mortgage of the homestead, without her joining in the conveyance, is anything less than utterly void. And a bill filed by a creditor of the husband to foreclose an encumbrance on the homestead executed by the husband alone, if it shall result in a decree for the sale, results in a decree that is void for the obvious reason that the wife was an essentially necessary party. The doctrine announced in the case, which we unhesitatingly overrule, operates an absolute nullification of our statute providing that a wife must join in a conveyance for the encumbrance of a homestead. The doctrine which we approve is laid down, also, in 15 American and English Encyclopedia of Law, 683 (last clause of the section). It will be seen by an examination of the notes that the overwhelming weight of authority is to that effect. Amongst the cases cited are *Cummings v. Busby*, 62 Miss. 195, and *McKenzie v. Shows*, 70 Miss. 388, 35 Am. St. Rep. 654, 12 South. 336. In the first-named case the court, speaking through Chief Justice Campbell, held the trust deed executed by the husband alone to secure his debt absolutely void. The creditor had advertised the property under the trust deed, and bought it in. Afterward Busby and wife brought an action of ejectment to recover the lands. The sole question in the case was whether the deed was void or voidable, and the court held that the deed of trust was void, and that the husband and wife could both join in an ejectment to recover the land. Here is a case holding that, whatever the interest of the wife is, it is such an

interest or right that she can maintain ejectment to recover it. In the case of *McKenzie v. Shows*, 70 Miss. 388, 35 Am. St. Rep. 654, 12 South. 336, the court expressly held that the conveyance of the homestead by the husband without the wife's joinder conveyed no estate whatever of any kind. The court said: "There is no estate in reversion expectant upon which the appellants can enter upon the proper sale of the homestead by the ⁶⁴¹ husband and wife jointly, for the reason that the attempted conveyance and encumbrance of the husband alone, in the sale by deed of the timber, was absolutely invalid to convey any right or title. Collins, the purchaser of the timber, acquired nothing by the invalid conveyance from the husband alone. We are not inclined to eat away a wise and most beneficent statute, designed for the welfare and support and comfort of wife and children, by ingrafting any exceptions upon it. The law must be upheld and enforced as written, and this we do by declaring Yawn's deed to the timber on the homestead an encumbrance upon the title and invalid for any purpose."

The decree is reversed, the demurrer overruled, and the cause remanded, with leave to answer within thirty days from the filing of the mandate in the court below.

In the Case of *Pounds v. Clark*, 70 Miss. 263, 14 South. 22, expressly overruled by the principal case, it appeared that a husband undertook to convey the homestead by deed of trust without the wife's joining therein, and the supreme court held that the "conveyance may be shown by the grantor to be invalid in any forum in which the question may arise. The attack may be made upon this invalid conveyance by the husband at law or in equity, and there is neither necessity nor propriety in making the wife a party to litigation concerning lands in which she has no estate or interest. If the husband elects to invoke the aid of a court of equity, rather than resort to a law court, the shadow of the wife's name as an unnecessary party to the proceeding will not absolve him from the operation of the rule which requires him to do equity before asking relief in equity. Though the conveyance is invalid, the appellant must be required to do equity by paying what the conveyance was designed to secure before he can have a court of conscience cancel the invalid interest."

The Effect of a Conveyance or Encumbrance of the Homestead by one spouse only is the subject of a note to Jerdee v. Furbush, 95 Am. St. Rep. 909. The general rule is, that a conveyance of a homestead by the owner without his wife's joinder is void: *Bolen v. Lilly*, 85 Miss. 344, 107 Am. St. Rep. 291.

SCOTTISH-AMERICAN MORTGAGE COMPANY v.
BUNCKLEY.

[88 Miss. 641, 41 South. 502.]

ESTOPPEL by Silence.—If a person, by the execution of a mortgage on land, secures a loan in the presence and with the knowledge of another, the mortgagee cannot successfully set up an estoppel against such other to claim the land from the fact of his mere silence, if he was ignorant of his rights at the time, or if his title to the land was duly recorded, or if the mortgagee did not rely upon his acts or conduct. (p. 764.)

COTENANCY—Limitations—Ouster.—A mortgage of the whole estate executed by one cotenant alone, possession not being taken under it, does not constitute an ouster nor start the statute of limitations to running against the other cotenants. (p. 766.)

COTENANCY—Conveyance—Rents.—If one cotenant conveys his interest in land to another cotenant without assigning the rents due at the time, and the grantee succeeds thereafter in a suit to remove a cloud from the title, he is not entitled to the rents which were due prior to the conveyance. (p. 766.)

PARTITION—Cross-bill.—Cotenants who file no cross-bill praying for partition are not entitled to partition of lands in a suit in equity not contemplating partition. (p. 767.)

JUDGMENTS—Res Judicata.—A decree in a suit that complainant is not the owner of certain land by virtue of certain deeds is not res judicata in a second suit by him against the same defendant, for the same land based on entirely different grounds, wholly independent of the two deeds involved in the former suit. (p. 769.)

JUDGMENTS—Res Judicata.—A judgment, to constitute res judicata, must not be open to argument or inference whether the same cause was decided in the former suit. There must be certainty that the very matter in dispute has been the subject of judicial determination. (p. 770.)

Bill in equity by one cotenant to set aside certain conveyances as clouds on the title to the property in dispute, to which the other cotenants and other adverse claimants were made defendants.

C. Perkins, for the appellant.

T. McKnight, for the appellee.

647 CAMPBELL, S. J. This case was before this court on demurrer to the bill, and was reported in 81 Miss. 599, 33 South. 416. The demurrer was held bad, because it was decided that Albert N. Bunckley, the complainant, was entitled to an interest in the land in his own right as a son of Nathan

Bunckley and also as grantee of his brother, W. R. Bunckley. The cause was remanded, and the bill was answered by the mortgage company and by some of the other defendants, and was heard on pleadings and evidence, and resulted in a decree for the complainant for the interest in the land sued for and rent for the use of it. The grounds set up for the defeat of the claim of complainants are *res adjudicata*, estoppel by conduct, and the statute of limitations of ten years.

⁶⁴⁸ The defense of *res adjudicata* consists of a decree in a case in which complainant exhibited a bill of chancery in which he propounded a claim of ownership of an interest in the land embraced in this suit by virtue of two conveyances set forth in his bill, which are altogether different from the claim he makes in this suit. It was held in that case on appeal to this court that he had no right by virtue of the claim made in that suit. The subject matter of the two suits is different, and the former decree is not a bar to the claim made in this. That case is reported in *Bunckley v. Jones*, 79 Miss. 1, 29 South. 1000, by reference to which the manifest difference between the two cases will be apparent.

The presentation relied on as estopping by conduct is, as to Albert N. Bunckley, that he was at the home of his father, Nathan Bunckley, when the agent of the mortgage company was there to inspect the land for a loan of money on it by the company, and was cognizant of the proposed loan, and was silent as to any claim of his own to the land; that a large body of some three thousand acres of land was conveyed in 1847 by Ransom Bunckley in remainder, after a life estate to his three sons, of whom Nathan was one; that soon a partition was made between the three grantees and a partition deed executed; that Nathan went into possession of the part allotted to him and soon acquired other interests in the large tract by purchase from co-owners, and from 1873 or before was in possession as sole owner of all the land in controversy, dealing with it as his own, having it assessed as his, paying the taxes, receiving the rents, selling timber—in short, exercising all such acts of individual ownership and control as pertains to complete and undisputed ownership, and that in order to get the loan from the mortgage company Nathan made affidavit that his father had long owned the land and his title had never been disputed, and that he had acquired it from his father by the conveyances in 1847, and had gone into possession ⁶⁴⁹ in the early '70's, and his title had never

been questioned, and he had, as he believed, a perfect title in fee simple; that an attorney at law employed by Nathan had made an abstract of the title, and given an opinion that it was perfect in Nathan, whereupon the sum of five thousand dollars was loaned and a deed of trust taken on the land, under which the mortgage company acquired title by a sale in accordance with the deed in 1893. Albert N. Bunckley, the complainant, lived with his father, Nathan, on the land, and cultivated a part of it, and was on the land with his father when it was sold under the deed of trust, and was dispossessed with his father by a proceeding of unlawful detainer, after the sale.

The question is, Is he estopped by his silence? The truth is, he did not know that he had any interest in the land. As stated by counsel for the mortgage company, "it was not considered in the family at that time, nor until after 1893, that the children of Nathan had any interest whatever in the property in controversy." His ignorance of his rights precludes the claim of estoppel by his mere silence: 11 Am. & Eng. Ency. of Law, 433, 434b, and cases cited; Pomeroy's Equity Jurisprudence, sec. 805; *Houston v. Witherspoon*, 68 Miss. 190, 8 South. 515; *Hignite v. Hignite*, 65 Miss. 447, 7 Am. St. Rep. 673, 4 South. 345; 7 Ballard on Real Property, p. 40. Apart from this, it is by no means certain that he knew of the loan being effected, and if he did, he was under no legal obligation to assert his claim, to interfere with the success of his father's application for a loan. His title, in fact, had not then accrued, so far as he derived from his brother, W. R. Bunckley, and his claim arising from the conveyances of Ransom Bunckley in 1847 was of record and constructively as much known to the mortgage company as to him.

The claim of estoppel as to the interest in the land acquired by complainant by conveyance of W. R. Bunckley is based on the fact that on January 5, 1891, W. R. Bunckley opened a written correspondence with the agent of the mortgage company in ⁶⁵⁰behalf of his father about the deed of trust and its payment, and wrote several letters in which he spoke of the land as his father's, and about paying the debt of his father, and made no claim of his own to any interest in it, and as the mortgage company afterward sold the land, and purchased it, W. R. Bunckley was estopped to assert any claim to it, and, he being estopped, complainant, his grantee, is. But W. R. Bunckley was ignorant of his right to the land,

and did nothing by which the mortgage company was misled to its prejudice. It thought it had a lien on the fee simple and a perfect claim on the land by virtue of its deed of trust, relied on that, and could not have been misled by any act of W. R. Bunckley, on which it did not rely. He was not estopped, and his grantee took his title free from estoppel.

The statute of limitations is not a bar, for the reason that, although they did not know it, as before stated, Nathan Bunckley, who thought he was sole owner, was a cotenant with the complainant and W. R. Bunckley, and his possession was, in view of the law, that of all the co-owners, and the statute of limitations could not be set in motion until an ouster or its equivalent, and there was none. "A conveyance alone, without possession taken under it, can never amount to an ouster. The same remark is applicable to a mortgage of the whole": Freeman on Cotenancy, sec. 226; Warvelle on Ejectment, sec. 450 et seq.; Wood on Limitations, p. 621. The intimate relationship between the cotenants here is an important circumstance: Warvelle on Ejectment, sec. 456. In such case much stronger evidence is required to start the running of limitations than among strangers: Wood on Limitations, p. 621.

The complainant is entitled to recover the land, as held by the decree of the chancellor, but is not entitled to rent of the interest acquired in 1898 from W. R. Bunckley prior to that date.

The mortgage company sought to amend its answer, so as to set up the six-year statute as a bar to the claim for rent and to have stricken out of the bill an amendment allowed long before, ⁶⁵¹ and was refused, we think properly, because, while amendments are to be liberally allowed, there is a limit to liberality, and it was reached in this case.

On cross-appeal complainant insists that partition should have been decreed, and part of the defendants insist that partition should have been decreed. It was not asked by complainant in his bill, nor did the defendants exhibit a cross-bill. "Ask, and ye shall receive," is still the law to which we are subject, and no complaint against the decree on this ground can be maintained.

The decree will be opened, so far as to correct it by reducing it by the amount of the part of the rent accruing prior to the conveyance by W. R. Bunckley to complainant, and with this change the decree will stand.

The costs of the appeal will be taxed on complainant; the other costs on the defendants below.

OPINION ON FIRST SUGGESTION OF ERROR.

CAMPBELL, S. J., delivered the opinion of the court in response to the suggestion of error made by Theodore McKnight, for appellees.

In disposing of this case on a former day, we gave full consideration to the claim of the cross-appellants that the court should declare their rights as to the land and decree partition; and, as they were defendants and had not exhibited a cross-bill, we held they were not entitled to any relief. We are "strenuously" urged by counsel to re-examine this question, and have done so, and have examined every citation of counsel, and not found one which, according to our apprehension, calls for a change of our view as heretofore announced. Our own cases certainly sustain this view. In *Millsaps v. Pfeiffer*, 44 Miss. 805, it is said: "It is the settled doctrine that a defendant cannot pray anything in his answer, except to be dismissed, with his costs. If he has any relief to pray, . . . he must do so by a bill of his own, which is called a cross-bill." In *Weeks v. Thrasher*, ⁶⁵² 52 Miss. 142, it is said: "It is impossible for us to understand how a decree could be made in this case for the sale by the administrator of the lot. . . . The answer of the administrator could ask no relief, and the court could grant none." To the same effect are *Bay v. Shrader*, 50 Miss. 326; *Edwards v. Hillier*, 70 Miss. 803, 13 South. 692; *Preston v. Banks*, 71 Miss. 601, 14 South. 258.

It is true that a court of chancery will shape its decrees to effect justice between parties, without regard to their attitude as complainants or defendants, but with due regard to the rules above announced. There are cases in which relief will be given to the complainant on terms, as illustrated by *Harrison v. Harrison*, 56 Miss. 174, and *Ragsdale v. Alabama G. S. R. Co.*, 67 Miss. 106, 6 South. 630, and there are cases where relief may be granted between defendants, as declared in *Arnold v. Miller*, 26 Miss. 152; but they are exceptional and stand on peculiar grounds, and in our opinion this case does not come within the exception. We found one case which may be claimed as a precedent for the action asked of us in this. In a suit by a vendor of land to reform

the bond for title on the ground of mistake and to enjoin an action by the vendee for breach of the condition, the decree reformed the bond and dissolved the injunction, leaving the vendee to his remedy on the bond.

On his appeal the decree was reversed, because the chancellor had not declared the rights of the vendee as to the course he might pursue in dealing with the case: *Reese v. Kirk*, 29 Ala. 406. The right and future course of the vendee were not involved in that suit and were not the subject of discussion by counsel, and announcement by the court on that subject was uncalled for. "Sufficient unto the day is the evil thereof" is a good maxim for courts as for individuals. We are not willing to follow such precedent. Whatever may be true as to the right of a court to pursue such a course, its refusal to do so is not ground for ⁶⁵³ reversal of a decree which gives all proper relief as properly asked and stops at that.

We adhere to our former announcement on this subject.

OPINION ON THE SECOND SUGGESTION OF ERROR.

CAMPBELL, S. J., delivered the opinion of the court in response to the suggestion of error filed on behalf of the Scottish-American Mortgage Company and its vendees, by Calvin Perkins, Carruthers Ewing and Green & Green, counsel.

The complaint is that the court erred in not sustaining the defense of *res judicata*, and as to the statute of limitations of ten years as to the land and of six years as to rents. The doctrine of *res judicata* is probably as well settled and understood as any in the whole range of jurisprudence. Its application is illustrated by many cases in our own reports and by vast multitudes elsewhere, so numerous as to discourage any effort to cite them. The learning is familiar to every lawyer. "*Nemo bis vexari debet pro una et eadem causa*" is the maxim on which it rests. "*Una et eadem causa*" is the test by which to determine the question of *res judicata*. The parties may be the same, and the property about which the controversy is may be the same, in the two suits; but what is involved in the second may be entirely different from that involved in the former, and, if so, *res judicata* does not apply. The distinction is clearly made in *Barataria Canning Co. v. Ott*, 88 Miss. 771, 41 South. 378, and may be found in many other cases, while *Thornton v. Natchez* (decided at

the same time), 88 Miss. 1, 41 South. 498, presents a case where the vital matter involved had been decided in a former suit, and it was rightly held to be *res judicata*. Judgment on the same cause of action is always conclusive between parties and privies, but it must be the same cause—"una et eadem causa." It is probable that there is really no difference of opinion between the court and the learned counsel in this case as to the law applicable, but that the difference is as to the case, and we address ourselves to that.

⁶⁵⁴ The former suit, the decree in which is invoked as *res judicata*, was brought by the complainant to cancel clouds and obtain partition of an interest he claimed in the land now in suit by virtue of two deeds, one made in 1873 and one in 1890. In deraigning his title he set forth and made exhibits of the deeds of 1847, not claiming any right in himself by virtue of those deeds, but presenting them as the source of the title of the grantors in the two deeds to him, by virtue of which alone he made any claim. These two deeds were held to be ineffectual to vest any title in him, and this court held that there was nothing else in the case calling for decision, and refused to consider anything else: *Bunckley v. Jones*, 79 Miss. 1, 29 South. 1000. Undoubtedly the matter decided was put at rest forever, and it was that complainant has no valid claim to the land by virtue of the two deeds of which he propounded his claim. The present suit is for an interest in the same land based on entirely different grounds wholly independent of the two deeds in the former suit. All that was put in issue in the former suit was the claim of complainant to an interest in the land by virtue of two deeds, made, respectively, in 1875 and 1890. Nothing else was litigated or decided, and, therefore, nothing else was settled by that suit. It was needless for counsel to cite decisions holding that a decree for partition is conclusive as to the interest of parties. That is too plain for dispute. There was no decree for partition in the former suit. What would have been the effect of such a decree we are not called on to decide. Had one been made it is reasonably certain that the present case would never have arisen to vex counsel and court. Perhaps a decree for partition in the former suit would have precluded all further claim by complainant, not on the doctrine of *res judicata*, but on a totally different one, the doctrine of election; but as to that we do not de-

cide. One of the rules as to *res judicata* is that it must not be open to argument or inference whether the same cause was decided. It must not be doubtful or uncertain. There must be certainty that the ^{ess} very matter in dispute has been the subject of judicial determination. Here we have indisputable evidence in the opinion of this court as to what was involved in the former suit.

On the statute of limitations of ten years, the argument of Messrs. Perkins & Ewing proceeds on a misapprehension of our opinion on that subject. It was not necessary to argue or quote books to convince us that ignorance of one's rights does not prevent the running of the statute of limitations. We have not held or intimated that it did.

We do not perceive any merit in the "new" suggestion of counsel, consisting of a quotation from the bill in the former suit spoken of. That is an averment that certain parties, including complainant, were tenants in common of the land. We held that they were such, and therefore the statute of limitations did not run as between them upon the facts of the case. We think it still necessary to set up the bar of the statute of limitations, unaffected by the statute, which makes the completion of the bar an extinguishment of the debt as well as the remedy.

In conclusion, we disclaim any purpose to overrule or modify any former decision of this court on any of the questions involved; but we adhere to our former views in this case.

The Adverse Possession of One Tenant in Common and the creation of a prescriptive title thereby are discussed at length in the note to *Joyce v. Dyer*, 109 Am. St. Rep. 609.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

FLINT v. CHALOUPKA.

[72 Neb. 34, 99 N. W. 825.]

LIEN OF JUDGMENT—Equitable Interests.—A judgment of the district court is not a lien upon an equitable interest in the real estate of the debtor. (p. 772.)

CREDITOR'S SUIT—Attaching of Lien.—The beginning of a creditor's suit gives a specific lien upon the property sought to be reached which continues until the final determination of the cause. The issuance of execution on the judgment is unnecessary in order to keep the judgment alive so far as the specific property is concerned. (p. 773.)

COURTS.—The Opinions of the Commissioners of the supreme court of Nebraska designated as "unofficial" are of no value as authority or precedent, within the meaning of the doctrine of stare decisis. The court has not necessarily approved all the propositions of law advanced either as indicated in the syllabi or in the opinions themselves. (p. 776.)

J. H. Grimm & Son and A. R. Scott, for the appellant.

A. S. Sands, for the appellee.

35 LETTON, C. This was a creditor's bill brought by the appellant against the appellees in the district court for Saline county. After the note upon which the suit is based was placed in judgment, an execution was issued and returned unsatisfied, whereupon this action was begun. While this action was pending five years expired without the issuance of another execution, and the appellees contend that the judgment upon which it is based became dormant. The principal question discussed at the oral argument and in the briefs is whether or not this action can proceed when the judgment upon which it is based has become dormant. The appellees maintain that the lien of a judgment cannot be enforced in

equity after the right to enforce the judgment at law has ceased to exist; that there is a clear distinction between a creditor's suit in aid of execution and a creditor's suit to reach property rights and interests that never were subject to and never could be taken into execution; that, in the latter case, a lien upon the interest sought to be reached is acquired only by the bringing of the equity suit, while in the former case the judgment is a lien upon the property which the judgment debtor has fraudulently conveyed, and the creditor's suit is brought to remove an obstruction from the title, in order that the property may be levied upon and sold advantageously upon execution; that the judgment ³⁶ is a lien upon the property fraudulently conveyed so long as the title remains in the fraudulent grantee; that any lien the appellant ever had upon the property in controversy was the lien of the judgment, and that this creditor's action creates no lien on the property, and that, consequently, when the judgment became dormant it ceased to be a lien thereon, and could no longer be enforced either by execution or by a creditor's bill. We have given the argument of the appellees at this length so that their contention may be clearly seen.

Is a judgment a lien in this state upon the equitable interest of the debtor in real estate?

In *Rosenfield v. Chada*, 12 Neb. 25, 10 N. W. 465, where an action in equity was brought to subject the equitable interest of a purchaser in possession of real estate to the payment of a judgment, it was held that an equitable interest in land, coupled with actual possession, may be reached by a seizure and sale under an ordinary execution.

The next case in which this general subject was considered is *Nessler v. Neher*, 18 Neb. 649, 26 N. W. 471. In this case it was first held (23 N. W. 345) that the lien of a judgment will extend to all the legal or equitable interests of the defendant in lands within the county, of which such defendant is in actual possession; but upon rehearing it was held that "a judgment in the district court is not a lien upon an equitable interest in the real estate of the debtor." This was followed in *Dworak v. More*, 25 Neb. 735, 41 N. W. 777; *Shoemaker v. Harvey*, 43 Neb. 75, 61 N. W. 109; *First Nat. Bank v. Tighe*, 49 Neb. 299, 68 N. W. 490; *Omaha Coal, Coke & Lime Co. v. Suess*, 54 Neb. 379, 74 N. W. 620; *Woolworth v. Parker*, 57 Neb. 417, 77 N. W. 1090; and may be considered as the settled doctrine of this court.

In *Westervelt v. Hagge*, 61 Neb. 647, 85 N. W. 852, 54 L. R. A. 333, *Foley v. Doyle*, 1 Neb. (Unof.) 643, 95 N. W. 1067, *First Nat. Bank v. Gibson*, 60 Neb. 767, 84 N. W. 259, and *State Bank v. Belk*, 68 Neb. 517, 94 N. W. 617, there are certain expressions used in the opinions which might be taken to imply that a judgment is a lien upon land which has been conveyed to a third person with the intent to defraud creditors, and that it is the lien of the judgment which ³⁷ is enforced by the bringing of the creditor's suit. But upon a careful examination of the points that were actually decided in these cases, it will be found that, while the language of the opinions may imply that a judgment is such a lien, in no case were the former decisions overruled, and the action taken by the court in each of these cases was not inconsistent with the prior holdings.

It is not so much what a court says in the decision of a case as that which it actually does that should be considered in applying the principles of the case as a precedent. Courts often use language in an opinion responsive to an argument of counsel of which the reader of the opinion is not cognizant and thus general statements may be given undue weight: *Williams v. Miles*, 68 Neb. 463, 110 Am. St. Rep. 400, 94 N. W. 136, 96 N. W. 157.

While it is said in *First Nat. Bank v. Gibson*, 60 Neb. 767, 84 N. W. 259, "The judgment was a lien on the land, and the plaintiff had the undoubted right to make his lien effective," still this, like the language used in *State Bank v. Belk*, 68 Neb. 517, 94 N. W. 617, and *Foley v. Doyle*, 1 Neb. (Unof.) 643, 95 N. W. 1067, which approve of the doctrine of *Fusze v. Stern*, 17 Ill. App. 429, means, as is said in that case, that the judgment is an equitable lien and that the recovery of a judgment which would in the absence of a fraudulent conveyance be a legal lien, is all that is necessary to prove in order to have the right to maintain the action.

We have considered at this length our former decisions, since it would appear from the position taken by appellees that a misapprehension of our meaning has occurred.

The beginning of a creditor's action gives a specific lien upon the property which it is sought to reach. The judgment is not a legal lien, but the creditor's action is in the nature of an equitable execution and when begun creates a specific lien. This lien continues while the cause is pending and until final determination. Since it is of the nature of an execution,

it tolls the statute of dormancy so far as the particular property sought to be reached is concerned, and hence the issuance of a general execution upon the judgment during the pendency of the creditor's ³⁸ action is not necessary to keep the judgment alive so far as the specific property equitably levied upon by this suit is concerned: *First Nat. Bank v. Gibson*, 60 Neb. 767, 84 N. W. 259; *Coulson v. Galtzman*, 1 Neb. (Unof.) 502, 96 N. W. 349; *Cincinnati v. Hafer*, 49 Ohio St. 60, 30 N. E. 197.

We are cognizant of the fact that this doctrine is at variance with the position taken by the supreme court of Minnesota in *Newell v. Dart*, 28 Minn. 248, 9 N. W. 732, and later cases, and also with the holdings of the courts of North Dakota and South Dakota, but the provisions of the statutes of these states upon which the rule is based by their courts are not the same as those of our statute. The holding in these cases is that at the end of ten years the judgment is void of vital force. In this state we have taken a different view as to dormant judgments; our statutes are not so broad and emphatic as to the inability to enforce a judgment after the time limited expires. We have held that a sale of real estate upon execution issued upon a dormant judgment could not be attacked collaterally after confirmation: *Gillespie v. Switzer*, 43 Neb. 772, 62 N. W. 228; *Link v. Connell*, 48 Neb. 574, 67 N. W. 475. A writ issued upon a dormant judgment is not void, but voidable. Unless the bar of the statute is raised by motion or pleading it is waived. For these reasons we conclude that the decisions mentioned are not applicable in this state, and we decline to follow them.

At the trial appellant proved the rendition of the judgment, the issuance of an execution upon the same, and its return wholly unsatisfied; that the conveyances alleged to be fraudulent were executed in 1896 and 1897. It was also proved that the promissory note upon which the judgment was rendered was in the hands of an attorney for collection in July, 1896, before any of the conveyances were made. By the pleadings the close family relationship of the parties to the conveyances were admitted, which was such as to throw the burden of proof as to good faith upon them under the familiar rule of this state. After this proof was offered and received, defendants ³⁹ demurred to the evidence, which demurrer was sustained by the district court. The record itself does not

show the ground upon which the demurrer was sustained by the court, but it is stated in appellant's briefs, and not denied by appellees, that it was upon the ground that the judgment which it sought to enforce by the creditors' suit had become dormant, and that thereby the right to maintain the action had abated.

Among the issues raised by the answers were the bankruptcy of the principal defendants, and the filing of appellant's judgment as to an unsecured claim against the bankrupt estate. Since no evidence was offered or received in the district court upon these issues, and the case was decided there upon other grounds, it is unnecessary for the questions presented by the pleadings, in relation to the effect of bankruptcy and the filing of appellant's claim, to be considered here. The demurrer to the evidence should have been overruled.

We therefore recommend that the judgment be reversed and the cause remanded to the district court for further proceedings.

Ames and Oldham, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded to the district court for further proceedings.

HOLCOMB, C. J. I do not think the prior decisions of the court afford any tenable ground for the contention that a judgment in a law action becomes a lien on the purely equitable interest of the judgment debtor in real estate, or that such interest can be reached by an execution on such judgment. I do not see the wisdom or necessity of explaining or distinguishing as to such opinions in rendering a decision on ⁴⁰ the questions arising in the case at bar. Certainly, in the case of *Westervelt v. Hagge*, 61 Neb. 647, 85 N. W. 852, 54 L. R. A. 333—a case involving the right of enforcing an attachment lien—the principle is distinctly recognized that a purely equitable interest in real estate can be reached only by invoking the aid of a court of equity. In *First Nat. Bank v. Gibson*, 60 Neb. 767, 84 N. W. 259, and *State Bank v. Belk*, 68 Neb. 517, 94 N. W. 617, the things decided were in respect of the time when, and the essential prerequisites upon which, a creditor's bill might be maintained. In neither was the

question of the lien of a judgment on an equitable interest in real estate considered or decided. As to *Foley v. Doyle*, 1 Neb. (Unof.) 643, 95 N. W. 1067, this is an opinion of a class formulated by the supreme court commissioners which has been designated as "unofficial." Such opinions are of no value as authority or precedent. Whatever value they possess must be found in their intrinsic merits as being cogent in reasoning and sound in principle. The doctrine of stare decisis has no application to opinions of this character. The court is not necessarily bound by anything said therein, nor to the propositions of law enunciated on which the conclusions are predicated. It approves only the conclusions. It is not required of the court that such opinions be cited with approval, if deemed sound in all respects, nor that an effort should be made to explain, distinguish, criticise or disapprove them when not followed in subsequent decisions in other cases brought here for its determination. The court has not necessarily approved all the propositions of law advanced as indicated either in the syllabi or in the opinions themselves. They rest on an altogether different footing from the opinions published in the official reports.

ESTATES AND INTERESTS TO WHICH JUDGMENT LIENS ATTACH.

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I. Nature of Property or Estate of Debtor.

a. Real as Distinguished from Apparent Interest.—A judgment is not a specific lien upon any particular property of the judgment debtor, but is a general lien upon all his real estate. It attaches to his actual, not his apparent, interest therein. A judgment creditor can acquire no better right to the estate of the debtor than the debtor himself has when the judgment is recovered. He takes it subject to every liability under which the debtor held it, and subject to all the equities which existed in favor of third persons. A court of equity will limit the lien of the judgment to the actual interest which the debtor has in the estate. A judgment creditor is not a bona fide purchaser, for he parts with nothing to acquire his lien. His rights cannot exceed those of a purchaser from the debtor with full notice of all existing legal and equitable rights of third persons: See the note to *Filley v. Duncan*, 93 Am. Dec. 346; *Doswell v. Adler*, 28 Ark. 82; *Owens v. Atlanta Trust etc. Co.*, 122 Ga. 521, 50 S. E. 379; *Yarnell v. Brown*, 170 Ill. 362, 62 Am. St. Rep. 380, 48 N. E. 909; *Clark v. Glos*, 180 Ill. 556, 72 Am. St. Rep. 223, 54 N. E. 631; *Heberd v. Wines*, 105 Ind. 237, 4 N. E. 457; *Leonard v. Broughton*, 120 Ind. 536, 16 Am. St. Rep. 347, 22 N. E. 731; *Holden v. Garrett*, 23 Kan. 98; *Burke v. Johnson*, 37 Kan. 337, 1 Am. St. Rep. 252, 15 Pac. 204; *Logan v. Herbert*, 30 La. Ann. 727; *Glen v. Morris-Glyndon*, 100 Md. 479, 60 Atl. 608; *Roberts v. Robinson*, 49 Neb. 717, 59 Am. St. Rep. 567, 68 N. W. 1035; *Bruce v. Nicholson*, 109 N. C. 202, 26 Am. St. Rep. 562, 13 S. E. 790; *Dimmick v. Rosenfeld*, 34 Or. 101, 55 Pac. 100; *Coldiron v. Asheville Shoe Co.*, 93 Va. 364, 25 S. E. 238; *Snyder v. Martin*, 17 W. Va. 276, 41 Am. Rep. 670; *Smith v. Gott*, 51 W. Va. 141, 41 S. E. 175; *Woodhurst v. Cramer*, 29 Wash. 40, 69 Pac. 501; *Baker v. Morton*, 12 Wall. 150, 20 L. ed. 262.

In some of the states the foregoing rule is qualified by the registration statutes: *Blankenship v. Douglas*, 26 Tex. 225, 82 Am. Dec. 608. Thus in Minnesota the registry laws place a docketed judgment upon the same footing as a recorded conveyance, and give it precedence over an unrecorded deed of which the judgment creditor has no other notice, and also of an equity on the part of a grantee to have his deed reformed so as to include the real estate in question: *Wilcox v. Leominster Nat. Bank*, 43 Minn. 541, 19 Am. St. Rep.

259, 45 N. W. 1136. However, if the title to land appears of record in the name of a judgment debtor who in fact never had any interest therein, the whole equitable title being vested in a third person by reason of a resulting trust, the registry law placing judgment creditors, as against unrecorded conveyances, on the same basis as bona fide purchasers, has no application, and the judgment is not a lien on the land: *School District v. Peterson*, 74 Minn. 122, 73 Am. St. Rep. 337, 76 N. W. 1126.

b. Personal Property.—The lien of a judgment does not attach to personal property, but a lien arises as against such property only by virtue of an execution: *Baldwin v. Johnston*, 8 Ark. 260; *Simpson v. Smith Sons Gin etc. Co.*, 75 Miss. 505, 22 South. 805; *Dunham v. Cox*, 10 N. J. Eq. 437, 64 Am. Dec. 460; *McNamara v. New York etc. R. R. Co.*, 56 N. J. L. 56, 28 Atl. 313; *Lanning v. Carpenter*, 48 N. Y. 408; *Stahlman v. Watson* (Tenn. Ch.), 39 S. W. 1055. And where the statutes, in a general sense, make a judgment bind all the property, both real and personal, of the person against whom it is rendered, the lien thereof, in the special sense which prevents the alienation of the property of the debtor after its rendition, attaches only to such property as is susceptible of seizure and sale under execution based upon the judgment. It does not attach to a chose in action: *Fidelity and Deposit Co. v. Exchange Bank*, 100 Ga. 619, 28 S. E. 393; *Armour Packing Co. v. Wynn*, 119 Ga. 683, 46 S. E. 865.

c. Property Partaking of the Nature of Personality.—The lien of a judgment has been held not to attach to growing crops: *Gaston v. Marengo Imp. Co.*, 139 Ala. 465, 36 South. 738; *Planters' Bank v. Walker*, 11 Miss. (3 Smedes & M.) 409; nor to the rents and profits of real estate: *Fifield v. Gorton*, 15 Ill. App. 458; *Boggs v. Douglass*, 105 Iowa, 344, 75 N. W. 185; note to *Filley v. Duncan*, 93 Am. Dec. 352; nor to timber cut after the rendition of the judgment: *Lanning v. Carpenter*, 48 N. Y. 408; nor to a parol license to mine: *Blindert v. Kreiser*, 81 Wis. 174, 51 N. W. 324; nor to a judgment: *Gray v. McCallister*, 50 Iowa, 497. An unpatented mining claim is real property to which the lien of a judgment will attach: *Bradford v. Morrison* (Ariz.), 86 Pac. 6; *Butte Hardware Co. v. Frank*, 25 Mont. 344, 65 Pac. 1. Contra, *Phoenix Min. etc. Co. v. Scott*, 20 Wash. 48, 54 Pac. 777. And permanent improvements erected on real estate, partaking of the character of realty, are subject to judgment liens: *Lessert v. Sierbeling*, 59 Neb. 309, 80 N. W. 900; note to *Filley v. Duncan*, 93 Am. Dec. 348. A mortgage on land is personal property, and a judgment against the mortgagee does not create a lien upon the mortgaged realty: *Scott v. Mehrtter*, 49 Iowa, 487; *Butman v. James*, 34 Minn. 547, 27 N. W. 66.

d. **Leasehold Estates.**—The common-law theory that leasehold interests, or estates for years, are merely chattel interests to which the lien of a judgment will not attach, prevails in some states: *Summer-ville v. Stockton Milling Co.*, 142 Cal. 529, 76 Pac. 243; *Vredenberg v. Morris*, 1 Johns. Cas. 223; *Merry v. Hallet*, 2 Cow. 497; *Bismark Bldg. etc. Assn. v. Bolster*, 92 Pa. 123. In a majority of the states, however, judgment liens attach to leaseholds: *Ives v. Beecher*, 75 Conn. 564, 54 Atl. 207; *Sweezy v. Jones*, 65 Iowa, 272, 21 N. W. 603; *Hayden v. Goppinger*, 67 Iowa, 106, 24 N. W. 743; *Northern Bank v. Roosa*, 13 Ohio, 334; *Steers v. Daniel*, 2 Flipp. 310, 4 Fed. 587. In New York the lien of a judgment does not attach to a leasehold, unless the lessee or his assignee is possessed of at least five years of the unexpired term: *Taylor v. Wynne*, 55 Hun, 610, 8 N. Y. Supp. 759; 57 Hun, 590, 10 N. Y. Supp. 644. And in Ohio, a leasehold in the lands and water power situated on the canals and rivers owned and leased by the state are not subject to the liens of judgments: *Buckingham's Exrs. v. Reeve*, 19 Ohio, 399. After a leasehold has been sold on foreclosure, no lien can attach to such estate by reason of the subsequent rendition of a judgment against the lessee: *Commerce Vault Co. v. Barrett*, 222 Ill. 169, 113 Am. St. Rep. 382, 78 N. E. 47.

e. **Life Estates—Curtesy and Dower.**—The lien of a judgment will attach to a life estate: *Verdin v. Slocum*, 71 N. Y. 345; *Bridge v. Ward*, 35 Wis. 687. But if the estate is upon a condition subsequent, a breach thereof divests the lien: *Moore v. Pitts*, 53 N. Y. 85; and if it is subject to a power of sale, the lien is defeated by the exercise of such power: *Leggett v. Doremus*, 25 N. J. Eq. 122.

It seems doubtful whether a husband's estate by the curtesy initiate is subject to the lien of a judgment against him; but if it is, execution thereon is postponed until the death of the wife: *Anderson v. Tydings*, 8 Md. 427, 63 Am. Dec. 708; *Lancaster County Bank v. Stauffer*, 10 Pa. 398; *Bankers' Loan etc. Co. v. Blair*, 99 Va. 606, 86 Am. St. Rep. 914, 39 S. E. 231.

A judgment rendered against a man prior to his marriage creates a lien paramount to the right of his wife to dower; but a judgment lien attaching to his property after marriage is subordinate to her dower right: See the note to *Filley v. Duncan*, 93 Am. Dec. 357.

f. **An Estate in Remainder or Reversion**, if vested, is subject to the lien of a judgment (*Real Estate Bank v. Watson*, 13 Ark. 74; *Bockover v. Ayres*, 22 N. J. Eq. 13; *Sayles v. Best*, 140 N. Y. 368, 35 N. E. 636; *Lawrence v. Belger*, 31 Ohio St. 175; *Burton v. Smith*, 13 Pet. 464, 10 L. ed. 248; *In re L'Hommedieu*, 138 Fed. 606), or to sale under execution: *Williams v. Amory*, 14 Mass. 20; *Brown v. Gate*, 5 N. H. 416; *Rickey v. Hillman*, 7 N. J. L. 180; *Woodgate v. Fleet*, 44 N. Y. 1. In some states a contingent remainder is not

liable to sale under execution: *Jackson v. Middleton*, 52 Barb. 9; *Watson v. Dodd*, 68 N. C. 528; *Allston v. State Bank*, 2 Hill Eq. 235. According to the better rule, however, a judgment recovered against a debtor when he is a contingent remainderman binds his interest in the estate when it thereafter vests in him upon the happening of the contingency: *Wilson v. Langhorne*, 102 Va. 631, 47 S. E. 871.

g. Property Held by Tenants in Common.—A judgment recovered against a tenant in common attaches to his interest in the common property. If the property is afterward partitioned by a division in kind, the lien follows and binds the portion allotted to him: *Polhemus v. Empson*, 27 N. J. Eq. 190; *Bavington v. Clarke*, 2 Penr. & W. 115, 21 Am. Dec. 432; *Cumming's Appeal*, 25 Pa. 268, 64 Am. Dec. 695. If the partition is by sale and division of the proceeds, the lien is preserved against his share of the fund: *Eldridge v. Post*, 20 Fla. 579. See, further, the note to *Filley v. Duncan*, 93 Am. Dec. 355.

h. Property Owned by Partnership or Its Members.—A judgment against a partner individually is a lien on his interest in the real estate of the firm, but perhaps it will be postponed to the prior equities of partnership creditors: *Coster's Exrs. v. Bank of Georgia*, 24 Ala. 37; *Page v. Thomas*, 43 Ohio St. 38, 54 Am. Rep. 788, 1 N. E. 79; *Meily v. Wood*, 71 Pa. 488, 10 Am. Rep. 719; *Holt's Appeal*, 98 Pa. 257; *How v. Kane*, 2 Penn. 531, 54 Am. Dec. 152. In Georgia, all the property of a judgment debtor is bound alike by the judgment, although some of it is held by him as a member of a partnership which itself needs all its property for the payment of its own debts: *Dennis v. Green*, 20 Ga. 386; *Green v. Ross*, 24 Ga. 613. In California a judgment recovered in an action on a note executed by partners jointly, but as individuals, the proceeds of which are not used for partnership purposes, is not a lien upon the firm assets, as against a subsequent judgment recovered on a partnership debt: *Whelan v. Shain*, 115 Cal. 326, 47 Pac. 57.

A judgment rendered against a partnership for a partnership debt is a lien on the firm real estate: *In re Coddling*, 9 Fed. 849. It is also a lien on the individual real estate of each of the partners (*Cumming's Appeal*, 25 Pa. 268, 64 Am. Dec. 695; *Reid v. House*, 21 Tenn. (2 Humph.) 576; *Pitts v. Spotts*, 86 Va. 71, 9 S. E. 501), although there is a holding to the contrary in *Stadler v. Allen*, 44 Iowa, 198.

II. Equitable Estates and Interests.

a. In General.—At the common law, and under the law as it now exists in many of the American commonwealths, a judgment does not become a lien upon an equitable title or interest in real estate: *Powell v. Knox*, 16 Ala. 364; *People v. Irwin*, 14 Cal. 423 (approved in *Riley v. Nance*, 97 Cal. 203, 31 Pac. 1126, 32 Pac. 315); *Harvey v. West*, 27 Ga. 553, 13 S. E. 693; *Terrell v. Prestal*, 68 Ind.

86; Truesdell v. Lehman, 47 N. J. Eq. 218, 20 Atl. 391; Siple v. Wass, 49 N. J. Eq. 463, 24 Atl. 233; Wood v. Robinson, 22 N. Y. 564; New York Dry Dock Co. v. Stillman, 30 N. Y. 174; Dixon v. Dixon, 81 N. C. 323; Jackman v. Hallock, 1 Ohio, 318, 13 Am. Dec. 627; Baird v. Kirtland, 8 Ohio, 21; Bloomfield v. Humason, 11 Or. 229, 4 Pac. 332; Miner v. Lane, 87 Wis. 348, 57 N. W. 1105; Blackburn v. Lake Shore Traffic Co., 90 Wis. 362, 63 N. W. 289; Morsell v. Washington First Nat. Bank, 91 U. S. 357, 23 L. ed. 436; Brandies v. Cochrane, 112 U. S. 344, 5 Sup. Ct. Rep. 194, 28 L. ed. 760; Withnell v. Courtland W. Co., 25 Fed. 372. This is the doctrine affirmed by the Nebraska court in the principal case, and in Omaha Coal etc. Co. v. Suess, 54 Neb. 379, 74 N. W. 620.

In not a few jurisdictions, however, the lien of a judgment attaches to the equitable as well as the legal estate of the judgment debtor: Baldwin v. Thompson, 15 Iowa, 504; Lathrop v. Brown, 23 Iowa, 40; Kirkwood v. Koester, 11 Kan. 471; McMechen v. Marman, 21 Md. (8 Gill & J.) 57; Robinson v. Miller, 158 Pa. 177, 27 Atl. 887; In re Fair Hope North Savage Fire-Brick Co., 183 Pa. 96, 38 Atl. 519; Weaver v. Smith, 102 Tenn. 47, 50 S. W. 771. This has been held true in Illinois, notwithstanding the fact that the instrument under which the equity arises is not recorded: Niantic Bank v. Dennis, 37 Ill. 381; Barlow v. Cooper, 109 Ill. App. 375. But in Iowa a judgment is not a lien upon an equitable interest in land in such a sense as to charge or affect a subsequent bona fide purchaser without notice: Hultz v. Zollars, 39 Iowa, 589.

Courts of equity have always regarded equitable estates and interests as subject to the liens of judgments, and have enforced them accordingly: Whitney v. Kimball, 4 Ind. 546, 58 Am. Dec. 638; Lee v. Stone, 18 Md. (5 Gill & J.) 1, 23 Am. Dec. 589; Roach v. Bennett, 24 Miss. 98; Chapron v. Cassody, 22 Tenn. (3 Humph.) 661; Haleys v. Williams, 1 Leigh, 140, 19 Am. Dec. 743; Michaux's Admr. v. Brown, 10 Gratt. 612; Freedman's Sav. etc. Co. v. Earle, 110 U. S. 710, 4 Sup. Ct. Rep. 226, 28 L. ed. 301.

b. **The Equity of Redemption** which remains in the owner of real estate after he has executed a mortgage or deed of trust thereon to secure a debt is subject to the lien of judgment thereafter recovered against him: Pahlman v. Shumway, 24 Ill. 127; Julian v. Beal, 26 Ind. 220, 89 Am. Dec. 460; Martin v. Berry, 159 Ind. 566, 64 N. E. 912; McKeithan v. Walker, 66 N. C. 95; Trimble v. Hunter, 104 N. C. 129, 10 S. E. 291; Kaston v. Storey, 47 Or. 150, 114 Am. St. Rep. 912, 80 Pac. 217; Hale v. Horne, 21 Gratt. 112. Some courts hold that a judgment at law is not a lien on land conveyed to trustees with a power of sale to secure an indebtedness of the grantor: Morsell v. First Nat. Bank, 91 U. S. 357, 23 L. ed. 436; yet they permit the judgment creditor to file a bill in equity to take an account of the debt secured and to have the land sold subject

thereto and the proceeds applied to the satisfaction of the judgment: *Freedman's Sav. etc. Co. v. Earle*, 110 U. S. 710, 4 Sup. Ct. Rep. 226, 28 L. ed. 301.

The rule that the lien of a judgment attaches to an equity of redemption has been applied where the right to redeem was from an equitable mortgage: *Kinports v. Boynton*, 120 Pa. 306, 6 Am. St. Rep. 706, 14 Atl. 135; from a deed absolute intended as a mortgage: *Macauley v. Smith*, 132 N. Y. 524, 30 N. E. 997 (contra *Gibson v. Hough*, 60 Ga. 588; *Phinizy v. Clark*, 62 Ga. 623; *Omaha Coal etc. Co. v. Suess*, 54 Neb. 379, 74 N. W. 620); from a sale for taxes: *McNeill v. Carter*, 57 Ark. 579, 22 S. W. 94; and from an execution sale under a prior judgment: *Curtis v. Millard*, 14 Iowa, 123, 81 Am. Dec. 460. It has been decided that a judgment against the owner of an equity of redemption docketed after the decree but before the sale has a lien on the surplus proceeds, but not if the docketing is after the sale: *Sweet v. Jacocks*, 6 Paige, 355, 31 Am. Dec. 252. And when land is sold under a trust deed, the lien of a judgment ceases as against the land and attaches to the money in the hands of the trustee after the secured debt is paid: *Cook v. Dillon*, 9 Iowa, 407, 74 Am. Dec. 354.

III. Trust Estates and Bare Legal Title.

a. **Naked Legal Title.**—It is generally conceded that the lien of a judgment does not attach to land to which the judgment debtor has only a naked legal title, unaccompanied by any beneficial interest, the equitable and beneficial title being in another. A judgment lien attaches only to the interest which the debtor has in real estate, and if he has no actual interest, though possessing the legal title, then no lien attaches: *Dodd v. Bond*, 88 Ga. 355, 14 S. E. 581; *Hays v. Reger*, 102 Ind. 524, 1 N. E. 386; *Moore v. Thomas*, 137 Ind. 218, 36 N. E. 712; *Thomas v. Kennedy*, 24 Iowa, 397, 95 Am. Dec. 740; *Bucknell v. Deering*, 99 Iowa, 548, 68 N. W. 825; *Harrison v. Andrews*, 18 Kan. 535; *Peters v. Toby*, 10 La. Ann. 408; *Fleming v. Wilson*, 92 Minn. 303, 100 N. W. 4; *Rosina v. Trowbridge*, 20 Nev. 105, 17 Pac. 751; *Denzler v. O'Keefe*, 34 N. J. Eq. 361; *Lounsbury v. Purdy*, 11 Barb. 490; *Dalrymple v. Security Imp. Co.*, 11 N. Dak. 65, 88 N. W. 1033; *Wright v. Franklin Bank*, 59 Ohio St. 80, 51 N. E. 876; *Baird v. Williams*, 4 Okla. 173, 44 Pac. 217; *Michael v. Knapp*, 4 Tex. Civ. App. 464, 23 S. W. 280; *Davenport v. Stephens*, 95 Wis. 456, 70 N. W. 661; *Withnell v. Courtland Wagon Co.*, 25 Fed. 372.

b. **Title of One Acting as Mere Conduit for Conveyance.**—When land passes through a judgment debtor as a mere conduit or medium of transmission, he having no interest and only a transitory or instantaneous seisin, the lien of the judgment does not attach to the land: *Aicardi v. Craig*, 42 Ala. 311; *Atkinson v. Hancock*, 67 Iowa, 452, 25 N. W. 701; *O'Donnell v. Kerr*, 50 How. Pr. 334; *Tallman v.*

Farley, 1 Barb. 280; *Gordon v. Cox*, 110 Tenn. 306, 100 Am. St. Rep. 812, 75 S. W. 925; *Main v. Bosworth*, 77 Wis. 660, 46 N. W. 1043. Thus a creditor of the person selected as a medium through whom a conveyance is made by a husband to his wife acquires no right, title, or interest in the land by virtue of a judgment existing against such medium, and it is immaterial that the conveyance is made pursuant to a purpose on the part of the husband to defraud his creditors: *Sokolowski v. Ward*, 98 Minn. 177, 107 N. W. 961. And land purchased through an agent who, without the principal's knowledge or consent, takes the title in his own name, and then conveys to her, is not thereafter subject to execution on a prior judgment against the agent, he never having any interest in the property: *Dimmick v. Rosenfeld*, 34 Or. 101, 55 Pac. 100.

c. Title in Case of Resulting Trust.—In case of a resulting trust where one person pays the purchase money for land, but the title is taken in the name of another, the entire beneficial interest in the property belongs to him who pays the money, and there is no interest in the other party to whom the lien of a judgment attaches: *Carter v. Challen*, 83 Ala. 135, 3 South. 313; *Wade v. Sewell*, 56 Fed. 129.

d. Title in Case of Active Trust.—Where a testator conveys land by will to a trustee and imposes active duties upon him, such as the care and management of the property and the paying of the income to certain persons, the will creates an active trust, and the legal title to the property vests in the trustee, and judgment creditors can obtain no lien, as against any of the remaindermen, so long as the legal title remains in him. If the language of the will is such that the trustee at the time of the termination of the trust is given the power of sale and disposition of the property, and is to divide the proceeds among designated persons, such disposition may be made, notwithstanding the fact that there are judgment creditors who have claims against the persons named in the will as remaindermen. This is for the reason that the remaindermen have no vested legal title as the legal title is in the trustee, with power to sell: *Moll v. Gardner*, 214 Ill. 248, 73 N. E. 442.

IV. Property Transferred, Assigned or Conveyed.

a. Property Purchased at Judicial Sale.—One who has purchased property at a judicial sale has, after the time for redemption has expired and he has become entitled to a deed, an interest in the property which is subject to a judgment lien: *Pogue v. Simon*, 47 Or. 6, 114 Am. St. Rep. 903, 81 Pac. 566. It would seem, too, that a judgment rendered against him after the sale, but before its confirmation, is a lien upon the land subject to the future confirmation of the court: *Slater's Appeal*, 28 Pa. 169; *Holms' Appeal*, 108 Pa. 23. If the sale is voidable, as where an executor purchases at his own sale, the interest acquired by him is subject to the lien of a judgment: *Thornton*

v. Willis, 65 Ga. 184. But a purchaser who makes no compliance whatever with the terms of sale has no estate which will be bound by a judgment rendered against him: *Jacob's Appeal*, 23 Pa. 477.

b. *After-acquired Property*.—While a few authorities take a contrary view (*Roads v. Symmes*, 1 Ohio, 281, 13 Am. Dec. 621; *Stiles v. Murphy*, 4 Ohio, 92; *Water's Appeal*, 35 Pa. 523, 78 Am. Dec. 354), the great majority of the courts hold that a judgment is a lien on lands acquired after its rendition: *Real Estate Bank v. Watson*, 13 Ark. 74; *Harrison v. Roberts*, 6 Fla. 711; *Wales v. Bogue*, 31 Ill. 464; *Breed v. Gorham*, 108 Ill. 81; *Ware v. Delahaye*, 95 Iowa, 667, 64 N. W. 640; *Babcock v. Jones*, 15 Kan. 296; *Hayden v. Stewart*, 1 Md. Ch. 459; *Jenkins v. Gowen*, 37 Miss. 444; *Duell v. Potter*, 51 Neb. 241, 70 N. W. 932; *Lessert v. Sieberling*, 59 Neb. 309, 80 N. W. 900; *Greenway v. Cannon*, 22 Tenn. (3 Humph.) 177, 39 Am. Dec. 161; *Barron v. Thompson*, 54 Tex. 235; *McClung v. Beirne*, 10 Leigh, 394, 34 Am. Dec. 739; *Taylor's Admr. v. Spindle*, 2 Gratt. 44; *Coad v. Cowhick*, 9 Wyo. 316, 87 Am. St. Rep. 953, 63 Pac. 584.

The lien of the judgment attaches to the land the instant the title vests in the judgment debtor, but does not relate to the date of the judgment. Therefore, there is no priority between the liens of different judgments rendered at different times prior to the acquisition of the property by the debtor, but all attach at the same time and stand on the same footing, without reference to the time when they were docketed: *Michaels v. Boyd*, 1 Ind. 259; *Campbell v. Martin*, 87 Ind. 577; *Kisterson v. Tate*, 94 Iowa, 665, 58 Am. St. Rep. 419, 63 N. W. 350; *Ware v. Delahaya*, 95 Iowa, 667, 64 N. W. 640; *Cayce v. Stovall*, 50 Miss. 396; *Smith v. Gage*, 41 Barb. 60; *Estate of Hazard*, 78 Hun, 22, 25 N. Y. Supp. 928; *Moore v. Jordan*, 117 N. C. 86, 53 Am. St. Rep. 576, 23 S. E. 259, 42 L. R. A. 209; *Ex parte Trenholm*, 19 S. C. 126; *Chapron v. Cassaday*, 22 Tenn. (3 Humph.) 661; *Relfe v. McComb*, 39 Tenn. (2 Head) 558, 75 Am. Dec. 748; *Barth v. Makeever*, 4 Biss. 206, Fed. Cas. No. 1069. In Oregon, however, judgments rank upon after-acquired property in the order of their dates of docketing: *Creighton v. Leeds*, 9 Or. 215.

c. *Property Previously Transferred.*

1. *In General*.—A judgment rendered against a debtor after he has made an assignment for the benefit of creditors (*McFerran v. Davis*, 70 Ga. 661), or after his property has been sold at a sheriff's sale (*Paddock v. Staley*, 13 Colo. App. 363, 58 Pac. 363; *Robinson v. Robinson*, 3 Harr. (Del.) 391), does not become a lien on the property. And obviously the general rule must be that a judgment against a debtor after he has made a bona fide sale and conveyance of real estate does not attach thereto: *Norton v. Williams*, 9 Iowa, 528; *Mercur v. State Line etc. R. R. Co.*, 171 Pa. 12, 32 Atl. 1126; *Hurt v. Reeves*, 6 Tenn. (5 Hayw.) 50; *Bowman v. Hicks*, 80 Va. 806. However, a judgment rendered subsequently to the execution of a deed

by the judgment debtor, but before its delivery, has priority over the deed: *Cravens v. Rossiter*, 116 Mo. 338, 38 Am. St. Rep. 606, 22 S. W. 736.

2. **In Case of Insane Grantor.**—A judgment against an insane debtor, rendered after he has made a transfer of his real property, will not be a specific lien on such property until after the conveyance is avoided. And if the debtor dies before the avoidance of the conveyance, the judgment creditor cannot by execution levy obtain a lien on the property which equity will protect: *French Lumbering Co. v. Theriault*, 107 Wis. 627, 81 Am. St. Rep. 856, 83 N. W. 927, 51 L. R. A. 910.

d. Property Sold Under Executory Contract.

1. **Interest of Vendor.**—A judgment against a vendor of land who retains the legal title under an executory contract of sale attaches as a lien to the land, and, as against the vendee in possession with actual notice, may be enforced to the extent of the unpaid purchase money: *Ware v. Jackson*, 19 Ga. 452; *Bell v. McDuffie*, 71 Ga. 264; *Gaar v. Lockridge*, 9 Ind. 92; *Courtney v. Parker*, 21 Neb. 582, 33 N. W. 262; *Olander v. Tighe*, 43 Neb. 344, 61 N. W. 633; *Wehn v. Fall*, 55 Neb. 547, 70 Am. St. Rep. 397, 76 N. W. 13; *Falls City Nat. Bank v. Edgar*, 65 Neb. 340, 91 N. W. 404; *Lefferson v. Dallas*, 20 Ohio St. 68; *McMullen v. Wenner*, 16 Serg. & R. 18, 16 Am. Dec. 543; *Kinports v. Boynton*, 120 Pa. 306, 6 Am. St. Rep. 706, 14 Atl. 135. The lien is subject, however, to the equitable rights of the vendee: *Kraner v. Chambers*, 92 Iowa, 681, 61 N. W. 373; *Hampson v. Edelen*, 2 Har. & J. 64, 3 Am. Dec. 530; *Welles v. Baldwin*, 28 Minn. 408, 10 N. W. 427; *Coolbaugh v. Roemer*, 30 Minn. 424, 15 N. W. 869; *Berryhill v. Potter*, 42 Minn. 279, 44 N. W. 251. And the mere docketing of the judgment against the vendor is not notice of the lien to the vendee in possession. Hence, payments subsequently made by him to the vendor pursuant to the terms of the contract of sale, without actual notice of the judgment, are valid as against the lien on the land: *Wehn v. Fall*, 55 Neb. 547, 70 Am. St. Rep. 397, 76 N. W. 13; *Moyer v. Hinman*, 13 N. Y. 180. In any case a judgment against the vendor is enforceable against the land only to the extent of the unpaid purchase money. If the purchase money has been paid, and the sale consummated except for the execution of a deed, the lien of a judgment then rendered against the vendor does not attach to the land, for he has no beneficial interest therein, but merely a bare legal title: *Elwell v. Hitchcock*, 41 Kan. 130, 21 Pac. 109; *Fleming v. Wilson*, 92 Minn. 303, 100 N. W. 4; *Dalrymple v. Security Imp. Co.*, 11 N. Dak. 65, 88 N. W. 1033; *Minns v. Morse*, 15 Ohio, 568, 45 Am. Dec. 590; *Hurt v. Prillaman*, 79 Va. 257; *Snyder v. Martin*, 17 W. Va. 276, 41 Am. Rep. 670; *Pack v. Hansbarger*, 17 W. Va. 313; *Snyder v. Botkin*, 37 W. Va. 355, 16 S. E. 591; *Goodell v. Blumer*, 41 Wis. 436.

2. Interest of Vendee.—In those jurisdictions where judgment liens do not attach to equitable estates, the interest of a vendee under an executory contract for the purchase of land is not subject to the lien of a judgment recovered against him: *Sweeney v. Pratt*, 70 Conn. 374, 66 Am. St. Rep. 101, 39 Atl. 182; *Evans v. Feeny*, 81 Ind. 532; *Merchants' Nat. Bank v. Eustis*, 8 Tex. Civ. App. 350, 28 S. W. 227. In *Nelson v. Turner*, 97 Va. 54, 33 S. E. 390, it is held that the judgment creditor of a vendee has no lien where the contract is set aside because of the misrepresentations of the vendor or the default of the vendee in making payments; and in *Raffensberger v. Cullison*, 28 Pa. 426, it is held that a vendee who has paid no part of the purchase money, and who has, with the vendor's consent, canceled the articles of agreement, has no estate which is bound by a judgment against him.

In many of the states the interest of a vendee in possession of land under an executory contract of purchase is such an interest as is subject to the lien of a judgment rendered against him: *Stewart v. Berry*, 84 Ga. 177, 10 S. E. 601; *Rand v. Garner*, 75 Iowa, 311, 39 N. W. 515; *Coombs v. Jordan*, 3 Bland, 284, 22 Am. Dec. 236; *Adams v. Harris*, 47 Miss. 144; *Davis v. Vass*, 47 W. Va. 811, 35 S. E. 826.

c. Property Fraudulently Conveyed.—Proceeding on the theory that a conveyance of land made in fraud of the creditors of the grantor is valid as between the parties and merely voidable as to the creditors, many courts have concluded that the lien of a judgment rendered against him subsequently to the conveyance does not attach to the land, since no title, legal or equitable, remains in him: *Doster v. Manistee Nat. Bank*, 67 Ark. 325, 77 Am. St. Rep. 116, 55 S. W. 137, 48 L. R. A. 334; *Davidson v. Burke*, 143 Ill. 139, 36 Am. St. Rep. 367, 32 N. E. 514; *Union Nat. Bank v. Lane*, 177 Ill. 171, 69 Am. St. Rep. 216, 52 N. E. 361; *Howland v. Knox*, 59 Iowa, 46, 12 N. W. 777; *Sawtelle v. Weymouth*, 14 Wash. 21, 43 Pac. 1101; *Preston-Parton Milling Co. v. Dexter Horton Co.*, 22 Wash. 236, 79 Am. St. Rep. 928, 60 Pac. 412; *French Lumbering Co. v. Theriault*, 107 Wis. 627, 81 Am. St. Rep. 856, 83 N. W. 927, 51 L. R. A. 910; *In re Estes*, 5 Fed. 60; *United States v. Eisenbeis*, 88 Fed. 4. Said Justice Deady in *Re Estes*, 3 Fed. 134, 6 Saw. 459: "In my opinion, the lien of a judgment which is limited by law to the property of or belonging to the judgment debtor at the time of the docketing is not nor cannot, without doing violence to the language, be held to extend to property previously conveyed by the debtor to another by deed valid and binding between the parties. A conveyance in fraud of creditors, although declared by the statute to be void as to them, is nevertheless valid as between the parties and their representatives, and passes all of the estate of the grantor to the grantee; and a bona fide purchaser from such grantee takes such estate, even as against the creditors of the fraudulent grantor, purged of the anterior fraud

that affected the title. Such a conveyance is not, as has sometimes been supposed, 'utterly void,' but it is only so in a qualified sense. Practically it is only voidable, and that at the instance of creditors proceeding in the mode prescribed by law, and even then not as against a bona fide purchaser. The operation of the lien of a judgment, being limited by statute to the property then belonging to the judgment creditor, is not a mode prescribed by which a creditor may attack a conveyance fraudulent as to himself, or assert any right as such against the grantor therein. This lien is constructive in its character, and is not the result of a levy or any other act directed against the specific property. It is creature of the statute, and cannot have effect beyond it': Approved in *Luhrs v. Hancock*, 181 U. S. 567, 21 Sup. Ct. Rep. 726, 45 L. ed. 1005.

Some courts, however, hold that the real estate of a debtor which has been conveyed by him in fraud of creditors still remains, as to them, his property, and that a judgment thereafter rendered in their favor against him becomes a lien on the property transferred: *First Nat. Bank v. Maxwell*, 123 Cal. 360, 69 Am. St. Rep. 64, 55 Pac. 980; *Hillyer v. Le Roy*, 179 N. Y. 369, 103 Am. St. Rep. 919, 72 N. E. 237; *In re Lowe*, 19 Fed. 589; note to *Filley v. Duncan*, 98 Am. Dec. 350. It has been affirmed that a judgment recovered subsequently to a fraudulent conveyance, and based upon an indebtedness contracted partly prior and partly subsequent thereto, is a lien upon the property of the judgment creditor to the extent only of the indebtedness contracted prior to the conveyance: *Cole v. Brown*, 114 Mich. 396, 68 Am. St. Rep. 491, 72 N. W. 247; *Henderson v. Henderson*, 133 Pa. 399, 19 Am. St. Rep. 650, 19 Atl. 424. It has also been decided that the liens of judgments attach in the order of their rendition to land that has been transferred, or the title to which has been taken in the name of another, for the purpose of defrauding creditors, and take precedence of attachments subsequently levied: *Slattery v. Jones*, 96 Mo. 216, 9 Am. St. Rep. 344, 8 S. W. 554.

V. Location of Property as Affecting Lien.

a. *Of Judgment of State Court.*—The lien of a judgment of a state court attaches to all of the property of the debtor situated within the territorial jurisdiction of the court rendering the judgment, but not to property without such jurisdiction unless a transcript of the judgment is filed in the county where the property is situated: *Sapp v. Wightman*, 103 Ill. 150; *Hollahan v. Sowers*, 111 Ill. App. 283; *Baker v. Chandler*, 51 Ind. 85; *State Bank v. Carson*, 4 Neb. 498; *Lowdermilk v. Corpening*, 92 N. C. 333; *Kilbreth v. Diss*, 24 Ohio St. 379; *McCullough's Appeal*, 34 Pa. 248; *Kerngood v. Davis*, 21 S. C. 183; *Bostwick v. Benedict*, 4 S. Dak. 414, 57 N. W. 78; *Goodell v. Blumer*, 41 Wis. 436. However, the rule is announced in some of the early decisions, and perhaps is still in force in some jurisdictions,

that the lien of a judgment extends to all lands of the debtor within the state: *Campbell v. Spence*, 4 Ala. 543, 39 Am. Dec. 301; *Commercial Bank v. Helderburn*, 7 Miss. (6 How.) 536. This has been held true of the judgments of the supreme court of a state: *Durham v. Heaton*, 28 Ill. 264, 81 Am. Dec. 275; *Ralston v. Bell*, 2 Dall. 158, 1 L. ed. 330. The statutes of many states now require, however, that a judgment of the supreme court must first be docketed in the county where the land is situated before it becomes a lien thereon: *Clark v. Dakin*, 2 Barb. Ch. 36; *Alsop v. Moseley*, 104 N. C. 60, 10 S. E. 124.

The judgment of a court of one state certainly does not become a lien on lands situated in another state: *Billan v. Hercklebrath*, 23 Ind. 71.

b. *Of Judgment of Federal Court.*—The lien of a judgment of a federal court has, by analogy to state laws, been held to be coextensive with the territorial jurisdiction of the court, and to attach to the real estate of the debtor situated in any county within such jurisdiction, without the filing of a transcript in such county: *Trapnall v. Richardson*, 13 Ark. 543, 58 Am. Dec. 338; *United States v. Duncan*, 12 Ill. 523; *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593, 64 Am. St. Rep. 137, 50 N. E. 1089; *Manhattan Co. v. Evertson*, 6 Paige, 457; *Branch v. Lowery*, 31 Tex. 96; *Shrew v. Jones*, 2 McLean, 78, Fed. Cas. No. 12,818; *United States v. Duncan*, 4 McLean, 607, Fed. Cas. No. 15,003; *United States v. Scott*, 3 Woods, 334, Fed. Cas. No. 16,242; *Massingill v. Downs*, 7 How. 766, 12 L. ed. 903.

The hardships which resulted from this all-pervading character of the lien of a judgment of a federal court (for persons dealing with realty were likely to search no further than the county records for judgment liens) induced Congress to enact in the year 1888, "That judgments and decrees rendered in a circuit or district court of the United States within any state shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state; provided, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the state of Louisiana, before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state": U. S. Stats. at Large, 357; *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593, 64 Am. St. Rep. 137, 50 N. E. 1089; *Blair v. Ostrander*, 109 Iowa, 204, 77 Am. St. Rep. 532, 80 N. W. 330, 47 L. R. A. 469; *First Nat. Bank*

v. Clark, 55 Kan. 219, 40 Pac. 270; Alsop v. Moseley, 104 N. C. 60, 10 S. E. 124; Cooke v. Avery, 147 U. S. 375, 13 Sup. Ct. Rep. 340, 37 L. ed. 209; Dartmouth Sav. Bank v. Bates, 44 Fed. 546.

It is pointed out in the last case cited that where the laws of a state provide for docketing the judgments of its own courts in any county in the state, but do not make a like provision as to the judgments of federal courts, the act of Congress is not operative. However, state statutes requiring a certified copy or transcript of a judgment to be filed in the county where land of the judgment debtor is situated before it shall become a lien thereon have been held applicable to the judgments of United States courts: Tarpley v. Hamer, 17 Miss. (9 Smedes & M.) 310; Hall v. Green, 60 Miss. 47; Reid v. House, 21 Tenn. (2 Humph.) 576; Vance's Heirs v. Johnson, 29 Tenn. (10 Humph.) 214. Compare, however, Doyle v. Wade, 23 Fla. 90, 11 Am. St. Rep. 334, 1 South. 516.

c. In Case of Division of County or State.—The lien of a judgment is not lost by a division of the county, so that land affected by the lien falls without the old county, in the absence of legislation to the contrary: People v. Hovious, 17 Cal. 471; Davidson v. Root, 11 Ohio, 98, 37 Am. Dec. 411; West's Appeal, 5 Watts, 87; Hart's Appeal, 8 Pa. 185; Garvin v. Garvin, 34 S. C. 388, 13 S. E. 625. The same is true when a state is divided. The lien of a prior judgment still adheres to land falling within the boundaries of the new commonwealth: Gatewood's Admr. v. Goode, 23 Gratt. 880; Calwell's Exr. v. Prindle's Admr., 19 W. Va. 604.

DONNER v. STATE.

[72 Neb. 263, 100 N. W. 305.]

LARCENY—Evidence.—A Record Kept by a Stockyards Company of carloads of stock received by it which have been copied from a book or tab of original entries from hearing another person read the waybills of the railroad company, is not admissible in a prosecution for larceny to trace cattle, alleged to have been stolen, to the possession of the accused. (p. 792.)

CRIMINAL LAW—Accused as Witness.—An Instruction Concerning the Testimony of the Accused given in his own behalf which concludes with the words: "You are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true or made in good faith, or only for the purpose of avoiding conviction," is erroneous. (p. 794.)

CRIMINAL LAW—Accused as Witness.—If in a criminal trial the accused testifies in his own behalf, the court should not, by conduct or instructions, in any manner disparage his testimony. (p. 794.)

Jackson & Williams and Brome & Burnett, for the plaintiff in error.

Frank N. Prout, attorney general, and Norris Brown, for the defendant in error.

263 BARNES, J. Frank Donner was charged, in the district court for Antelope county, with the larceny of two steers, the property of one John Thompson. A trial resulted in his conviction **264** and he was sentenced to the penitentiary for the term of four years. On error proceedings the judgment was reversed and the cause remanded for a new trial. He was again found guilty and sentenced to the penitentiary for a term of six years. From that judgment he brings error, and the case is now before us for the second time.

It appears that the steers described in the information were kept in the pasture of one Henry Wilson, situated in said county, and were seen there up to a short time before July 17, 1902, the date at which it was alleged they were stolen. It was shown that the plaintiff had a carload of stock in his possession on the sixteenth day of July, 1902, in the stockyards of the Fremont, Elkhorn and Missouri Valley Railway Company, at Oakdale, in Antelope county, Nebraska, and on that day shipped the cattle, consigned by the Antelope county bank, to the commission firm of Shelley, Rogers & Company, at South Omaha. It further appears that on the morning of the seventeenth day of July, 1902, a carload of stock was received by the South Omaha Stock Yards Company, which it is claimed was delivered to Shelley, Rogers & Company, and sold by that firm and accounted for to the Antelope County Bank. The testimony discloses that one of the steers in question was shortly afterward found in the stockyards of Shelley, Rogers & Company; that it was purchased from them and shipped back to Antelope county. There was no direct testimony that the stolen cattle were in the plaintiff's possession in the stockyards at Oakdale with the cattle which made up his carload of stock shipment from that place to South Omaha, and in order to trace the stolen property it was necessary for the state to show that the identical shipment of cattle made by the plaintiff from Oakdale to South Omaha, after having been received by the stockyards company, was turned over to Shelley, Rogers & Company, and that the steer described in the information and found in the yards of the last-named company was contained in said shipment. In this manner the

state ²⁶⁵ sought to show that the stolen property had been in the possession of the plaintiff. In order to make this proof the state introduced in evidence a book said to have been kept by the Omaha Stock Yards Company, which is referred to in the bill of exceptions as exhibit "D." The introduction of this evidence was objected to as incompetent, immaterial, hearsay, and because the proper foundation had not been laid. The objection was overruled in so far as it related to page 2 of the book offered, and the same was received and read in evidence over the plaintiff's objections. This is assigned as one of the grounds of error. It appears that one William R. Thompson identified exhibit "D," and testified that he made it up from a tab that he used in the yards at the time the train containing the carload of cattle in question was backed into the chutes at the South Omaha Stock Yards, and from hearing another person read the waybills. His cross-examination discloses the following facts in relation to this book:

"Q. Mr. Thompson, the only entry that you made out at the time this car was backed into the chutes was the figures in the line under the words 'car number'? A. Yes, sir.

"Q. That was the only entry you made in this book at the time you was out of the yards—at the time the cars were backed in? A. I copied this off my tab.

"Q. You made no entries in this book at the time you were out in the yards? A. No, sir.

"Q. This book that you have here is a book that is made up afterward? A. Yes, sir.

"Q. After these entries are put onto a book which you use in the actual work of checking they are afterward transferred to this book? A. Yes, sir."

Thereupon counsel moved the court to strike out the entries on page 2 of exhibit "D" because they were hearsay, incompetent and immaterial, not the best evidence, and because no proper foundation had been laid sufficient to authorize the book to be received in evidence. The court overruled the motion, and the defendant excepted. This was the only way by which ²⁶⁶ the state attempted to trace the carload of cattle from the railroad company into the hands of the stockyards company, and from that company to the consignee. It thus appears that the evidence in question was very material, and without it the stolen cattle were not traced into the possession of the plaintiff. It is therefore necessary for us to

determine whether the court erred in receiving the book exhibit "D" in evidence. This book was not a book of accounts; neither was it a book of original entries, nor the original record of the transaction relating to the carload of stock sought to be traced from the possession of the plaintiff into the hands of Shelley, Rogers & Company. It appears from the evidence of the man who says that he made the entries that as to the record of the receipt of the car and its number, there was better evidence than the book. He testifies that the original entry or record was made on another book or tab, which he had in his possession in the stockyards at the time the stock was checked in. It further appears that he did not make the other entries in the book from his own examination or knowledge, but from hearing another person read the waybills of the railroad company. He nowhere testifies that he ever compared the entries so made with the waybills themselves, or with his book or tab of original entries, and strange to say he was not asked as to whether or not the entries contained in exhibit "D" were correct. So it clearly appears that no proper foundation was laid for the introduction of this evidence. Original books of account or letters cannot be admitted in evidence until the proper foundation has been laid: *Norberg v. Plummer*, 58 Neb. 410, 78 N. W. 708. In the case of *Holland v. Commercial Bank*, 22 Neb. 571, 36 N. W. 113, it was held error, and a new trial was granted on account of the introduction of books of account made by and in the handwriting of a clerk, who was neither called nor subpoenaed to verify the entries therein, nor was his absence accounted for. Books of account are receivable in evidence only when verified in the manner provided by section 346 of the code: *Gilbert* ²⁶⁷ *v. Merriam R. S. Co.*, 26 Neb. 194, 42 N. W. 11; *Pollard v. Turner*, 22 Neb. 366, 35 N. W. 192; *Atkins v. Seeley*, 54 Neb. 688, 74 N. W. 1100. The book in question does not even purport to be a book of accounts. The most that can be said for it is that it is a record of carloads of stock received by the stockyards company, and it would seem that, being in the nature of a memorandum, even with the proper foundation laid, it could only be used by the witness who made it for the purpose of refreshing his recollection. This same book was offered and received in evidence on the former trial of this case. On that trial no evidence was introduced to show who made the entries therein, when they were made, or under what circumstances. For these reasons its admission was held

error. It is apparent, from an examination of the record herein, that the state attempted to supply such omission on the second trial. In doing so it was disclosed that the book was not one of original entries, and was therefore not the best evidence. The failure to produce the original entries, or in other words, the best evidence, was not explained, and the witness who copied such original entries into the book in question did not even testify that they were correct. So it is clear that the admission of this evidence was reversible error.

Plaintiff further complains of certain instructions given by the court on his own motion. It is said that although it was not reversible error to give either of the instructions numbered 8 and 9, yet the giving of both of them grouped together was prejudicial to the plaintiff. Both of these instructions define and explain a reasonable doubt. It is apparent that either one of them would have been sufficient, and that one is practically a repetition of the other. We have held, in several cases, that it is not reversible error to repeat an instruction unless it appears that such repetition might operate to the prejudice of the accused. Yet, we are frank to say that we are unable to commend such a course.

It is further contended that the court erred in giving instruction No. 10, on his own motion. This instruction ~~268~~ concludes with the words: "You are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true and made in good faith, or only for the purpose of avoiding conviction." It is urged that it was reversible error for the court to thus suggest to the jury that the testimony of the defendant may have been given for the purpose of avoiding a conviction; and that this suggestion was calculated to disparage the testimony of the accused. The case of *Clark v. State*, 32 Neb. 246, 49 N. W. 367, is cited in support of this contention. In that case it was held that, "where a person on trial for a crime testifies in his own behalf, the court may instruct the jury that in weighing his testimony they may consider his interest in the result of the suit. The court, however, cannot, by repeating its statement in that regard, give it undue weight or say aught calculated to disparage the testimony of the accused." The state, to support the instruction, cites the case of *Carleton v. State*, 43 Neb. 373, 61 N. W. 699, where the trial court charged the jury as follows: "The jury are instructed that they have no right to disregard the

testimony of the defendant on the ground alone that he is a defendant and stands charged with the commission of a crime; nor are the jury required to blindly receive the testimony of the defendant as true, but the jury are to fully and fairly consider whether it is true and made in good faith, and for this purpose the jury have a right to consider the interest of the defendant in this prosecution. The law presumes the defendant to be innocent until he is proved guilty by the evidence beyond a reasonable doubt, and the law allows him to testify in his own behalf, and the jury should fairly and impartially consider his testimony together with all the other evidence in the case, and if from all the evidence, the facts and circumstances proved, the jury have any reasonable doubt of the guilt of the defendant as charged in the information, then the jury should give the defendant the benefit of the doubt and acquit him." The court after much discussion, in which it was said that "true" and "made in good faith" were ²⁰⁰ synonymous terms, reluctantly approved of the foregoing instruction; but it will be observed that the instruction complained of, in this case, is much broader in its terms, goes further and is more prejudicial to the accused than the one above quoted. In that instruction it was not suggested that the testimony of the accused might have been given in bad faith, and for the purpose of avoiding a conviction, while this one goes to that extreme length. We are unwilling to go any further in approving instructions of this kind than the rule announced in the Carleton case (43 Neb. 373, 61 N. W. 699). No case has been called to our attention, and we have not been able to find one which seems to justify us in so doing. Indeed, common experience teaches us that juries are prone to view the evidence of one who is on trial for a criminal offense with suspicion, and the court should not, by his conduct or instructions, in any manner disparage the evidence of the accused.

It is further contended that the court erred in receiving the testimony of the state's witnesses by which it was sought to prove confessions of guilt on the part of the plaintiff in error. It is unnecessary to determine this question, for the reason that the judgment must be reversed and a new trial granted on account of the matters hereinbefore considered. It may not be amiss, however, to say that it is the duty of the state when offering witnesses to prove the confessions or

admissions of a person charged with crime, to fully qualify its witnesses by showing that such confessions or admissions were made voluntarily, in such a manner and under such circumstances as to make them competent evidence; that it is no part of the duty of the accused or his counsel to supply the element of competency by a cross-examination of the witnesses or otherwise.

For the foregoing reasons, we hold that the court erred in the admission of exhibit "D" in evidence, and in giving instruction numbered 10 to the jury on his own motion. The judgment of the district court is therefore reversed, and the cause is remanded for a new trial.

Records of Entries Made in the Usual Course of Business on "train sheets" by a train dispatcher from reports telegraphed to him by station agents as to the arrival and departure of trains, are admissible in evidence to show the position and place of a train at a certain time: Fireman's Ins. Co. v. Seaboard Air Line Ry., 138 N. C. 42, 107 Am. St. Rep. 517. And the trip report of a street-car conductor, showing the number of passengers on a certain trip and that they paid cash fares, is admissible in evidence against one who claims to have been a passenger, under a transfer slip, on that trip and negligently injured: Callihan v. Washington Water Power Co., 27 Wash. 154, 91 Am. St. Rep. 829.

LAMB v. ROONEY.

[72 Neb. 322, 100 N. W. 410.]

ELECTION OF REMEDIES—When not Conclusive.—If, in attempting and designing to make an election, one does an act or commences an action in ignorance of substantial facts which proffer an alternate remedy, and the knowledge of which is essential to an intelligent choice of procedure, he may, when informed, adopt a different remedy. (p. 796.)

TRUST—Stolen Property.—The Conventional Relation of trustee and cestui que trust, or other fiduciary relation, is not essential to the jurisdiction of a court of equity to declare and enforce a trust with respect to property stolen from the beneficial owner. (p. 797.)

T. J. Doyle and H. C. Vail, for the plaintiff in error.

James R. Swain and Abbott & O'Malley, for the defendants in error.

323 OLDHAM, C. The facts underlying this controversy are, that on the twenty-second day of April, 1902, Harry

Hill and Verne Stewart stole and drove away from a herd of cattle owned by plaintiffs ten head of steers which they delivered to defendant Michael Lamb, who intermingled the stolen cattle with fifteen head of his own and shipped the same to South Omaha, Nebraska, where they were sold to the commission firm of Ralston & Fonda, the proceeds of sale amounting to \$1,800; \$830 of the proceeds of the sale of this carload of cattle were invested in forty-nine head of yearling steers by defendant Lamb, and the cattle purchased were shipped to his ranch in Greeley county, Nebraska. Subsequently the defendant Lamb was arrested on a criminal warrant and charged with aiding and abetting the larceny of the cattle and with receiving the stolen cattle, knowing the same to have been stolen. He was convicted of this criminal charge in the district court for Greeley county, Nebraska, and sentenced to the penitentiary for a term of nine years. The judgment of the district court was subsequently affirmed by the court in the case of *Lamb v. State*, 69 Neb. 212, 95 N. W. 1050. Shortly after the larceny of plaintiff's cattle they began an action against the defendant Lamb to recover the value of the stolen cattle and procured an attachment to issue and levied the same upon the cattle now in dispute. ⁸²⁴ Subsequently, the attachment proceeding was dismissed by plaintiff and the instant case, a bill in equity to impose a resulting trust on the forty-nine head of cattle purchased from the proceeds of the sale of the cattle stolen from plaintiffs, was instituted. Issues were properly joined on the petition in the court below, and a trial had to the court, which resulted in a judgment for plaintiffs and a decree quieting title to the forty-nine head of cattle in dispute in plaintiffs. From this judgment and decree, the defendant brings error to this court.

The first contention urged for a reversal of the cause is, that the plaintiffs, by instituting suit against the defendant to recover the value of the property stolen, and having an attachment issued, elected to treat the cattle as the property of the defendant, and that, having so elected, they are now estopped by this act from claiming the equitable title to the cattle in dispute. There are two sufficient answers to this contention: The first is, that by instituting a suit at law against the defendant for the recovery of the value of the cattle alleged to have been stolen, plaintiffs by this act did not elect to declare that the defendant was the owner of any

particular property. Nor did they by this act disaffirm their title to the property stolen by the defendant, nor their right to trace the proceeds of such property when reinvested and have a trust declared therein. And again it clearly appears from the testimony that at the time the attachment proceeding was instituted, plaintiffs had no knowledge of the fact that the forty-nine head of cattle now in dispute had been purchased from the proceeds of the sale of their cattle. In *Pekins Plow Co. v. Wilson*, 66 Neb. 115, 92 N. W. 176, this court said that, "If in attempting and designing to make an election, one puts forth an act or commences an action in ignorance of substantial facts which proffer an alternate remedy, and the knowledge of which is essential to an intelligent choice of procedure, his act or action is not binding. He may, when informed, adopt a different remedy."

The next question urged is as to the sufficiency of the ³²⁵ testimony to impress a resulting trust in favor of plaintiffs on the cattle in dispute. The evidence as to the larceny of the cattle and defendant Lamb's participation therein was the same in the case at bar as it was in the criminal proceeding, and we may say that, in full compliance with all rules of evidence, this fact has been fully established. That a thief who steals the property of another and changes its form by reinvestment is a trustee ex maleficio of the owner of the property is well established in this state, and as was said by Post, C. J., in *Nebraska Nat. Bank v. Johnson*, 51 Neb. 546, 71 N. W. 294: "The conventional relation of trustee and cestui que trust, or other fiduciary relation, is not essential to the jurisdiction of a court of equity to declare and enforce a trust with respect to the property stolen from the beneficial owner."

Then the question to be determined is: How much, if any, of the proceeds of the cattle stolen from plaintiffs have been traced by the testimony in the record to the purchase of the cattle in dispute? The evidence shows that before the theft of the cattle the defendant had a small balance of about \$76 in the Spaulding State Bank; that after the sale of the carload of cattle at South Omaha, defendant deposited in this bank a draft on the Packers' National Bank of South Omaha for \$1,589.92; that from the moneys so deposited in the Spaulding bank he purchased a draft of \$555.93, which was applied as payment of a part of the

purchase price of the cattle in dispute. The evidence shows that the ten head of plaintiff's cattle, which were intermixed with the fifteen head of defendant's cattle, were of the value of about \$850, and that the draft for \$1,589.92 was part of the proceeds of the sale of all those cattle. This is all the evidence in the record which tends to trace the proceeds of plaintiff's cattle into the purchase of the herd in controversy. It seems to us, in view of this state of the record, that the learned trial court went too far with his decree in declaring plaintiffs the absolute owners of the property in dispute. Plaintiffs voluntarily abandoned a court of law for the redress of their civil ³²⁶ wrong and sought the assistance of a court of chancery, which always abhors forfeitures and penalties. Having thus selected a forum of conscience for relief, although in a contest with a convicted felon, they are only entitled to such a decree as equity provides, which is to have a resulting trust declared in the property in controversy, to the extent that they have traced the proceeds of the sale of their property to the chattels in dispute.

We therefore recommend that the judgment of the district court be reversed, and that the cause be remanded, with direction to the court below to impress a trust in favor of plaintiffs on the property in dispute for the sum of \$555.93, with seven per cent interest from May 1, 1902, and to declare this trust a first lien on the property in dispute, and to enter a proper decree directing the sale of the property, unless the amount of this lien be paid within twenty days from the entry of judgment.

Ames and Letton, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with direction to the court below to impress a trust in favor of plaintiffs on the property in dispute for the sum of \$555.93, with seven per cent interest from May 1, 1902; and to declare this trust a first lien on the property in dispute, and to enter a proper decree directing the sale of the property, unless the amount of this lien be paid within twenty days from the entry of judgment.

Judgment accordingly.

A Person having a Right to Choose either of two inconsistent remedies, who, with full knowledge of all the facts in the case, makes a deliberate choice of one mode of redress, is usually bound by his election, and cannot thereafter resort to the other: See the notes to *Thomas v. Joslin*, 1 Am. St. Rep. 626; *Fowler v. Bowery Sav. Bank*, 10 Am. St. Rep. 487; and the recent cases of *Seeley v. Seeley-Howe-Le Van Co.*, 130 Iowa, 626, 114 Am. St. Rep. 452; *Davis v. Schmidt*, 126 Wis. 461, 110 Am. St. Rep. 938; *McCoy v. McCoy*, 32 Ind. App. 38, 102 Am. St. Rep. 223.

Trustees Ex Maleficio are considered in the note to *Cassels v. Finn*, 106 Am. St. Rep. 94.

NELSON v. WEBSTER.

[72 Neb. 332, 100 N. W. 411.]

SURETYSHIP—Right of Surety to Enforce Judgment Against Principal.—One of several defendants in an action on a promissory note, who is found to be a surety, may take an assignment of the judgment therein recovered, and enforce it by the issue of execution against his principal, and this without the necessity of a separate action to establish the relation of principal and surety between the parties. (p. 803.)

John H. Barry, for the plaintiff in error.

V. L. Hawthorne, for the defendant in error.

333 LETTON, C. This is an action of replevin brought by Edward Nelson, plaintiff in error as plaintiff, against J. R. Webster, sheriff of Saunders county, and Peter Johnson, defendants in error as defendants, in the district court for Saunders county. The case was tried to the court upon an agreed stipulation of facts which are substantially as follows: That on March 29, 1897, the Farmers' and Merchants' Bank recovered a judgment against Friberg, Nelson and Johnson in the sum of one hundred and fifty-four dollars and twenty-five cents and costs taxed at eleven dollars and fifty-five cents upon a promissory note signed by said parties; that the evidence, findings and judgment of the court show that Peter Johnson signed the note as surety; that afterward Peter Johnson paid the full amount due upon the judgment of the plaintiff by his attorney, S. H. Sornborger, and the following record was made upon the court docket upon which the judgment appears:

"April 8, 1897.

"In consideration of the payment of \$163.81 by Peter Johnson, surety of the plaintiff, this judgment as against Andrew Friberg and Edward Nelson is hereby assigned and set over to said Peter Johnson to proceed herein in plaintiff's name or otherwise against said Friberg and Nelson but not at plaintiff's costs.

"FARMERS' & MERCHANTS' BANK,

"By S. H. SORNBORGER,

"Its Attorney."

That a transcript of the judgment and assignment was filed in the district court for Saunders county and an execution issued thereon, by virtue of which execution the defendant Webster as sheriff seized the property described in plaintiff's petition which is of the value of six hundred and ninety dollars; that Peter Johnson, the defendant, caused the execution to issue claiming to own the judgment by virtue of having paid the same and receiving the assignment thereof. Upon the pleadings and evidence, judgment was rendered for the defendant, and the plaintiff prosecutes error to this court.

The plaintiff in error contends, first, that Johnson, having paid and satisfied the judgment, it was extinguished and no longer remained a valid judgment against anyone; ³²⁴ second, that one of several judgment defendants cannot become the assignee of the judgment, as against the other defendants.

It is admitted by the plaintiff in error that had Johnson, after paying the judgment, filed his petition containing the proper averments in a court having jurisdiction against Nelson and Friberg, his codefendants, had brought them into court and sustained the allegations of his petition with proper proof, he would have been subrogated to the rights of the bank. But it is contended that he cannot summarily acquire the right to enforce the judgment against his codefendants, and determine his rights and the rights of Nelson without giving Nelson his constitutional right to be heard in his own defense. The defendants in error, upon the other hand, contend that the fact that Johnson was only a surety is *res adjudicata*, that payment to the bank and the assignment of the judgment to him operate as a transfer of the judgment, and that thereby he was subrogated to all the

rights and remedies possessed by the bank at that time, and can enforce the judgment as to his principal as fully as the bank could have done. In the original action in the county court issues were tendered upon the question of whether the relation of principal and surety existed as between Johnson and his codefendants; evidence was taken and a finding and judgment was had upon such issue, which determined as between the parties the fact that Johnson was merely a surety. So that the status of the parties as principal and surety was conclusively determined before the payment of the judgment and its assignment to Johnson took place.

By section 511 of the code it is provided that "in all cases where judgment is rendered in a court of record within this state, upon any other instrument of writing, in which two or more persons are jointly and severally bound, and it shall be made to appear to the court, by parol or other testimony, that one or more of said persons so bound signed the same as surety or bail for his or their codefendant, it shall be the duty of the clerk of said ³³⁵ court, in recording the judgment thereon, to certify which of the defendants is principal debtor, and which are sureties or bail." By the provisions of this section the question of whether the parties stand in the relation of principal and surety may be as effectually litigated and settled in the original action, as could be done under the common law in a subsequent action in which the surety sought exoneration. One of the principal objects, therefore, of the surety's suit had been realized by the adjudication in the original suit that Johnson stood in the relation of surety to his codefendants.

It is further established that the surety has paid the judgment creditor the full amount of the judgment and costs and obtained an assignment thereof. Under the pleadings in this case no issue is tendered that could be litigated in an action for exoneration, other than the allegation in the reply that Nelson was only a surety upon the obligation and not a principal, but this issue as we have seen has been adjudicated and settled as between these parties.

Under the civil law not only is the surety entitled where he pays the whole debt to the benefit of all the collateral securities taken by the creditor, "but he is also entitled to be substituted, as to the very debt itself, to the creditor by way of cession or assignment. And upon such cession or assign-

ment . . . the debt is, in favor of the surety, treated not so much as paid, as sold; not as extinguished, but as transferred with all its original obligatory force against the principal": 1 Story's Equity Jurisprudence 13th ed., sec. 500. And this, it seems, was the earlier doctrine at common law: See cases cited in 1 Story's Equity Jurisprudence, 13th ed., sec. 499. Mr. Story, however, states that the doctrine is now established that the surety has no such right to be enforced in equity, and that he cannot insist upon any assignment, upon the ground that by the payment of the debt the debt has become extinguished, but he comments upon this doctrine as follows: ³³⁶ "It is observable that the whole of this reasoning proceeds upon the ground that by the payment by the surety the original debt is extinguished. Now that is precisely what the Roman law (as we shall presently see) denied; and it treated the transaction between the surety and the creditor according to the presumed intention of the parties to be not so much a payment as a sale of the debt: 1 Domat Civil Law, book 3, tit. 1, sec. 6, art. 1; post, secs. 500, 635-637. It is not wonderful that courts of equity, with this enlarged doctrine in their view, which is in entire conformity to the intention of the parties as well as to the demands of justice, should have struggled to adopt it into the equity jurisprudence of England. The opposing doctrine is founded more on technical rules than on any solid reasoning founded in general equity. In truth, courts of equity in many cases do adopt it and act upon it": Sec. 499d.

It will be observed that in the case at bar, the purpose and object of the usual action in equity, by which the surety seeks to be subrogated to the rights and remedies of the creditor, has been effectually accomplished by the assignment of the judgment. The object of the equitable action was to procure the right to the surety who had paid the debt, to have the advantage and benefit of every lien, claim or security which the original creditor had against the principal debtor. We think that the equitable doctrine of the civil law has become the doctrine of the majority of the American courts.

In *Townsend v. Whitney*, 75 N. Y. 425, the whole subject is examined, and it is said that it has not always been easy to define the cases in which subrogation could be had and the English authorities are not all consistent, and in that case it was held that where a judgment has been rendered

upon the surrogate's decree against an administrator and the judgment has been paid by one of the sureties he may have the decree assigned to himself or to some one else for him and enforce it by attachment against the administrator.

³³⁷ In a leading case in New Hampshire, there is an extended discussion of the legal principles involved in this case in which the language used by the writer of the opinion is so apt that we quote from it at length. The court say, by Bell, J.: "The general principle, that a surety is entitled in equity to be subrogated to all the securities which the creditor holds against the principal, is everywhere admitted: Citing cases. So it is beyond question that the surety, paying the debt, may stipulate for an assignment of all the collateral securities of the creditor against the principal, and such assignment will be protected in courts of law, as well as in equity: Citing cases. It is equally clear that the payment of a debt by any person who is liable to its payment is a discharge of it. It is thenceforward *functus officio*, and cannot be enforced against any person, who is liable to its payment in the same degree as the party paying: *United States v. Preston*, 4 Wash. (U. S. C. C.) 446, Fed. Cas. No. 16,087. So payment of a judgment, or execution, by either of the judgment debtors, discharges the execution, and is a satisfaction of the judgment: Citing cases. And, as a general rule, the same result follows from a payment made by any other person; and any agreement made by the party making the payment with the creditor, that the execution shall not be discharged, or returned satisfied, in order that the party paying may collect upon it a part or the whole of the judgment debt from another of the judgment debtors, will be entirely nugatory. . . . But the rule that a surety may take an assignment of any security for the payment of the debt, which is held by the creditor, unavoidably implies an exception to the general rule that payment of a debt by a codebtor discharges the other codebtors, whether the debt rests in contract merely, or is merged in a judgment. . . . We apprehend, therefore, that the rule that payment by a codebtor discharges the debt must be subject to this exception: if the codebtor making the payment is a surety, the debt will be holden undischarged, so far as ³³⁸ is necessary to preserve and give effect to the collateral securities against the principal, assigned by the creditor to the surety, either voluntarily or by a decree of a court of equity. . . . The

payment, for most purposes, discharges the debt, but does not so discharge it as to destroy the security of the surety; but a judgment may be entered up, to be levied on the property attached, or, if judgment be rendered, a levy on that property may be effectually made, though the execution would be enjoined, or set aside, if used for any other purpose": *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207.

The American cases on this subject are collected and distinguished in 24 American and English Encyclopedia of Law, first edition, 204-206, and notes: See, also, *Lidderdale v. Robinson*, 12 Wheat. (U. S.) 595, 6 L. ed. 740; *Pott v. Nathans*, 1 Watts. & S. (Pa.) 155, 37 Am. Dec. 456; *Searing v. Berry*, 58 Iowa, 20, 11 N. W. 708; *Bank of Montpelier v. Dixon*, 4 Vt. 587, 24 Am. Dec. 640; *Mason v. Pierron*, 63 Wis. 239, 23 N. W. 119; *Mitchell v. DeWitt*, 25 Tex. Supp. 180, 78 Am. Dec. 561.

The case at bar is easily distinguished from the cases of *Potvin v. Meyers*, 27 Neb. 749, 44 N. W. 25, and *Henry & Coatsworth Co. v. Halter*, 58 Neb. 685, 79 N. W. 616, cited by plaintiff in error. In each of these cases, the defendant who paid the judgment was apparently primarily liable for the debt, and it was not ascertained by the judgment that he stood in the relation of surety to the principal debtor.

In *Wilson v. Burney*, 8 Neb. 39, the facts were that Humphrey Brothers had commenced an action against Horace Taylor, E. A. Berry and the defendant Burney, and recovered a judgment against Taylor as principal and Berry and Burney as sureties. An affidavit for garnishment was filed against the firm of Wilson & Phillips, summons issued thereon, the answer of the garnishees taken and an order made that the garnishees pay the sum of eighty-five dollars into court. After this order was made an execution was issued on the original judgment and the amount due thereon was paid by Burney, who took an assignment of the judgment to himself and brought an action under the ³³⁰ judgment against Wilson & Phillips as garnishees. Judgment was rendered in his favor and Wilson & Phillips prosecuted error. This court held, the opinion being written by Chief Justice Maxwell: "The principle is well settled that upon the payment of the debt by the surety, he is entitled to the securities held by the creditor against the principal debtor, and to stand in his shoes, and it can make no difference that the security is in the form of an order upon garnishees to pay

money into court. It follows that the defendant, being entitled to be subrogated to the creditor's rights in the premises, the judgment of the court below must be affirmed."

The only difference in the facts between this case and the case at bar is that an order had been made upon the garnishees to pay the money into court before the surety took the assignment of the judgment, but this does not change the principle which is applicable.

Since the relation of principal and surety has been adjudicated and established between these parties, and since an assignment has been made of the judgment from the creditor to the surety, all that could be done in another action has already been performed. Laws are established for the purpose of affording a remedy where a person has suffered a wrong. It was the plaintiff in error's duty to pay the judgment to the bank. Failing this, if he is called upon by any other person to pay the debt, he has the right to have it conclusively established that the person now calling upon him for payment occupies such a position that if he pay the debt to him, he cannot be compelled to pay the debt again to the original creditor.

When the person seeking payment has conclusively shown that he was the surety, that he paid the full amount of the debt, and that the judgment against the defendant has been assigned to him, there is nothing further necessary to be proved to authorize him to compel payment. These facts may be established by a separate action in the nature of a suit in equity for subrogation, or suretyship ³⁴⁰ may be shown, under the provisions of our statutes in the original action itself, and if the judgment is in fact assigned, the surety may enforce it. No good can result from compelling the defendant in error to maintain another suit. The plaintiff in error has had his day in court and should pay the debt without further litigation.

For these reasons the judgment of the district court is correct and should be affirmed.

Oldham, C., concurs.

Ames, C., dissents.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

The Right of Sureties to Subrogation is considered at length in the note to *American Bonding Co. v. National etc. Bank*, 99 Am. St. Rep. 474.

**CHICAGO, BURLINGTON AND QUINCY RAILROAD
COMPANY v. CASS COUNTY.**

[72 Neb. 489, 101 N. W. 11.]

RES JUDICATA.—A Right, Question or Fact.—distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies, even though the second suit is for a different cause of action. (p. 807.)

RES JUDICATA.—Although a Claim for Taxes under an assessment for one year is not adjudicated by a prior adjudication of the validity of a tax upon the same property under an assessment for a different year, still, if the liability to taxation depends upon a charter right of exemption, the adjudication of such right in one litigation will estop the parties to question that exemption in subsequent litigation. (pp. 809, 810.)

RES JUDICATA.—Taxation.—The West Half of a Railroad Bridge owned by the corporation which operates through trains from Nebraska across such bridge and thence through adjoining states, is a "part of the continuous line of road" within the meaning of sections 39 and 40 of the revenue act of 1901. It is assessable by the state board, not by local assessors, and a prior adjudication that the bridge is not a "part of the continuous line of road" is not an adjudication of fact, and does not operate as an estoppel against the parties to such prior litigation. (p. 812.)

Jesse L. Root, for the appellants.

J. W. Deweese, Byron Clark and F. E. Bishop, for the appellee.

C. C. Wright and W. H. Herdman, amici curiae.

⁴⁹⁰ **SEDGWICK, J.** The principal questions involved in this case are identical with those stated and discussed in Chicago etc. R. Co. v. Richardson County, 72 Neb. 482, 100 N. W. 950, which follows and approves Chicago etc. R. Co. v. Richardson County, 61 Neb. 519, 85 N. W. 532, and also in State v. Back, 72 Neb. 402, 100 N. W. 952, 69 L. R. A. 447.

There is another question presented in this case which has been thoroughly discussed in the briefs and in the oral argument upon the rehearing. The bridge in question in this case was assessed by the local officers for taxation for the years 1881 to 1885, inclusive, and in the year 1886 the railroad company, having paid those taxes under protest, brought an action in the district court for Cass county to recover the amounts so paid. Afterward that action was brought to this

court, and was determined against the company: *Cass County v. Chicago etc. R. Co.*, 25 Neb. 348, 41 N. W. 246, 2 L. R. A. 188. It is contended that by the judgment in that case the questions involved in the case at bar are *res judicata*. The local authorities assessed this bridge for taxation for the year 1901, and the company brought this action to restrain the collection of the taxes. The district court enjoined the collection of the taxes as prayed, and the case was brought to this court by appeal. The subject matter of the former litigation was the taxes ⁴⁹¹ assessed against this property for the respective years therein named, and the subject matter here is the taxes assessed for the year 1901, so that it cannot be said that the two cases involved the same subject matter, and, strictly speaking, the judgment in the one case could not have been *res judicata* of the subject matter involved in the other: *State v. Savage*, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557; *State v. Broatch*, 68 Neb. 687, 110 Am. St. Rep. 477, 94 N. W. 1016.

The real question in dispute between the parties is whether in the former action the rights of the parties and questions of fact, then in dispute between them, have, by that case, been adjudicated so as to estop the parties to that litigation from now questioning the facts so determined. It was said by this court in *State v. Broatch*, 68 Neb. 687, 110 Am. St. Rep. 477, 94 N. W. 1016: "A judgment, rendered by a court of competent jurisdiction, determining the rights of the litigants on a cause of action or defense, is an effectual bar against future litigation over the same right determined by such judgment, and is for all time, unless reversed or modified, binding on the parties and their privies in estate or in law. A 'right, question or fact' distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies, and this even though the second suit is for a different cause of action."

Of course, the propositions of law that were advanced by the court as requiring the disposition made of the issues in the former case, if afterward found to be erroneous, would not be binding upon the court in subsequent litigation between the parties involving a different cause of action: *State v. Savage*, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557; *State v. Broatch*, 68 Neb. 687, 110 Am. St. Rep. 477, 94 N. W. 1016.

Many authorities are cited and ably discussed in the re-

spective briefs of counsel. Our labors have been much lightened by those discussions and by the oral arguments at the bar. There is substantially no difference of opinion upon the controlling legal principle involved. Specific facts that are so involved in a litigation that the result of ⁴⁹² the litigation depends upon the determination of these facts are necessarily settled by that litigation, and the authorities substantially agree that such facts so determined cannot afterward be controverted by the parties to the former litigation. To determine, then, the question before us, it is necessary to ascertain what facts controlling the rights of the parties in the former case were adjudicated, and how far those facts so ascertained are involved in and necessarily control the decision in this case. The petition in that action alleged that the plaintiff "owns the line of railroad extending from Pacific Junction, in Mills county, Iowa, westwardly across the Missouri river, and through the counties of Cass, Lancaster and other counties farther west in the state of Nebraska; and that it has owned and operated said line of railroad since the first day of January, 1880; and that said line of road and property thus owned by the plaintiff is situated in more than one county in the state of Nebraska." The answer alleged "that the said railroad bridge, which spans the Missouri river at Plattsmouth, Nebraska, is a separate and independent structure from the 'roadbed and right of way' of said railroad company," and further alleged "that said railroad bridge has never been operated and controlled by said plaintiff, either in the states of Iowa or Nebraska, as a continuous part of its roadbed and main track; on the contrary, defendant avers and charges that said bridge has been maintained and operated by said corporation plaintiffs always since its construction as a separate and independent structure from its main line."

In the brief for the county in the case at bar it is said: "The real controversy between the railway company and the county of Cass is the right of the local officers to assess and tax the west half of the bridge across the Missouri river near Plattsmouth, in said county," and again, "We now ask this court to say whether in the district court in said cause the issue of fact as well as of law was not raised, litigated and determined."

It is insisted that after the former case had been brought ⁴⁹³ to this court, and the judgment of the lower court therein

reversed and the cause remanded, the case was dismissed and no final judgment entered in the lower court, and that therefore the issues therein presented were not finally adjudicated. If our attention had been called to a showing in this record that the plaintiffs had been allowed by the court to dismiss their former proceedings without prejudice to a future action, we would feel it incumbent upon us to discuss the effect of such dismissal. As it is, we think the question before us is fairly stated by counsel for the county in the foregoing quotation from the brief. It was said in the opinion of the court in the former case that it was alleged in the petition that the taxes "were unlawfully levied and collected, for the reason that the bridge was, at all times, a part of the line of railroad of defendant in error, and legally taxable only as the other portions of the road were taxable; and that the same was for each year reported to the state board of equalization as a part of the railroad, and taxed accordingly, all of which taxes had been paid," and that the answer consisted mainly of specific denials of the allegations of the petition, and "alleged that the bridge was not legally taxable by the state board of equalization; that it was not a part of the roadbed of defendant in error's road; that it was not operated as a part of said road; that it was listed to the precinct assessor for taxation by the duly authorized officers of the railroad company, and that it was legally subject to taxation by the county." The language might indicate that the writer of the opinion considered that the general question whether the bridge was "a part of the line of said road" was the ultimate fact to be determined, and was a simple question of fact upon which the decision in controversy depended; but in construing this language of the learned author of that opinion, it must be borne in mind that he was not discussing a question of *res judicata*. It was not necessary for him to discuss the question whether the result of the litigation depended upon the determination of disputed questions of fact, or depended ⁴⁹⁴ upon the application of legal principles to conceded facts.

Although a claim for taxes under the assessment for one year is not adjudicated by a prior adjudication of the validity of a tax upon the same property under assessment for a different year, still, if the liability to taxation depends upon a charter right of exemption, the adjudication of that charter right in one litigation will estop the parties thereto to ques-

tion that exemption in subsequent litigation. This was distinctly held in *New Orleans v. Citizens' Bank*, 167 U. S. 371, 17 Sup. Ct. Rep. 905, 42 L. ed. 202. This is a case much relied upon by the appellant in the case at bar. The thing in litigation upon which the right to collect the tax in that case depended was the contractual exemption of the bank under its charter, and it having been determined in the prior litigation that such contractual relations existed, it was held that the parties were estopped to deny it in subsequent litigation. The adjudication of a contract right is an adjudication of fact, and a judgment that necessarily involves the question of the existence of a charter or contract right will be binding upon the same parties in future litigation, involving the existence of that right. The existence of such contract right was held to be the thing adjudicated in the former litigation. The court said: "The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies." Some of the leading cases are then reviewed to illustrate this rule, and the court said further: "*In Tioga R. Co. v. Blossburg & C. R. Co.*, 20 Wall. 137, 22 L. ed. 331, and *Mason Lumber Co. v. Buchtel*, 101 U. S. 633, 25 L. ed. 1073, it was held that when the proper construction of a contract was in controversy, the construction adjudged by the court would bind the parties in all future disputes."

495 When the court construes a contract and determines the fact that the contract exists with the construction given it, and the rights of the parties are made to depend upon the existence of such contract, the parties are estopped in future litigation to deny its existence.

In *Chicago etc. R. Co. v. Richardson County*, 61 Neb. 519, 85 N. W. 532, it is made plain that the court was construing the statute and merely applying its provisions to conceded facts. The court said: "It is conceded by defendants that the bridge over the Missouri river at Rulo, on the west half of which the taxes in dispute were levied, is owned and used by plaintiff as a part of its continuous line of track," and after quoting at large sections 39 and 40 of the statute, it was further said: "It needs no argument to show that the railroad

bridge at Rulo is neither a machine-shop, a general office building or a storehouse; and if this bridge, within the meaning of the statute, is neither real nor personal property outside the right of way of plaintiff, it is not to be assessed by the local assessor, but is taxable only by the state board of equalization. There is no claim that it is exempt from taxation, the only controversy being as to the jurisdiction of the taxing powers. If it is inside, i. e., a part of, the right of way, as the term is employed in the act, then it must be assessed by the state board, otherwise not. The meaning of the term 'right of way,' as employed by the statute, is important, indeed decisive of the question.

This fact is made the basis of the decision. Manifestly all other matters discussed in the opinion are legal questions and relate to the construction of sections 39 and 40 of the revenue law (Comp. Stats. 1901, c. 77). Clearly, this does not make the determination of the question depend upon any disputed fact. It is held that the fact which is here recited, "if the bridge is inside the right of way as the term is employed in the act," then it must be assessed by the state board. It is in that case, and in the two later cases above referred to, determined as matter ⁴⁹⁶ of law that the proper construction of the sections of the statute under consideration is that a bridge which is used by a railroad company as a part of its continuous line of track is assessable by the state board and not by local assessors. The determination of these cases was made to depend upon the existence of this fact alone. It is manifest that this fact was not contested in the prior litigation relied upon as an estoppel in this case. The pleadings in that case will not admit of the construction that an issue was tendered as to whether the property of the railroad company was situated in more than one county, or as to whether the railroad company owned the bridge in question, or as to whether it used the bridge as a part of its continuous line of track, or as to whether the bridge was inside the right of way within the meaning of the statute as it is now construed. The question contested was whether these facts brought the case within the provision of section 39, and it was erroneously determined that they did not. The court, in determining whether the conceded ultimate facts constituted the bridge in question a part of the continuous line of road within the meaning of the statute, said that it was shown that much higher rates were charged for the transportation of passen-

gers and freight across the bridge than over any portion of defendant's road, and that while, in fact, so far as the running of trains and transportation of passengers was concerned, no change or transfer was made, yet additional burden was placed upon all for crossing the bridge. It was said: "To that extent, at least, the road was not operated as a continuous line." Other facts are mentioned in the opinion as tending to show that the road was not operated as a continuous line. Upon consideration of all these facts, none of which were in dispute, it was concluded that the road was not operated as a continuous line within the meaning of the law. This construction of the law has been found to be erroneous, and it is by the later decisions declared to be the law of this state that the facts which have always been conceded to exist⁴⁹⁷ constitute the bridge a part of the continuous line of road within the meaning of the statute. The facts, then, to which the construction of the statute is applied are not in controversy in this case, and have never been controverted, but always conceded or assumed in all the similar litigation. It follows that neither party is estopped to assert these essential facts. The other questions presented by the record are sufficiently discussed in the opinions above referred to.

The judgment of the district court is affirmed.

A Judgment of One Court is Conclusive in another in an action between the same parties, not only as to the same cause of action, but as to other causes involving the right or title asserted and the defenses interposed in the previous action: *Rew v. Independent School Dist.*, 125 Iowa, 28, 106 Am. St. Rep. 282; *Brack v. Boyd*, 211 Ill. 290, 103 Am. St. Rep. 200, and see the cases cited in the cross-reference note thereto. "The right question or fact," in the legal acceptance of the terms, which, when put in issue and determined, thereby becomes subject to the rule of *res judicata*, is necessarily distinguishable from holdings and expressions of the court with reference to the principles of the law, which, when applied to the facts or thing in litigation, must control in the final disposition of the action and determine the judgment rendered therein: *State v. Broatch*, 68 Neb. 687, 110 Am. St. Rep. 477.

An Order of Court Refusing a Judgment for One Installment of a special assessment is conclusive on an application for a judgment for a subsequent installment of the same assessment on the same piece of property, where such judgment was refused because of the invalidity of the ordinance on which the assessment was based: *Markley v. People*, 171 Ill. 260, 63 Am. St. Rep. 234.

SNELL v. RUE.

[72 Neb. 571, 101 N. W. 10.]

LIMITATION OF ACTION on Dormant Domestic Judgment.—

An action may be brought upon a dormant judgment, and the provisions of the statute of limitations do not apply to actions upon domestic judgments. (p. 816.)

J. S. McCarty and H. A. Lambert, for the plaintiff in error.

S. P. Davidson, for the defendant in error.

571 LETTON, C. The question presented in this case is whether or not the provisions of the statute of limitations of this state apply to an action upon a dormant domestic judgment. The plaintiff in error contends that the provisions of the statute do not apply to an action brought in this state upon such a judgment, while on the other hand the defendant in error contends that the provisions of section 16 of the code, which provide, "An action for relief not hereinbefore provided for can only be brought within four years after the cause of action shall have accrued," apply. The judgment sued upon was rendered in 1897, and was dormant at the time this action was commenced. The argument of the plaintiff in error substantially is that, since an execution may issue upon the judgment for a period of five years **572** after its rendition, it could not have been the intention of the legislature to bar the bringing of an action upon the same claim while it was still an enforceable judgment, and that, since the code was enacted as a whole, the sections which provide that a judgment shall not be a lien upon real estate after the expiration of five years from the rendition thereof unless an execution is issued, and which provide for revivor of dormant judgments, and the sections of the statute of limitations which provide that an action may be brought upon foreign judgments within five years, are to be construed together, and make it plain and obvious that the legislature never intended that the statute of limitations should apply to domestic judgments. On the other hand, defendant in error insists that the provisions of section 16 are broad and sweeping in their terms and embrace actions of every nature other than those specifically mentioned.

In examining this question we have been able to receive but little light from adjudications in other states, the statutes of limitations of the several states being so different in their provisions that the decisions in each state are largely determined and governed by the local statute. The provisions of the code of the state of Ohio with reference to the lien of judgments, the time at which they became dormant, and the limitation of actions upon the same, were the same as those of this state are now, in 1864, when the case of *Tyler's Exrs. v. Winslow*, 15 Ohio St. 364, was decided by the supreme court of that state, except that our statute limits the time for bringing an action upon a foreign judgment to five years, while no mention was made in the Ohio statute of actions upon foreign judgments. In that case it was contended that a domestic judgment was a "specialty" and became dormant within fifteen years, as provided by the statute. The court held, however, that a domestic judgment was not a specialty. It was further contended that the four years' limitation upon the bringing of all actions not specifically enumerated in the statute applied. In this connection, ⁵⁷³ however, the Ohio court, in the case above mentioned, say: "A domestic judgment is not embraced in the limitation of four years provided in the last clause of the section, for the obvious reason, among others, that by a contemporaneous act, taking effect on the same day with this, it was provided that such judgments should not become dormant until after five years. This court, however, are of opinion that the judgments of the courts of this state are not subject to any of the provisions of the section under consideration. By this section, actions are limited to the specific period of each, 'after the cause of such action shall have accrued' or 'after such right of action shall have accrued.' We think that a fair construction of this language, according to the ordinary import, excludes domestic judgments; and was intended, by the legislature, to apply to claims that accrue by maturity, or arise by the happening of events that give a right of action, as usually understood. It can hardly be supposed that, without any specific provision to that effect, it was understood that the merging of a cause or right of action, as ordinarily understood, in a judgment, was the accruing of a cause of action. Surely the object of adjudicating a claim or 'cause of action,' and the rendition of judgment thereon is not to mature, or 'accrue,' a right of action; but to ter-

minate a cause of action in a judgment finally determining the rights of the parties, and to secure the remedies that follow a judgment. Undoubtedly a judgment is a cause or right of action of the highest nature, and that such action accrues when the judgment is rendered; but its objects and purposes are ordinarily so foreign to the mere maturity or accruing of a right of action that it would be deemed singular to speak of the rendition of a judgment, merging an adjudicated claim, as the accruing of a cause of action; and especially would this be so, in relation to a domestic judgment, where the only purpose of obtaining it may be the remedies that follow."

This case was decided after the adoption of the statutory provisions which are construed in the opinion by the territory ⁵⁷⁴ of Nebraska, and this court, therefore, is not bound by the well-known principle of statutory construction to follow the decision. It seems to us, however, that the view taken by the Ohio court is in consonance with right principles. In this state a judgment does not lose its vital force by the expiration of five years after its rendition without the issuance of an execution thereupon. It is not dead, but sleepeth. This court has held that a sale of real estate made upon a dormant judgment cannot be attacked collaterally after confirmation (*Gillespie v. Switzer*, 43 Neb. 772, 62 N. W. 228), and that the payment of a dormant judgment cannot be recovered back: *Gerecke v. Campbell*, 24 Neb. 306, 38 N. W. 847. In some states, at the expiration of the statutory period, a judgment becomes actually dead and is possessed of no force or potency for any purpose whatsoever, but such is not the case in Nebraska.

An action may be brought in this state upon a foreign judgment within five years after its rendition; and it hardly seems probable that the legislature would debar its citizens from the same rights which it grants a creditor in a foreign state. Further, since by the issuance of an execution within five years a judgment may be kept alive in this state, or if dormant it may be revived, we would have the anomalous situation of a judgment being enforceable by execution, or revivable by proceedings for that purpose, and not enforceable by action after four years from its rendition. We are not forgetful of the language used in certain opinions rendered by this court (*State v. School District*, 30 Neb. 520, 27 Am. St. Rep. 420, 46 N. W. 613; *Beall v. McMenemy*,

63 Neb. 70, 93 Am. St. Rep. 427, 88 N. W. 134), wherein it is said in general terms that by section 16 of the code the legislature intended to cover every form of action; such language, however, must be taken as applying to the specific case which the court was then considering, and under the view taken by the Ohio court, this language is not applicable to an action upon a domestic judgment. Statutes of limitations are intended as statutes of repose, but where the right of enforcement of a judgment by execution still exists after the bar which it is ⁵⁷⁵ claimed the statute interposes to an action has taken effect, the bar is of no avail so far as preventing the collection of the debt is concerned. Hence the statute fails of its purpose as a statute of repose. We cannot believe that the legislature intended to fix such a short time within which an action upon a domestic judgment might be maintained, and at the same time leave the judgment open to enforcement by execution.

•In this state a judgment plaintiff, who has suffered his judgment to become dormant by failure to issue an execution upon the same within five years, may prosecute proceedings in revivor. We see no reason why he may not be permitted to enforce the same by action if the debt has not been paid. This has been the general rule in regard to dormant judgments in most jurisdictions: See 2 Freeman on Judgments, 4th ed., sec. 432, p. 751.

The right to prosecute revivor proceedings and the right to maintain an action upon the judgment are merely cumulative remedies. The plaintiff may have either or both, as he sees fit. We hold, therefore, that an action may be brought upon a dormant judgment, and that the provisions of the statute of limitations do not apply to actions upon domestic judgments.

We recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

Oldham and Ames, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

The Statute of Limitations of Connecticut does not run against a judgment of a court of that state or of the United States: *Barber v. International Co.*, 74 Conn. 652, 92 Am. St. Rep. 246. But see *Citizens' Nat. Bank v. Lucas*, 26 Wash. 417, 90 Am. St. Rep. 748, and cases cited in the cross-reference note thereto.

DENNISON v. CHRISTIAN.

[72 Neb. 703, 101 N. W. 1045.]

EXTRADITION—Federal and State Legislation.—The legislation of Congress on extradition does not exclude state legislation on that subject. (p. 820.)

EXTRADITION—Fugitive from Justice.—No Extradition is allowable, under the Nebraska statutes, unless the accused is a fugitive from justice. (p. 822.)

EXTRADITION—Fugitive from Justice.—It is not Necessary That the Warrant issued by this state upon the requisition of the governor of another state should contain an express recital that he found the accused was a fugitive from justice. The fact of the issuance of the warrant justifies the presumption that the governor so found, until evidence to the contrary is produced. (p. 823.)

EXTRADITION—Return on Habeas Corpus.—On habeas corpus to obtain the release of a fugitive from justice held under the governor's warrant in extradition, it is not indispensable that the officer's return to the writ should contain direct traversable allegations of all the facts upon which the extradition proceedings are based. It is enough if the return, the warrant of the governor which accompanies it, and the application for the writ together show facts sufficient to justify the detention of the accused. (p. 823.)

EXTRADITION.—The Decisions of the Supreme Court of the United States upon the subject of extradition between states are binding upon all persons and upon all courts. (pp. 824, 825.)

EXTRADITION—Findings of Governor.—When requisition is made on the governor in extradition proceedings two questions are presented to him: 1. Whether the person demanded is substantially charged with a crime against the laws of the state from whose justice it is alleged that he has fled, by an indictment or affidavit properly certified; and 2. Whether he is a fugitive from justice from the state demanding him. When it is made properly to appear to the court upon what showing the governor acted, it becomes a question of law for the court to determine whether the accused has been substantially charged with a crime against the laws of the demanding state. (p. 825.)

APPEAL—Review of Evidence.—In determining whether the evidence before the trial court was sufficient to support the judgment, the supreme court will disregard errors of the lower court in admitting incompetent evidence, if from the whole record it appears that, upon the evidence conceded to be competent, no other conclusion was possible than the one reached by the trial court. (p. 826.)

EXTRADITION.—Courts will not Review the Decision of the Governor in extradition proceedings upon a question of fact made before him which he ought to decide and as to which there was evidence pro and con. (p. 828.)

APPEAL—Harmless Error in Cross-examination.—An error in the cross-examination of the relator in habeas corpus proceedings by the court permitting an inquiry into irrelevant matters is not prejudicial, if the trial is to the court, and no other judgment could have been rendered on the evidence conceded to be competent. (p. 830.)

W. J. Connell, Smyth & Smith, Cochran & Egan and Thomas C. Munger, for the plaintiff in error.

H. C. Brome, E. E. Thomas and T. W. Fallon, for the defendant in error.

⁷⁰⁵ SEDGWICK, J. In April, 1904, the relator, Thomas Dennison, was, by an indictment of the grand jury of Harrison county, Iowa, charged with the crime of receiving and aiding in the concealing of stolen property knowing the same to be stolen. The crime was alleged to have been committed in November, 1892, in Harrison county, Iowa. Upon this indictment, a requisition was issued by the governor of Iowa upon the governor of this state, upon which a warrant was issued by the governor of this state for the arrest of the relator as a fugitive from justice, and for his return to the state of Iowa for trial. He made application to the district court for Douglas county for a writ of habeas corpus, and upon the hearing of that application he was remanded to the custody of the officers under the governor's warrant. He prosecutes these proceedings in error to this court to review that decision. The record shows that the relator was at the time of the alleged offense a resident of the city of Omaha, in this state, and that he has since that time openly and notoriously continued his residence there. The right of the officers and of the special agent of the state of Iowa, designated by the governor's warrant for that purpose, to restrain the relator of his liberty under the governor's warrant was resisted upon various grounds; and, among others, it was insisted by the relator that he was not in the state of Iowa at the time of the alleged commission of the offense, and was therefore not a fugitive from the justice of the state of ⁷⁰⁶ Iowa. Various questions arising out of this contention are discussed in the briefs and will be hereinafter noticed. An indictment having been found about twelve years after the alleged commission of the offense, if the crime had been committed in this state, the prosecution would be barred under our statute of limitations; and if the defendant had resided during this time in the state of Iowa, it would likewise be barred under their statutes. The manifest cause of the delay in the prosecution was the failure to discover sufficient evidence against the defendant to warrant it. The defendant's whereabouts during this time being a matter of public notoriety, if this evidence had been sooner discovered,

the proceedings for extradition might have been as readily pursued at an earlier date as at the present time. Nothing was done by the relator in the meantime which could have hindered such extradition. Statutes of limitations ordinarily prevent the prosecution of crimes after so long a period of time has elapsed as to render it probable that evidence that might vindicate the accused would be lost or otherwise become unavailable. A statute of limitations which provided that proceedings for the extradition of persons charged with crime should, under circumstances like these, be subject to the same limitations prescribed for criminal proceedings in ordinary cases would perhaps not be unreasonable. Under such a statute the authorities of Iowa would have had the full term prescribed by the statute in which to have begun these proceedings against this relator. His place of residence having been notorious, and no concealment having been attempted, there seems to have been no reason for delay in taking these proceedings that would not have been of equal force if the defendant had resided in the state of Iowa, which might have been but a few rods from his actual residence. It is true that, if a person commits a crime and withdraws himself from the state where he has committed it, without any thought of fleeing from justice, but for the purpose of going to his own home, he is still, within the extradition laws, a fugitive from justice ⁷⁰⁷ of the state in which he has committed the crime. This has been frequently determined. It is not contended by relator that the statutes of limitations of the respective states apply to extradition proceedings, nor that one who has become a fugitive from justice may, by lapse of time, under any circumstances, cease to be so regarded; but the foregoing considerations tend to emphasize the necessity of guarding the accused against an unwarranted deportation from the state of his residence.

1. In support of the judgment of the court below it is urged that, in this state, it is not necessary to show that the accused is a fugitive from justice in order to justify his extradition. It is said that our statute provides that one who is charged with having committed a crime in another state may be sent to such state for trial; that the federal legislation upon the subject of extradition is not exclusive, and hence such legislation on the part of our state is valid. There is a dictum of Judge Story's to the effect that the legislation of Congress supersedes and prohibits all state

legislation upon this subject: *Prigg v. Pennsylvania*, 16 Pet. (U. S.) *539, 10 L. ed. 1060. But the validity of such state legislation, ancillary to and in aid of the act of Congress, is now established: See *Ex parte Ammons*, 34 Ohio St. 518; *Ex parte White*, 49 Cal. 433; *Ex parte Romanes*, 1 Utah, 23. And such provisions are now found in the laws of many of the states in the Union. The power to arrest and surrender a fugitive from justice is not dependent upon the constitution, since it existed prior to the adoption of that instrument; it was recognized among the states under the confederation, and, even before the confederation, among the colonies: *Commonwealth of Kentucky v. Dennison*, 24 How. (U. S.) 66, 16 L. ed. 717. It seems to be reasonable to suppose that the state legislatures have power to authorize extradition between the states independently of the provisions of Congress upon that subject.

This case was heard below before three judges of the district court sitting together. It appears that they were ^{not} not agreed upon the question of the power of the state legislatures, but it would seem that they were agreed in the view that the statute relied upon does not authorize extradition unless the accused is a fugitive from justice. We find in the record an opinion of Judge Redick, who was one of the judges who heard the case below, in which he concludes that the relator could not be held unless he is shown to be a fugitive from justice, and in this part of his opinion the other judges appear to concur. He says:

"Section 364 contains a proviso at the end of the section. The first part of the section provides that no person shall be removed from the state of Nebraska to any other state, a prisoner, for any crime committed within the state of Nebraska. It then provides certain penalties against any persons who are interested and take part in any such removal; provided, however, that any person who has committed any crime in any other state, where he ought to be tried for that crime, may be sent to that other state, and it is that proviso which it is claimed warrants the extradition, regardless of the question of whether or not he is a fugitive from justice.

"This section 364 contains in the first part an exception, 'Except in cases specially provided for,' that is, no removal shall be had except in cases specially provided for by statute. It first came upon the statute books of this state by an act passed in 1858, approved November 4, and was section 9 of

that act, and the exception which I have just read doubtless had reference to cases provided for by another law in existence at that time, and not now upon the statute books, providing that the governor of the state might enter into contracts with the governors of other states for the care of prisoners sentenced by the courts of this state for crimes committed in this state, because at that time there was no adequate provision in this state for taking care of such prisoners, and the exception which I have just read doubtless had reference to that special provision of the law.

"Section 333, which is declaratory of the law of the ⁷⁰⁹ United States, authorizes the governor to extradite an accused when he has committed a crime, or stands charged with the commission of a crime in any other state and is a fugitive from justice of that state, because the provision is that, in cases provided for by the constitution and laws of the United States, the governor shall issue his warrant when it is made to appear that the defendant stands charged, etc. Under that section it must appear that the defendant was a fugitive from justice, otherwise the governor has no power to issue his warrant. That section I have been unable to find prior to the Revised Statutes of 1866. No doubt it was passed prior to that time; but it was not in the criminal code of 1858, so called, or the collation of the criminal laws in 1858, and doubtless was a subsequent enactment to section 364. Believing that to be true, it probably was intended by this proviso to except or exclude from the prior provisions of that section cases of extradition. . . . No provision in this state with reference to extradition appears prior to this section 364. . . . These two laws were incorporated into the revision of 1866, and also that of 1873, and have been continued in the statute books from that time down to the present, and they are two provisions apparently referring to the same subject. In that case it is the duty of the court to harmonize them if possible.

"Under section 364, when originally enacted, and until the enactment of section 333, there was no method provided by the state for the enforcement of that act—no power granted by the state to the governor to issue his warrant in such cases. The power was given and the duty imposed, however, by the United States statute. . . . While the existence of these two sections is something of an anomaly in a statute, by construing them together under the ordinary rules

in the construction of statutes so that it may be possible that both may stand, we conclude that section 333 is the only one which grants power from the state to the executive to issue his warrant for extradition, and that the effect of that section is to restrict ⁷¹⁰ his power to such cases as are provided for by the constitution and laws of the United States."

The language of the proviso of section 364 of the criminal code, which is referred to, is: "Provided, that if any citizen of this state, or any person or persons at any time resident in the same, shall have committed, or shall be charged with having committed, any treason, felony, or misdemeanor, in any other part of the United States or territories where he or she ought to be tried for such offense, he, she, or they may be sent to the state or territory having jurisdiction of the offense."

For the reasons stated by the learned district court, we think that this proviso ought not to be construed to provide for extradition in cases not contemplated by the federal statute; but its purpose is rather to so limit the application of section 364 as not to interfere with the legislation of Congress on the subject of extradition. No extradition, therefore, can be allowed unless it appears that the accused is a fugitive from justice.

2. The first contention in relator's brief is that "the warrant and return are insufficient on their face." One ground of this objection seems to be that it does not sufficiently appear upon the face of the papers that the accused is a fugitive from justice. There is annexed to the requisition an affidavit of the prosecuting attorney of Harrison county, Iowa, in which affiant says: "That Tom Dennison, who is charged with the crime of receiving and aiding in the concealing of stolen property committed on or about November 8, 1892, in the county of Harrison, has, since the commission of said crime, actually fled from the state of Iowa, the time of his escape being about November 8, 1892, and that he is now a fugitive from the justice of this state, and I have reason to believe is at Omaha in the state of Nebraska." This was held to be sufficient in *Ex parte Sheldon*, 34 Ohio St. 319. And in *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. Rep. 291, 29 L. ed. 544, it is said: "It is conceded that the determination of the fact (that the accused is a fugitive from justice) by the executive of ⁷¹¹ the state in issuing his warrant of arrest,

upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof."

It is not necessary that the writ contain an express recital that the governor found that the accused was a fugitive from justice. The fact of the issuing of the warrant, upon demand made upon that ground, is sufficient to justify the presumption that the governor so found, until that presumption is overthrown by proof to the contrary.

3. The foregoing considerations seem also to answer the objection that the return of the respondent is insufficient. This objection seems to be predicated upon the idea that the return to the writ of habeas corpus must contain direct traversable allegations of all the facts upon which the extradition proceedings are based. It is said in the brief: "There is no allegation, statement or suggestion that Governor Cummins or anybody else presented to the governor of this state any proof whatever that Dennison had fled from the justice of the state of Iowa; no allegation or statement that Dennison was a fugitive—simply that the governor demanded him as a fugitive; no statement or allegation that he was charged with crime in the demanding state, but simply a statement that he was demanded by the governor as one charged with crime; no statement, averment or suggestion that the demanding governor produced or caused to be produced to the governor of this state a copy of an indictment found, or affidavit made, before a magistrate, charging Dennison with having committed a crime; no statement, averment or suggestion that the executive of Iowa produced or caused to be produced a copy of an indictment found, or affidavit made, before a magistrate, charging Dennison with having committed a crime, either certified or otherwise."

Some of the things above suggested are shown in the application itself for the writ of habeas corpus. Others⁷¹² are recited in the return and in the warrant of the governor which accompanies it. There was annexed to the application for the writ of habeas corpus a copy of the indictment and of the affidavit of the county attorney of Harrison county, Iowa, alleging that the accused is a fugitive from justice. The return to the writ alleged the finding of the indictment by the grand jury of Harrison county, and that thereafter application in due form was made to the

governor of the state of Iowa for a requisition upon the governor of the state of Nebraska, upon a showing that said Dennison, after the commission of said crime and upon the eighth day of November, 1892, actually fled from the state of Iowa, and was at the city of Omaha in the state of Nebraska. It was also alleged that the governor of Iowa issued his requisition in due form, and that thereafter the requisition so issued by the governor of the state of Iowa was duly presented to and honored by the governor of the state of Nebraska, and that thereupon the governor of the state of Nebraska issued and delivered to respondent his warrant for the extradition of said Dennison to the state of Iowa. A copy of the warrant is set out in the return, and the recitals thereof are: "Whereas, Albert B. Cummins, governor of the state of Iowa, has demanded of the governor of this state Tom Dennison, charged with the crime of receiving and aiding in the concealing of stolen property, as a fugitive from justice from said state of Iowa, and complied with the requisites in that case made and provided." In *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. Rep. 291, 29 L. ed. 544, it is held that a decision of the governor as expressed in the warrant "is sufficient to justify the removal (of the accused) until the presumption in its favor is overthrown by contrary proof." In *Hyatt v. Corkran*, 188 U. S. 691, 23 Sup. Ct. Rep. 456, 47 L. ed. 657, the return to the writ of habeas corpus "was to the effect that the relator was held by virtue of a warrant of the governor of New York, and a copy of it was annexed. . . . No other paper was returned by the chief of police bearing upon his right to detain the relator." The issue was made by the filing of ⁷¹⁸ an affidavit on the part of the relator which traversed this return, and which set up the facts relied upon to show that the extradition of the relator was unwarranted. Authorities cited by relator upon the general rules of code pleading are not applicable. It would seem that the finding by the governor that accused is a fugitive from justice, which finding is sufficiently declared by issuing his warrant, is conclusive, at least so far as to place the burden upon the accused to make it appear that he is not a fugitive from justice. The decisions of the supreme court of the United States upon the subject of extradition between states are binding upon all persons and upon all courts, and there can be no doubt that, under the decisions of that court

above referred to, the return to this application was *prima facie* sufficient.

4. Is the judgment of the district court supported by the evidence?

"When a demand of this character is made on the governor of a state, two questions are presented to him: First, is the person demanded substantially charged with a crime against the laws of the state from whose justice it is alleged that he has fled, by an indictment or affidavit properly certified? Second, is he a fugitive from justice from the state demanding him?" *Bruce v. Rayner*, 124 Fed. 481, 62 C. C. A. 501.

When the accused is in custody under the governor's warrant, it is necessary for him, in order to obtain his discharge by the courts upon a writ of habeas corpus, to make it appear, either that he is not "substantially charged with a crime against laws of the state from whose justice it is alleged that he has fled, by an indictment or affidavit properly certified," or that he is not a fugitive from justice from the state demanding him. When it is made properly to appear to the court upon what showing the governor acted, it becomes a question of law for the court to determine whether or not the accused has been substantially charged with a crime against the laws of the demanding state. If the governor's warrant upon which ⁷¹⁴ he is held recites the proceedings had before the governor, from which it appears that the accused was so substantially charged, it would seem from the cases above cited that the presumption is that the proceedings before the governor were regular in that regard. If the original papers described in the recitals of the governor's warrant are before the court, the evidence so furnished will, no doubt, control the recitals of the warrant. If the recitals of the warrant are not sufficient, and the relator in his application for the writ sets out the original papers that were considered by the governor, there can, of course, be no doubt that the court before which the proceedings are pending, will consider those original papers in determining whether the relator was charged with a crime against the laws of the demanding state, and whether the requirements of the federal statute in that regard have been met. In this case, it appears from the application for the writ itself that an indictment had been regularly found in the district court for Harrison county, Iowa, charging the relator with the crime for

which he is held, and that, pursuant thereto, a request had been made by the authorities of Harrison county of the governor of the state of Iowa for his requisition upon the governor of this state, and that accompanying that request there was evidence that the accused had fled from the state of Iowa and was then in this state. It appears from the recitals of the governor's warrant that a requisition was made upon the governor of this state for the arrest and return of the relator upon the charge which was contained in the indictment, and it is also recited in the warrant that the governor of the state of Iowa in so doing "complied with the requisites in that case made and provided." It is alleged in the return to the writ: "Said requisition so as aforesaid issued by the said governor of the state of Iowa was duly presented to and honored by his excellency, John H. Mickey, governor of the state of Nebraska, and thereupon the governor of the state of Nebraska issued and delivered to respondent his warrant for the extradition ⁷¹⁵ of said Dennison to the state of Iowa." The evidence of the relator fails to show that these papers were not before the governor of this state when his warrant was issued. On the other hand, the evidence in the record clearly shows that all of these papers and proceedings were duly considered by the governor. The relator then failed to make it appear upon the hearing of his application for the writ of habeas corpus that he had not been substantially charged with a crime against the laws of the state demanding him, or that this fact did not sufficiently appear before the governor of this state when he acted upon the requisition. The evidence is, therefore, sufficient to support the judgment of the district court, unless the relator has made it appear that he was not a fugitive from justice from the state demanding him.

5. Upon the hearing of the district court a large volume of evidence was taken, principally upon the question whether the accused was a fugitive from justice. Some of this evidence was received against the objection of the relator that it was incompetent to show that the relator was in Iowa at the time of the alleged offense, which was one of the principal questions of fact controverted. An exhibit was offered in evidence which it was claimed was the hotel register of the Kimball House of Davenport, Iowa. Objection was made that no sufficient foundation was laid for its introduction. The objection was overruled, and the evidence received. It

is strenuously insisted that the court erred in this ruling. It has been frequently said by this court that the trial court will be presumed to have based its decision on such competent evidence as is introduced before it. And the judgment of the trial court, in matters tried to the court itself, will not be reversed because of errors in receiving incompetent or immaterial evidence, the presumption being that such evidence was disregarded. In this case, however, it appears from a consideration of the whole record that the evidence complained of was not disregarded by the court. Some of the judges who heard the matter appear to have ⁷¹⁶predicated their judgment, at least in part, upon this evidence. It is plausibly urged that in such case the incompetent evidence must be held to have prejudiced the relator. But this cannot be so if, upon consideration of the competent evidence only, any other decision than the one rendered must have been erroneous. In the following discussion of the sufficiency of the evidence the reasons will be given for the conclusion that no other decision could have been supported upon the evidence which is conceded to be competent.

6. In *Hyatt v. Corkran*, 188 U. S. 691, 23 Sup. Ct. Rep. 546, 47 L. ed. 657, it was said: "It must appear to the governor, before he can lawfully comply with the demand for extradition, that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit, etc., and that the person demanded is a fugitive from the justice of the state the executive authority of which makes the demand. . . . The question whether the person demanded was substantially charged with a crime or not was a question of law and open upon the face of the papers to judicial inquiry upon application for a discharge under the writ of habeas corpus; the question whether the person demanded was a fugitive from the justice of the state was a question of fact which the governor upon whom the demand was made must decide upon such evidence as he might deem satisfactory."

Prior to that decision there had been much controversy and some conflicting decisions in the courts of the several states as to whether the decision of the governor that the accused was a fugitive from justice might be reviewed judicially in proceedings in habeas corpus. In some cases the decision of the governor was thought to be conclusive upon the courts,

and in others it seems to have been considered as open to investigation as an original question. In *Hyatt v. Corkran*, 188 U. S. 691, 23 Sup. Ct. Rep. 546, 47 L. ed. 657, it was shown by stipulations upon the record itself that the accused was not in the demanding state at the time of the alleged commission of ⁷¹⁷ the crime charged, and it was held in that case that, when the facts from which it must follow that the accused is not a fugitive from justice "are proved so that there is no dispute in regard to them," the accused must be discharged. In the opinion this language is used: "If upon a question of fact, made before the governor, which he ought to decide, there were evidence pro and con, the courts might not be justified in reviewing the decision of the governor upon such question. In a case like that, where there was some evidence sustaining the finding, the courts might regard the decision of the governor as conclusive."

In *Bruce v. Rayner*, 124 Fed. 481, 62 C. C. A. 501, it was said by the circuit court of appeals of the fourth circuit: "If conflicting evidence has been submitted to the governor of the state in which the person is found upon the question of fact, and he, considering it, had decided to deliver the person demanded, the presumption being always in favor of the governor's decision, the courts will not inquire into and reverse his decision."

And to support this proposition the above language from *Hyatt v. Corkran*, 188 U. S. 691, 23 Sup. Ct. Rep. 546, 47 L. ed. 657, was quoted by the court. These are the latest expressions of the federal court upon this question that have been brought to our attention. There can be no doubt that this record shows that the question whether the accused was a fugitive from justice was before the governor; that there was sufficient evidence before him to make it appear, at least *prima facie*, that the accused was a fugitive from justice. Under the rule established by the federal courts in the above cases, this was sufficient to justify the remanding of the relator, unless it appeared from the record itself that he was not a fugitive from justice, or was made to appear by such clear and invincible proof that it can be said from the whole evidence that there was no dispute before the governor in regard to the fact. If the facts from which it is to be determined whether the accused is a fugitive from justice are established by the record, or if they are so established by proof ⁷¹⁸ that it may be fairly said that there is no dispute in re-

gard to them, then the question would become a question of law to be determined by the court upon the habeas corpus proceedings, but if it appear that there was evidence before the governor that was substantially conflicting in regard to the facts upon which this question is to be determined, the responsibility of determining the question rests with the governor.

The relator undertook to prove that he was not in the state of Iowa at the alleged time of the offense charged against him. There is no doubt of the competency of this proof, nor that, if this fact was conclusively shown upon the record, or was so proved that it could be said that there was no substantial dispute in regard to it, it would require the discharge of the accused. To establish this proposition, the relator himself testified that he was in Omaha, Nebraska, from the end of October, 1892, down to the first of January, 1893; that on the night of November 4th he stayed at the Arcade Hotel, in Omaha, and that he was not at any time during the period from that time to the first of January following in the state of Iowa. He produced several witnesses who corroborated him in these statements. Although the occurrence was some twelve years before this hearing, these witnesses testified that their attention had been particularly called to the facts at the time, and their testimony was positive that he was not out of the city of Omaha during that time. There are circumstances tending, at least in some degree, to discredit this testimony, and even though there were not, the statements of these witnesses are contradicted by other evidence; and without going into a detailed statement of the evidence that was adduced upon this point, it is sufficient to say that the testimony of these witnesses is not of such a character, in view of the other evidence in the record, as to enable us to say that the matter was established beyond dispute. It seems clear, therefore, that the evidence upon the hearing in the district court, which is conceded to be competent, shows that all questions of fact necessary ⁷¹⁹ to a determination of the matter were fairly controverted before the governor. That being the case, the rule now established by the federal courts precludes the courts from reviewing those questions upon habeas corpus proceedings. The great delay in beginning the proceedings for extradition, and all facts bearing upon the question whether the accused is a fugitive from justice, would be duly considered by the governor.

Objection was made to the cross-examination of the relator, and it seems that upon this cross-examination matters were inquired into that had no relevancy to the questions being investigated; but, from the view that we take of the effect of the competent evidence in this case, and considering that the evidence was to be weighed by the court itself, we cannot see that any prejudicial error against the relator was committed.

The judgment of the district court was the only one possible upon the evidence before it, and is affirmed.

The Principal Case was affirmed by the supreme court of the United States in *Dennison v. Christian*, 196 U. S. 637, 25 Sup. Ct. Rep. 797, 49 L. ed. 630. That court, however, delivered merely a memorandum opinion. For an extended discussion of extradition proceedings, see the recent note to *Farrell v. Hawley*, 112 Am. St. Rep. 103.

ECCLES v. UNITED STATES FIDELITY AND GUAR- ANTY COMPANY.

[72 Neb. 734, 101 N. W. 1023.]

A SURETY on an Official Bond is Liable for a statutory penalty incurred by his principal in taking illegal fees. (p. 831.)

A. Hardy, for the plaintiff in error.

Hazlett & Jack, for the defendant in error.

⁷³⁴ AMES, C. Defendant in error signed, as surety, the official bond of one W. H. Walker as a justice of the peace. This action was brought upon the bond against Walker and his surety ⁷³⁵ to recover the statutory penalty of fifty dollars for an alleged receipt by the former of illegal fees in his official capacity. The defendants answered separately, and there was a trial and verdict for the plaintiff. Upon motion the court set aside the verdict and granted a new trial as to the surety, but denied a like motion by Walker. Afterward the court sustained a motion by the surety to dismiss the action as to it, on the ground that the petition does not state facts sufficient to constitute a cause of action against it. From the judgment of dismissal the plaintiff prosecutes error.

It is not disputed that the defendant in error was lawfully obligated as surety upon the official bond of Walker, which it was doubtless capable of becoming by estoppel, if not otherwise; and the sole question properly presented for decision is whether a surety upon an official bond is liable for a statutory penalty incurred by his principal by taking illegal fees. We think the answer should be in the affirmative. It was so decided by this court in *Kane v. Union Pac. R. Co.*, 5 Neb. 105, and again in *Phoenix Ins. Co. v. McEvony*, 52 Neb. 566, 72 N. W. 956. We do not see how it can be held otherwise than that the justice committed the offense complained of by virtue of his office. He collected a gross sum as his taxable costs or fees in a suit before him, and the illegal charge was an item contributing to that amount, so that the act was an inseparable part of his official conduct, and the statute denouncing the penalty treats the taking of illegal or extortionate fees, in terms, as an official act: *Comp. Stats. 1903 (Annotated Statutes, 9060), c. 28, sec. 34.* Counsel for defendant in error are mistaken in supposing that *Snyder v. Gross*, 69 Neb. 340, 95 N. W. 636, and *State v. Porter*, 69 Neb. 203, 95 N. W. 769, are in conflict with the foregoing. The former of these latter cases was an instance in which it was attempted to hold the sureties of a justice of the peace liable for an act entirely foreign to any duty enjoined upon him in connection with his office, and in the latter of them it was sought to recover fees received for services not attempted to be required of the Secretary of State, but of the person who happened to hold ⁷³⁶ that office as a supposed member of an unconstitutionally and illegally constituted official board of commission. He certainly did not receive them by virtue of his office as Secretary of State, and, in the opinion of the writer, the decision goes to the farthest limit of linguistic propriety in saving that they were taken by color of that office. They were taken under color of the void statute.

We are of opinion, therefore, that the judgment of the district court dismissing the action as to the defendant in error is erroneous, and recommend that it be reversed and a new trial granted.

Oldham, C., concurs.

Letton, C., not sitting.

By the COURT. For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court dismissing the action as to the defendant in error be reversed and a new trial granted.

For Authorities upon the question adjudicated in the principal case, see the note to *Feller v. Gates*, 91 Am. St. Rep. 523, on the acts for which sureties on official bonds are liable.

CASES

IN THE

COURT OF APPEALS

OF

NEW YORK.

SERANO v. NEW YORK CENTRAL AND HUDSON
RIVER RAILROAD COMPANY.

[188 N. Y. 156, 80 N. E. 1025.]

APPELLATE PROCEDURE—Effect of the Findings of the Appellate Division.—The reversal of a judgment by the appellate division upon questions of law only, the facts having been examined and no error of law found therein, means that the jury was justified in accepting as true in all instances of conflict in the testimony that which was most favorable to the respondent, and yet that the judgment could not be permitted to stand because that most favorable view of the testimony fell short of supporting the judgment. (pp. 834, 835.)

APPELLATE PROCEDURE—Questions Reviewable on an Appeal to the Court of Appeals from the Appellate Division.—If the appellate division reverses on questions of law only, declaring that the facts have been examined and no error of law found therein, and an appeal is taken from such reversal, the court of appeals can review questions of law only. (p. 835.)

NEGLIGENCE—Parent and Child.—It is not Negligence, as a Matter of Law, for parents to permit a child, six years of age, to go unattended on a public street which is crossed by two lines of tracks of a steam railway running nearly at a right angle to the street. (p. 835.)

NEGLIGENCE of Parent—When not Imputed to Child.—Though parents are guilty of negligence, such negligence is not imputed to their child, if it exercises such care as is required of an adult under similar circumstances. (p. 838.)

NEGLIGENCE in the Speed of a Railway Train in Cities.—In the absence of signals or safeguards by way of gates or flagmen, a speed of from fifteen to twenty miles an hour on a very abrupt curve at a much used crossing in a city is some evidence of negligence to submit to a jury. (p. 838.)

NEGLIGENCE.—A Child of Tender Years is not Required to Exercise the Same Degree of Care and Prudence in the presence of danger which is expected of an adult under like circumstances, but she should exercise such care and prudence as is commensurate with one of her age and intelligence. (p. 838.)

Am. St. Rep., Vol. 117—53 (833)

APPELLATE PROCEDURE—Weight of Evidence, or Excessiveness of Verdict.—The court of appeals of New York cannot, on an appeal from the appellate division, consider the weight of the evidence on questions relating to the excessiveness of a verdict. (p. 839.)

NEGLIGENCE, Contributory, When cannot be Held to Exist as a Matter of Law.—A plaintiff cannot be held guilty of contributory negligence as a matter of law when, being a child six years of age, she undertook to cross the tracks of a railway in a city at a point near where there was an abrupt curve, after first stopping and waiting for a train to pass, which produced much noise and confusion, and by its presence and the smoke and steam which it emitted obscured the view of another and approaching train by which she was injured. (p. 839.)

Udelle Bartlett and Thomas L. McKay, for the appellant.

Henry Purcell, for the respondent.

¹⁶⁰ CHASE, J. On the twenty-ninth day of December, 1902, the plaintiff was struck at the Willow street crossing in the city of Oswego by a locomotive attached to a passenger train owned and operated by the defendant. At the time of the accident she was less than six years of age. She brings this action to recover damages for her personal injuries. The fact that an accident occurred is not disputed, but the extent of the plaintiff's injuries and the responsibility of the defendant therefor are denied. The action has been tried twice. On the first trial the plaintiff recovered a verdict. The judgment entered thereon was reversed by the appellate division and a new trial ordered, "upon the ground that the verdict of the jury was against the weight of the evidence," one of the judges concurring in the result, "only upon the ground that the finding of the jury that the defendant was negligent was against the weight of the evidence": *Serano v. New York etc. R. R. Co.*, 102 App. Div. 621, 92 N. Y. Supp. 1145. On the second trial the plaintiff again recovered a verdict. On appeal from the judgment entered thereon the appellate division, by a divided court, reversed the judgment and ordered a new trial, "upon questions of law only, the facts having been examined and no error found therein": 114 App. Div. 684, 99 N. Y. Supp. 1103. The effect of such an order was considered by this court in *Albring v. New York etc. R. R. Co.*, 174 N. Y. 179, 66 N. E. 665, in which case the court say: "This order . . . means . . . that the appellate division reached the conclusion after examining all the evidence that the jury were justified in accepting as true

in all instances of conflict in testimony that which was most favorable to the plaintiff, and yet could not permit the judgment to stand because that most favorable view of the testimony fell short of supporting the judgment."

This court, as said in the case last mentioned, can review ¹⁶¹ the questions of law that were before the appellate division. Our review is confined to such questions. The plaintiff is the child of poor parents, who for three or four years prior to the accident lived a short distance from the crossing where the accident occurred. She was an intelligent child, and had attended school for about one year prior to the accident. She had been accustomed to cross the tracks of the defendant's road without attendants, and to play with other little girls in the locality of the crossing. She had been told by both her father and mother that in crossing the railroad tracks she should be very careful and look up and down the tracks before crossing to see if a train was coming.

It was not negligence as a matter of law for plaintiff's parents to permit her to go into the street: *Huerzeler v. Central C. T. R. R. Co.*, 139 N. Y. 490, 34 N. E. 1101. Her parents seem to have regarded her as possessing sufficient discretion so that she could go to school and upon errands and to play in the street unattended. She had sufficient mental and physical capacity so that prior to the day in question she had avoided accidents. The plaintiff was not sworn on the trial and the record does not disclose why she was crossing the defendant's tracks at the time when the accident occurred. The mother testified that plaintiff left the house ten or fifteen minutes before the time when she was brought to the house after the accident. At the crossing in question the defendant has east and west bound tracks. The general direction of the tracks is east and west, and Willow street crosses the tracks so as to make the southeasterly angle of the street line with the tracks about fifty-eight degrees. The locomotive that hit the plaintiff was going west on the west-bound, or northerly track. The tracks east of the crossing curve sharply to the right, and there is a bank with fences and buildings adjoining the railroad tracks on the south. The curve of the defendant's road is such that with an otherwise unobstructed view the engineer sitting on the box on the right side of his locomotive cannot see the crossing until within about forty feet of the same, and the fireman sitting on the

¹⁶² box on the left side of the locomotive, which is the inside of the curve, cannot see the crossing until within about one hundred feet of the same. It is not claimed that the whistle of the locomotive was blown until a moment before the accident, when it was blown at the same time that the emergency brakes were applied. The defendant claims that the bell had been ringing automatically since the train left the Oswego station, about one-half mile east of the crossing where the accident occurred. An east-bound train had passed over the southerly track of the defendant's road a moment before the accident. The engineer on the west-bound train testified that the locomotives of the two trains passed about one hundred or two hundred feet east of Willow street, and other witnesses confirm his estimate. The defendant claims that the plaintiff was not at the Willow street crossing, but that she was on the defendant's right of way, walking between the rails on the west-bound track about ten to twenty-five feet east of the crossing, and that the engineer and fireman of the defendant's west-bound train saw the plaintiff on the tracks as stated, facing west, when their locomotive was within twenty or twenty-five feet of the plaintiff, and that the train was then stopped as quickly as possible, and that the plaintiff as she was stepping off the track was struck by the locomotive and thrown into Willow street. Two other witnesses for the defendant corroborated the defendant's contention. Five witnesses for the plaintiff testified that the plaintiff was on the easterly sidewalk of Willow street, going toward the crossing, and that when she arrived within a few feet of the east-bound track she stopped and waited for the east-bound train to pass, and when it had passed so that the rear of the train was from twelve to seventy-five feet east of the crossing she proceeded across the tracks. The distance between the east and west bound tracks is eight feet. One witness for the plaintiff, who saw the accident, testified that the plaintiff walked slowly, and when she came to the middle between the east-bound and west-bound tracks that she looked both ways, and that when she came to the last track she ¹⁶³ looked the way from which the train was coming and was then struck. Another witness for the plaintiff, who saw the accident, testified that after the east-bound train had passed about seventy-five feet, the plaintiff looked east and started across the track and was then struck. The defendant's engineer and fireman and eleven other witnesses, all of whom were on the train,

with two exceptions, and eight of whom were defendant's employés, testified that the bell on the locomotive was rung. The plaintiff produced five witnesses who were in the vicinity of the crossing, who testified, in substance, that they were in a position where they could hear the bell if rung and that they listened for it, but it was not rung, and that no signal of any kind was given. Other witnesses for the plaintiff testified that they did not hear any signals. Eleven witnesses for the defendant, all but two of whom were upon the train, and a majority of whom were the defendant's employés, testified that the train was running at a speed of from six to eight miles an hour. The plaintiff produced four witnesses, each of whom were in a position where they could observe the train, and one of them testified that the train was running fifteen miles an hour; one that it was running twenty miles an hour, and two that it was running from twenty to twenty-five miles an hour. The train was running upgrade, with only twelve or fifteen passengers, and the emergency brakes were fitted to all of the wheels of the train and the train was stopped, as the jury could have found, in about two hundred and twenty feet from where the brakes were first applied. One other fact that the jury could have considered in determining the defendant's negligence and the plaintiff's freedom from contributory negligence, relates to the steam and smoke from the east-bound train that it is claimed concealed the west-bound train. Defendant's engineer testified, in referring to his seeing the plaintiff on track: "I couldn't see her sooner because there was a very sharp curve there. The curve and the approaching train—some steam from the approaching train—but the curve had the most to do hiding my view from her." And he further ¹⁰⁴ testified: "I saw steam from the other engine, the east-bound engine, as I approached the Willow street crossing, and this girl; it settled; it blew across the west-bound tracks; it cleared up as we approached the girl." The baggage-man, who, after the danger signal was given, opened the door of his baggage-car on the left-hand side and looked toward the locomotive of his train, testified: "Observed nothing on account of the smoke and steam escaping from the train that we met there." A passenger referring to the east-bound train said: "I didn't see the east-bound train because the steam and smoke came in between the trains." And another that "The smoke and steam from that train going down the eastbound interfered

with my view ahead prior to my seeing the girl and the curve itself." Of the two witnesses sworn for the defendant who were not on the train, one, who was west of the crossing, testified: "When the east-bound train went by there was smoke and steam from that point," and the other who was on the west side of the crossing testified, referring to the girl and how she was dressed: "I couldn't tell at that time, the smoke and steam from the other train was coming down."

All of the questions involved in the trial, including the question as to whether the plaintiff was *sui juris* or not, and as to the imputed negligence of the plaintiff's parents, were left to the jury in a charge to which, except as hereafter mentioned, there was no exception and in which the court granted all of the numerous requests to charge made by the defendant's counsel. The defendant excepted to a statement by the court that if the jury found that the plaintiff exercised such care as is required of an adult under similar circumstances, that any negligence on the part of the parents was not imputable to the child, and to the charge of the court that if the jury found the speed of the train was from fifteen to twenty-five miles an hour, and they also found that to be a dangerous and excessive rate of speed in the locality of this crossing that they might then find the defendant guilty of negligence.

¹⁶⁵ We find no error in the charge of the court. If a child is capable of exercising the care that is required of an ordinarily prudent person of full age, and such child does exercise such care, the suggestion of negligence on the part of the parents imputable to the child is wholly negatived. The imputed negligence of the parents is wholly based upon the inability of the child to exercise the care and prudence of an adult.

In the absence of signals or safeguards by way of gates or flagmen, a speed of from fifteen to twenty-five miles an hour around a very abrupt curve at a much-used crossing in a city is some evidence to submit to a jury on the question of defendant's negligence: *Zwack v. New York etc. R. R. Co.*, 160 N. Y. 362, 54 N. E. 785.

A child of tender years is not required to exercise the same degree of care and prudence in the presence of danger which is expected and required of an adult under like circumstances, but she is required to exercise such care and prudence as is commensurate with one of her age and intelligence: *Wendell*

v. New York etc. R. R. Co., 91 N. Y. 420; *Zwack v. New York etc. R. R. Co.*, 160 N. Y. 362, 54 N. E. 785; *Costello v. Third Ave. R. R. Co.*, 161 N. Y. 317, 55 N. E. 897; *Byrne v. New York etc. R. R. Co.*, 83 N. Y. 620; *McGovern v. New York etc. R. R. Co.*, 67 N. Y. 417; *Thurber v. Harlem etc. R. R. Co.*, 60 N. Y. 326; *Berry v. New York etc. R. R. Co.*, 92 N. Y. 289, 44 Am. Rep. 377.

The opinion of the court in the appellate division concedes that the record discloses a conflict of fact upon all the questions involved between the parties, except the question as to whether the plaintiff was guilty of contributory negligence. In its opinion, referring to the defendant's negligence, the court say that, "By far the greater weight of evidence is to the effect that the speed was not excessive and that the bell was ringing as the train approached the crossing." And also, referring to the amount of the verdict, the court say: "The verdict for the plaintiff on the first trial upon the same evidence as to damages was six hundred dollars, and upon this five thousand dollars. It is grossly excessive."

¹⁶⁶ The evidence on the former trial is not before us, but even if it were, and we were inclined to agree with the appellate division as to the weight of the testimony relating to the defendant's negligence, and as to the amount of the verdict, this court cannot consider the weight of evidence or questions relating to an excessive verdict: *Dimon v. New York etc. R. R. Co.*, 173 N. Y. 356, 66 N. E. 1.

As we have stated, we can only consider whether the reversal of the judgment entered upon the verdict should be sustained as a matter of law. We cannot agree with the appellate division in holding as a matter of law that the plaintiff was guilty of contributory negligence. In view of the plaintiff's age; the peculiar danger arising from the abrupt curve in the defendant's road; the noise and confusion produced by the east-bound train; the extent to which the view to the east was obscured by the train going east; and the smoke and steam therefrom, it made the plaintiff's negligence, under all the circumstances and testimony disclosed by the record, a question of fact which was properly submitted to the jury.

The distinction between the facts in this case and those in cases like *Weiss v. Metropolitan Street Ry. Co.*, 33 App. Div. 221, 53 N. Y. Supp. 449, affirmed, 165 N. Y. 665, 59 N. E. 1132, *McCarthy v. New York etc. R. R. Co.*, 37 App. Div.

187, 55 N. Y. Supp. 1013, *Wendell v. New York etc. R. R. Co.*, 91 N. Y. 420, is apparent upon their recital.

There was some evidence upon each of the questions at issue which required that all of the issues involved in the action be submitted to the jury for their determination.

We have examined the exceptions to the admission and rejection of evidence and do not find any error in the rulings of the court which justified the reversal by the court below.

The order of the appellate division should be reversed and the judgment entered upon the verdict affirmed, with costs in all the courts.

Cullen, C. J., Edward T. Bartlett, Haight and Willard Bartlett, JJ., concur.

Gray and Hiscock, JJ., not sitting.

Order reversed, etc.

Negligence in Dealing With Children is the subject of a note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 406. The negligence of a parent is not, according to the better rule, imputable to his child: *Mattson v. Minnesota etc. R. R. Co.*, 95 Minn. 477, 111 Am. St. Rep. 483; *Hampel v. Detroit etc. R. R. Co.*, 138 Mich. 1, 110 Am. St. Rep. 275, and note on imputed negligence. As to the degree of care which will be exacted of children while in the public streets, see *Young v. Small*, 188 Mass. 4, 108 Am. St. Rep. 457; *Lee v. Jones*, 181 Mo. 291, 103 Am. St. Rep. 596. Generally speaking, a child is held to that degree of care and prudence reasonably to be expected of children of his age. But they are not held to a higher degree than this: *McDermott v. Boston Elevated Ry. Co.*, 184 Mass. 126, 100 Am. St. Rep. 548; *Buechner v. New Orleans*, 112 La. 599, 104 Am. St. Rep. 455. As to whether it is negligence for a parent to permit his children to go unattended in the public street, or near or upon railway tracks, see the note to *Hampel v. Detroit etc. R. R. Co.*, 110 Am. St. Rep. 285.

It is the Duty of a Railway Company running trains through a populous city to use ordinary care to regulate the speed of the train, so as not to injure anyone, and a failure to exercise such care is common-law negligence: *Haley v. Missouri Pac. Ry. Co.*, 197 Mo. 15, 114 Am. St. Rep. 743.

SHERRILL v. O'BRIEN.

[188 N. Y. 185, 81 N. E. 124.]

CONSTITUTIONAL LAW.—The Authority of the Judicial Department Both of the State and of the National Government to Determine the Validity of Legislative Acts is no longer an open question. (p. 844.)

CONSTITUTIONAL LAW.—The Authority of the Supreme Court of New York to Consider and Determine the Validity of an Apportionment Act dividing the state into senatorial districts is expressly conferred by the constitution of that state. (p. 844.)

APPELLATE PROCEDURE.—Authority of the Court of Appeals of New York to Determine Questions of Legislative Apportionment.—The constitution of the state of New York having given its supreme court authority to review legislative apportionments, the action of that court is the subject of further review by the court of appeals by virtue of the general grant of authority to it to review orders made by the supreme court finally determining special proceedings, but is restricted to the determination of questions of law only. (pp. 844-846.)

CONSTITUTIONAL LAW.—Review by the Courts of Legislative Apportionments.—The courts have jurisdiction to determine whether or not an act of apportionment is in conflict with the limitations of the constitution, and if such conflict is found, to declare the act void. (p. 846.)

CONSTITUTIONAL LAW.—Legislative Apportionments, Cases in Which Reviewable by the Courts.—The courts may review legislative action in reapportioning the state (1) when the question to be determined on the appeal is as to whether the legislature has obeyed the mandatory provisions of the constitution, and (2) when the legislature, though assuming to exercise a discretion extended to it, does a thing which is a mere exercise of arbitrary power, and which, in view of the provisions of the constitution, is beyond all reasonable controversy a gross and deliberate violation of the plain intent of the constitution and a disregard of its spirit and the purpose for which express limitations were inserted therein. (pp. 846, 847.)

CONSTITUTIONAL LAW.—The Authority of the Representatives in the Legislature is a Delegated Authority and is wholly derived from, and dependent upon, the constitution, but, having been granted in general terms by the constitution, is absolute and unlimited, except as restricted therein. (p. 847.)

CONSTITUTIONAL LAW.—Legislative Apportionment, Principles Which Should Control.—Under the several constitutions at various times in force in New York equal representation in proportion to the population has been and is a cardinal principle which should control legislation in reapportioning the state. (p. 850.)

CONSTITUTIONAL LAW.—Interpretation of Constitution by Aid of Proceedings in the Constitutional Convention.—The courts may properly look, when construing the constitution, to proceedings in the convention proposing it. (p. 852.)

CONSTITUTIONAL LAW.—Apportionment Legislation, Limitations upon.—As the discretion of the legislature respecting the relative number of inhabitants in a Senate district arises from necessity, it should cease where the necessity for discretion ends. (p. 854.)

CONSTITUTIONAL and Statutory Construction.—Where a Word in the Amendment or Re-enactment of a Constitution or Statute is Omitted, the omission must be assumed to have been intentional. (p. 854.)

CONSTITUTIONAL LAW—Legislative Apportionment.—Every provision of the constitution which allows any discretion by the legislature in apportionment must, to some extent, be affected and controlled by every other provision of the constitution, but in the division of the state into senatorial districts, matters of mere convenience and individual taste are not subjects for consideration. (p. 854.)

CONSTITUTIONAL LAW—Apportionment—Legislative Extent of Discretion with Respect to Senate Districts.—The legislature, in dividing the state into senate districts, must make as close an approximation to equality in the number of inhabitants as reasonably possible in view of the other constitutional provisions, and such approximation is the limit of legislative discretion. (p. 854.)

CONSTITUTIONAL LAW—Apportionment Legislation.—The words "contiguous thereto," as used in the constitution in providing for apportionment legislation, do not mean near by or in the neighborhood or locality of, but territory touching, adjoining and connected, as distinguished from territory separated, by other territory. (p. 854.)

CONSTITUTIONAL LAW—Apportionment of Senate Districts, Each County, When Entitled to One.—Every county having a citizen population in excess of the ratio required for a Senate district is entitled by the constitution to at least one senator without being joined with any other county. (pp. 856, 857.)

CONSTITUTIONAL LAW—Apportionment Legislation.—Under a constitution requiring Senate districts to be in as compact a form as practicable, an apportionment statute may be declared unconstitutional because a Senate district as provided for therein is not reasonably compact. (pp. 857, 858.)

CONSTITUTIONAL LAW—Apportionment Legislation, When may be Declared Wholly Void.—If under an apportionment statute its provisions concerning two Senate districts must be declared void, the whole statute must also be adjudged unconstitutional and void. (p. 858.)

CONSTITUTIONAL LAW—De Facto Legislature.—The acts of a de facto legislature, so long as its members remain actual incumbents of their offices, are valid. (pp. 850, 851.)

CONSTITUTIONAL LAW—Legislative Apportionment, Effect of Declaring Unconstitutional.—If a legislative apportionment is pronounced unconstitutional, the next general election at which members are chosen must be held under the pre-existing statute, unless in the bents of their offices, are valid. (pp. 858-861.)

Proceedings by mandamus for the purpose of obtaining an order directing the Secretary of State to transmit to the county clerk of each county and to the board of elections of the city of New York election notices as provided by the election law, and to embrace in such notices the number of senators and members of assembly to be voted for at the election to be held in November, 1906, under the apportionment contained in the constitution of the state, and not according to the apportionment contained in chapter 431 of

the laws of 1906. The applications were denied in the appellate division and appeals were taken to the court of appeals. By the statute of 1906, thus assailed, the state was divided into fifty-one Senate districts, and provision was also made for the number of assemblymen to be elected in each county. Prior to the passage of this act, an enumeration of the inhabitants of the state had been made, as provided in the constitution of 1894. The Senate districts as provided for exhibited wide variances in the number of inhabitants therein, district No. 42 containing less than 98,000, and district No. 38 nearly 170,000. The following diagram of the county of New York shows the island of Manhattan from Thirty-third street southerly and its division into districts.



Eugene Lamb Richards, Jr., William Allaire Shortt, Elon R. Brown, Edward B. Whitney, Robert Grier Monroe, Julius M. Mayer, James G. Graham and Merton E. Lewis, for the appellants.

William S. Jackson, attorney general, and George P. Decker, for the respondent.

¹⁹⁵ CHASE, J. The validity of the so-called apportionment act of 1906 is assailed, and it is claimed that some of its provisions relating to the division of the state into senatorial districts are contrary to express constitutional provision, and that other provisions thereof constitute such an arbitrary use of alleged discretionary power as to be wholly invalid and void. The power of this court to review the questions involved in the relator's claim should be first considered.

In the United States the general power and authority of the judicial department of the federal and of the state governments to determine the constitutional validity of legislative acts applicable to and involved in a pending controversy is not now open to question. It is also expressly provided by section 5 of article 3 of our state constitution of 1894 that an apportionment by the legislature or other body "shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe; and any court before which a cause may be pending involving an apportionment shall give precedence thereto over all other causes and proceedings, and if said court be not in session it shall convene promptly for the disposition of the same."

This constitutional provision is new, and it was intended to and does set at rest any further claim that the legislature in passing an act reapportioning the state for legislative purposes is so far exercising a political, as distinguished from a legislative power that its action cannot be reviewed by the courts. The jurisdiction of the supreme court of this state to review an apportionment by the legislature or other body is now express, but the jurisdiction to review such an act of apportionment is not expressly given by constitution to this court. The jurisdiction of this court to review the orders appealed from is the general jurisdiction of the court to review actual determinations made by the appellate division of the supreme court of ¹⁹⁶ orders finally determining special proceedings (Const., art. 6, sec. 9; Code Civ. Proc., sec. 190), and the jur-

isdiction of the court is limited to the review of questions of law: Const., art. 6, sec. 9; Code Civ. Proc., sec. 191, subd. 3. The determination of every question of law involved in the appeals is within the jurisdiction of this court.

In the opinion of Judge Andrews in *People v. Rice*, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836, referring to the jurisdiction of this court in determining the constitutionality of the apportionment act of 1892 (Laws 1902, c. 397), he said: "I shall not undertake to show that the question presented is of judicial cognizance. That it is a judicial question cannot under the authorities be denied. The legislature and the courts are alike bound to obey the constitution, and if the legislature transgresses the fundamental law and oversteps in legislation the barriers of the constitution, it is a part of the liberties of the people that the judicial department shall have and exercise the power of protecting the constitution itself against infringement. The power of the courts to set aside an unconstitutional apportionment has quite recently been asserted and exercised by the courts of Wisconsin and Michigan: *State v. Cunningham*, 82 Wis. 39, 51 N. W. 1133; *Giddings v. Blacker*, 93 Mich. 1, 52 N. W. 944, 16 L. R. A. 402; *Supervisors of Houghton County v. Blacker*, 92 Mich. 638, 52 N. W. 951, 16 L. R. A. 432."

Although the language quoted is taken from a dissenting opinion, the opinion of the court by Judge Peckham does not deny the power of the court to review an act of apportionment, but it says (page 501): "We think that the courts have no power in such case to review the exercise of a discretion intrusted to the legislature by the constitution unless it is plainly and grossly abused. . . . We do not intimate that in no case could the action of the legislature be reviewed by the courts. Cases may easily be imagined where the action of that body would be so gross a violation of the constitution that it could be seen that it had been entirely lost sight of and an intentional disregard of its commands both in the letter and in the spirit had been indulged in."

¹⁹⁷ And Judge Gray, in his concurring opinion in the same case (page 510), says "But if any provision of the fundamental law of the state intended to secure the equal representation of its citizens in the legislative department has been violated by the act in question, it is then properly the duty of the judicial department of power to declare it unconstitutional and therefore void. The judiciary has a duty to pro-

nounce all legislative acts null which are contrary to the manifest tenor of the constitution of the state."

The jurisdiction of this court was again considered in *Baird v. Board of Supervisors of the County of Kings*, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81, which involved the division of the county of Kings into assembly districts as provided by said chapter 397 of the Laws of 1892, and this court held that the division that had been made was not a constitutional division, and the court, among other things, said: "The proper discharge of the duty of division by the board implies considerable discretion in the formation of the various districts. The discretion exercised must be an honest and a fair discretion arising out of the circumstances of the case and reasonably affecting the exercise of the power of equal division."

Since the constitution of 1894 the case of *Smith v. Board of Supervisors of St. Lawrence Co.*, 148 N. Y. 187, 42 N. E. 592, has been before this court, and it was said that "Each case must be decided on its peculiar facts, and the courts can be relied upon at all times to enforce the constitution in its letter and spirit."

The courts have jurisdiction to determine whether or not an act of apportionment is in conflict with the limitations fixed by the constitution, and if such conflict is found to exist, to declare the act void: 2 Am. & Eng. Ency. of Law, 2d ed., p. 485, and cases cited. It appears, therefore, that the courts can review legislative action in reapportioning the state, and that on an appeal to this court jurisdiction should be entertained.

1. Where the question to be determined on the appeal is as¹⁰⁸ to whether the legislature has obeyed a mandatory provision of the constitution, in which case a question of law is presented for the determination of this court.

2. Where by the constitution some discretion is vested in the legislature, this court cannot inquire into the motives of the legislators in exercising such discretion and voting for a particular plan of apportionment, and it cannot inquire into the relative merits of several plans to choose from which requires the exercise of sound judgment and judicial discretion. But if the legislature under the assumption of an exercise of discretion does a thing which is a mere assumption of arbitrary power, and which, in view of the provisions of the constitution, is beyond all reasonable controversy, a gross

and deliberate violation of the plain intent of the constitution and a disregard of its spirit and the purpose for which express limitations are included therein, such act is not the exercise of discretion but a reckless disregard of that discretion which is intended by the constitution. Such an exercise of arbitrary power is not by authority of the people. It is an assumption and when it is claimed that an act is thus in violation of the constitution, a question of law is presented for the determination of this court.

A legislative apportionment act cannot stand as a valid exercise of discretionary power by the legislature when it is manifest that the constitutional provisions have been disregarded any more than an order of the appellate division can create a question of fact by declaring that there is one when no question of fact exists: See *Matter of Totten*, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711, and *Penryhn Slate Co. v. Granville Elec. etc. Power Co.*, 181 N. Y. 80, 73 N. E. 566. Any other determination by the courts might result in the constitutional standards being broken down and wholly disregarded.

We have seen that an apportionment may be such as to require that the act be declared invalid and void as a matter of law. Let us look, then, to the authority of the legislature.

The people are vested with the supreme and sovereign authority. The constitution is the voice of the people speaking ¹⁹⁹ in their sovereign capacity: *Matter of New York Elevated R. R. Co.*, 70 N. Y. 327.

An act of the legislature is the voice of the people speaking through their representatives. The authority of the representatives in the legislature is a delegated authority, and it is wholly derived from and dependent upon the constitution.

By our first constitution, adopted April 20, 1777, it is provided "That the supreme legislative power within this state shall be vested in two separate and distinct bodies of men; the one to be called the assembly of the state of New York; and the other to be called the Senate of the state of New York; who, together, shall form the legislature": Sec. 2.

Our constitution, adopted November 6, 1894, provides that "The legislative power of this state shall be vested in the Senate and assembly": Art. 3, sec. 1. The general legislative power is absolute and unlimited except as restrained by constitution: *Bank of Chenango v. Brown*, 26 N. Y. 467;

People v. Flagg, 46 N. Y. 401. It will be observed, however, that no general power is by the constitution vested in the legislature, to change or modify the number of its members or the districts from which they are to be elected. The constitution has always included special provisions relating thereto, and such special provisions constitute the full authority of the legislature. It is the authority of the legislature over itself that we must examine and study to aid in determining the questions before us.

By the constitution of 1777 it was provided that the Senate should consist of twenty-four freeholders. Section 12 provided: "That the election of senators shall be after this manner: That so much of this state as is now parceled into counties be divided into four great districts: the southern district to comprehend That the senators shall be elected by the freeholders of the said districts, qualified as aforesaid, in the proportions following, to wit: In the southern district, nine. . . . And be it ordained, that a census shall be taken as soon as may be after the expiration of seven years from the termination of the present war, under the direction ²⁰⁰ of the legislature; and if, on such census, it shall appear that the number of senators is not justly proportioned to the several districts, that the legislature adjust the proportion, as near as may be, to the number of freeholders, qualified as aforesaid, in each district. . . . And be it ordained, that it shall be in the power of the future legislatures of this state, for the convenience and advantage of the good people thereof, to divide the same into such further and other counties and districts, as shall to them appear necessary."

In the section of the constitution (section 5) relating to assemblymen, after providing for the census, it further provides: "And if on such census it shall appear that the number of representatives in assembly from the said counties is not justly proportioned to the number of electors in the said counties respectively, that the legislature do adjust and apportion the same by that rule."

The constitutional amendments of 1801 retained directions that senators and assemblymen should be apportioned "As nearly as may be according to the number of electors," but no further general limitations were placed upon the legislative power of apportionment.

By the constitution of 1821 the state was divided into eight Senate districts. It was therein further provided (article 1,

section 6) that "An enumeration of the inhabitants of the state shall be taken, under the direction of the legislature, in the year one thousand eight hundred and twenty-five, and at the end of every ten years thereafter; and the said districts shall be so altered by the legislature, at the first session after the return of every enumeration, that each Senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens, paupers and persons of color not taxed; and shall remain unaltered, until the return of another enumeration, and shall at all times consist of contiguous territory; and no county shall be divided in the formation of a Senate district."

By the constitution of 1846 the state was divided into thirty-two Senate districts to correspond with the number of ²⁰¹ senators to be elected. And it was therein further provided (art. 3, sec. 4) that "An enumeration of the inhabitants of the state shall be taken, under the direction of the legislature, in the year one thousand eight hundred and fifty-five, and at the end of every ten years thereafter; and the said districts shall be so altered by the legislature, at the first session after the return of every enumeration, that each Senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens, and persons of color not taxed; and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory; and no county shall be divided in the formation of a senate district, except such county shall be equitably entitled to two or more senators."

The constitution adopted November 6, 1894, divided the state into fifty districts, and it further provided by article 3, section 4, as follows: "An enumeration of the inhabitants of the state shall be taken under the direction of the Secretary of State during the months of May and June, in the year one thousand nine hundred and five, and in the same months every tenth year thereafter; and the said districts shall be so altered by the legislature at the first regular session after the return of every enumeration, that each Senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable, and shall remain unaltered until the return of another enumeration, and shall at all times, consist of contiguous territory, and no county shall be divided in the forma-

tion of a Senate district except to make two or more Senate districts wholly in such county. No town, and no block in a city inclosed by streets or public ways, shall be divided in the formation of Senate districts; nor shall any district contain a greater excess in population over an adjoining district in the same county, than the population of a town or block therein adjoining such district. Counties, towns or blocks which, from their location may be included in either of two districts, shall be so placed as to ²⁰² make said districts most nearly equal in number of inhabitants, excluding aliens.

"No county shall have four or more senators unless it shall have a full ratio for each senator. No county shall have more than one-third of all the senators; and no two counties or the territory thereof as now organized, which are adjoining counties, or which are separated only by public waters, shall have more than one-half of all the senators."

In a true representative government every person should be equally represented in its legislative bodies. Exact representation requires that every senator and every assemblyman shall represent the same number of people. The maintenance of county, town and block lines and other practical considerations, recognized by and provided for in the constitution, makes mathematical exactness in the division of the state into senate and assembly districts impossible. Because of the necessity of slight variations in the number of inhabitants in districts formed in accordance with the directions of the constitution, it has always provided in substance for a division as nearly as may be in accordance with the number of inhabitants. The quotations that we have made from our first constitution, and from the subsequent amendments thereto and changes therein show that equal representation in proportion to population has been the cardinal and underlying principle to which it has always pointed in directing and authorizing the legislature to reapportion the state.

The direction to the legislature that the senators be apportioned "as near as may be to the number of freeholders" is the only limitation on the power of apportionment contained in the first constitution and the amendment of 1891. The very purpose of a decennial census provided for in the several constitutions of the state has been to adjust differences in population which arise from changes in places of abode or increase in the number of inhabitants, and thus from time to

time to make representation in the legislature more nearly ideal.

By the second constitution of 1821 a new limitation was ²⁰³ placed upon the power of the legislature in the matter of apportionment by which it is provided that senatorial districts "shall at all times consist of contiguous territory." Substantially the same limitations were included in the third constitution of 1846. Prior to the constitutional convention of 1894 much controversy had arisen in the state about the possibility of unfair divisions of the state into Senate and assembly districts, so as to result in party or individual advantage. The apportionment of 1879 (Laws 1879, c. 208) was criticised; the enumeration of the inhabitants provided for in 1885 was delayed; and the apportionment of the state in 1892 (Laws 1892, c. 397), which was carried by vote of a majority of the legislature representing a different political party than the majority in 1879, was also criticised, and the act was challenged in the courts as not being in accordance with the letter and spirit of the constitution. At least three proceedings were commenced which had for their purpose a judicial determination of the constitutionality of the act of 1892. The decisions in the general term of the supreme court in such proceedings were conflicting. From orders in each of the proceedings an appeal was taken to this court and the decisions are reported under the title of *People v. Rice*, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836, in which case the question before the court was summed up in the prevailing opinion in these words: "The sole question now is whether the legislative discretion has been so far abused as to render the act liable to an overthrow by the courts." The conclusion of a majority of the court was that the "act of 1892 successfully withstands all assaults upon it and is a valid and effective law." A dissenting opinion by Judge Andrews was concurred in by Judge Finch. Thereafter and before the constitutional convention of 1894 another proceeding came before this court (*Baird v. Supervisors of the County of Kings*, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81), and it was held that the division of the county of Kings into assembly districts had been made in disregard of the principles of equal representation and contrary to the constitution. The decision in the *Baird* case was an exercise of jurisdiction by ²⁰⁴ this court and a determination that the constitutional provisions in regard to equality of representation had been disobeyed,

although section 5 of article 3 of the constitution at that time, as amended by a vote of the people November 3, 1874, provided for a division of the "respective counties into assembly districts, each of which districts shall consist of convenient and contiguous territory."

In 3 Lincoln's Constitutional History of New York, page 135, he calls attention to the opening address of the president of the convention, and commenting thereon he says: "The subject was doubtless given this precedence both on account of its intrinsic importance and also because of the unsatisfactory results of the apportionment of 1892, and the evident necessity of formulating rules which would prevent a repetition of inequitable apportionments and insure proportionate representation of population according to strict mathematical computation so far as consistent with other rules of limitation based on specified territorial divisions."

Referring again to the apportionment of 1892 he says (page 203): "Like many other events which have been noticed in these studies, it was a history-making statute and was the immediate occasion of important constitutional changes."

Again he says (page 218): "The apportionment of 1892 was frequently referred to in the course of debate. Its inequalities and the possibilities under the existing constitution, as shown by a decision in the Carter case (135 N. Y. 473, 31 N. E. 921), were considered a sufficient reason for including in the constitution rules which would make impossible a repetition of that statute."

These statements are fully justified by a perusal of the proceedings of the convention relating to the subject of apportionment, to which proceedings we can look when judicially construing the constitution: *People v. Supervisors of Westchester Co.*, 147 N. Y. 1, 41 N. E. 563, 30 L. R. A. 74; *Matter of Keymer*, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447.

This court, in *Smith v. Board of Supervisors of St. Lawrence Co.*, 148 N. Y. 187, 42 N. E. 592, said: "The evil sought to be ²⁰⁵ remedied by the new constitution was to prevent those gross discrepancies in apportionment and representation that had long been a public scandal and a reproach to the good name of the state." With that end in view, the constitution of 1894 includes the following mandatory provisions in regard to Senate districts:

1. Shall at all times consist of contiguous territory.

2. No county shall be divided in the formation of a Senate district except to make two or more Senate districts wholly in such county.

3. No town and no block in a city inclosed by streets or public ways shall be divided in the formation of Senate districts.

4. Nor shall any district contain a greater excess in population over an adjoining district in the same county than the population of a town or block therein adjoining such district.

5. No county shall have four or more senators unless it shall have a full ratio for each senator.

6. No county shall have more than one-third of all the senators.

7. No two counties or the territory thereof as now organized, which are adjoining counties or which are separated only by public waters, shall have more than one-half of all the senators.

In addition to these mandatory provisions it directs:

1. Each Senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens.

2. Be in as compact form as practicable.

3. Counties, towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens: *Smith v. Board of Supervisors of St. Lawrence Co.*, 148 N. Y. 187, 42 N. E. 592.

In view of these limitations this court, in *Re Smith v. Board of Supervisors*, 148 N. Y. 187, 42 N. E. 592, said: "We feel assured that the people of the state can never again be subjected to those inequalities of apportionment and representation which gave rise to some of the present constitutional provisions so long as ²⁰⁶ the maximum excess in the population of the district is limited by mandatory provision to the population of a town adjoining such assembly district and the discretion exercised within that narrow limit is subject to the supervision of the courts." These words were used with reference to a division of counties into assembly districts.

Can it be doubted that in view of the history of constitutional changes in regard to legislative apportionment which shows a gradual withdrawal from the legislature of discretionary power and a continued adding of limitations upon their power relating thereto, and in view of the clear intention of the constitutional convention of 1894 and of the people in adopting the constitution, that this court should now hold

that the minimum of discretion necessary to preserve county and other lines and to give reasonable consideration to the other provisions of the constitution is left to the legislature?

As the discretion of the legislature relating to the relative number of inhabitants in Senate districts arises from necessity it should cease where the necessity for discretion ends. In the section of the constitution relating to assemblymen (article 3, section 5) it is provided that in any county entitled to more than one member of assembly the board of supervisors, and in any city embracing an entire county and having no board of supervisors the common council, shall "Divide such counties into assembly districts as nearly equal in number of inhabitants, excluding aliens, as may be, of convenient and contiguous territory in as compact form as practicable."

The word "convenient" is omitted in directing the legislature in regard to a division of the state into Senate districts. We must assume that it was intentionally omitted: *Roosevelt v. Godard*, 52 Barb. 533.

Every provision of the constitution which allows any discretion by the legislature in apportionment must, to some extent, be affected and controlled by every other provision of the constitution, but in the division of the state into Senate districts matters of mere convenience and individual taste are not subjects for consideration.

²⁰⁷ While we recognize the binding force of the *Carter* case as applied to the facts then before the court, and in the construction of the constitution as it then existed, we are of the opinion that the constitution as it now exists should be construed so as to require that the legislature in dividing the state into Senate districts make as close an approximation to exactness in number of inhabitants as reasonably possible in view of the other constitutional provisions, and that such approximation is the limit of legislative discretion.

In construing the language of the constitution as in construing the language of a statute, the courts should look for the intention of the people and give to the language used its ordinary meaning. The ordinary and plain meaning of the words "contiguous territory" is not territory near by, in the neighborhood or locality of, but territory touching, adjoining and connected, as distinguished from territory separated by other territory.

Richmond county is not contiguous to Queens county within the meaning of contiguous as thus defined. Although Rich-

mond county by its statutory boundaries adjoins the county of Kings, the latter county by its statutory boundaries intervenes between the county of Richmond and the county of Queens. Richmond county, never having had a population sufficient to entitle it to a senator, has by reason of its insular situation been peculiarly situated. The people, by constitution and by acts of the legislature, have treated it as an exception to the mandatory provision of the constitution in regard to contiguity, and because it has been necessary it has been joined in Senate districts with counties whose actual and statutory boundaries do not touch or adjoin it.

The mandatory provision in regard to contiguity of territory comprising a Senate district has been in the constitution since 1821. By the constitution of 1846 the county of Richmond was joined with the counties of Suffolk and Queens to constitute the first Senate district. By chapter 339 of the Laws of 1857, by which the Senate districts of the state were changed by the legislature, said counties were joined to constitute ²⁰⁸ the first Senate district. By chapter 805 of the Laws of 1866 the legislature again joined these counties to make the first Senate district. Although in 1879 Richmond county was joined with a part of the county of New York and in 1892 with a part of the county of Kings, the constitution of 1894 joined the counties of Richmond and Suffolk to make the first Senate district. By reason of a new constitutional provision the county of Richmond cannot now be joined to a part of either New York or Kings counties to make a Senate district. In view of the construction placed on the constitution by constitutional and legislative provisions, it should be held that the county of Richmond is exempt from the constitutional provision requiring that Senate districts be composed of contiguous territory. The exception, however, should not be made more general than is required from the constitutional and legislative precedents. It nowhere appears by the constitution of 1846 or 1894 that it was intended that the county of Richmond should be so generally exempt from its provision in regard to contiguity of territory that it could be by statute joined with any of the other counties of the state to make a Senate district. The absurdity of joining Richmond county with some of the interior counties of the state to make a Senate district is apparent upon a mere suggestion of such possibility. It should not be joined with a county other than one like itself bounded on the Atlantic ocean or with a

county bounded on the Hudson river which is sufficiently near to Richmond county so that a Senate district so formed would be as far as possible within the letter and spirit of the constitutional provision requiring that Senate districts shall "be in as compact form as practicable."

We do not think that the legislature violated the mandatory provision of the constitution relating to contiguity of territory by joining the county of Richmond with the county of Queens.

The citizen population of the state as shown by the enumeration of 1905 was 7,062,988. Dividing this number by 50, as provided by the constitution, gives a ratio of 141,259 ²⁰⁰ for apportioning senators. With such ratio it appears that the county of New York was entitled to twelve senators; the county of Kings to eight, and the county of Erie to three, in which counties the average citizen population to a district would be respectively 150,024, 147,347 and 146,192, and the county of Kings was entitled to one senator more than the number specifically provided therefor by the constitution as adopted in 1894, and under the new constitutional provision it increased the full number of senators in the state from fifty to fifty-one. Deducting from the entire citizen population of the state the citizen population of the counties of New York, Kings and Erie, there remains a citizen population in the other counties of the state of 3,645,337, which divided by twenty-eight, the number of senators outside of the counties of New York, Kings and Erie, gives a ratio for each senatorial district of 130,190. The counties other than New York, Kings and Erie having a citizen population in excess of the ratio for apportioning senators are Queens, Westchester, Albany, Rensselaer, Oneida, Onondago and Monroe. Each of these counties having a citizen population in excess of the ratio is entitled by any just and reasonable construction of the constitution to at least one senator: *State v. Cunningham*, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561; *Parker v. State*, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567.

The minimum rights of such counties were determined by the enumeration, and they could not be taken away by an exercise of discretion by the legislature, at least unless the geographical position of some small county was such as to make it absolutely necessary that it be joined with some one of such counties. No such absolute necessity required that Richmond county be joined to Queens county or to any other

county having its full ratio. Joining Richmond county to Queens county to make the second senatorial district was an exercise by the legislature of arbitrary power not authorized by the constitution. If Richmond county should be joined to Nassau county it would not make a citizen population ²¹⁰ equal to the ratio, and even if the peculiar position of those island counties would allow the legislature in its discretion to join the counties of Richmond, Nassau and Suffolk in one Senate district the combined citizen population of such counties would be but 203,616. The relative citizen population of the first and second Senate districts as provided by the act is 137,175 to 246,187, and between the first and second districts, if the first was composed of the three counties stated and the second of Queens county alone, would be 203,616 to 179,746 or a difference in favor of equality between the first and second senatorial districts of 85,142. The rights of Queens county under the constitution, because of its having a citizen population above the ratio, and also by reason of inequalities in the number of citizens in the first and second Senate districts, required that Queens county be given a senator without joining with it any other county.

A reference to the diagram will show how grossly the provision of the constitution in regard to compactness has been violated in the thirteenth senatorial district, which is within the county of New York. All of the territory of the county of New York comprising that portion of Manhattan island shown on the diagram is comparatively level and fully covered by blocks bounded by streets, on which blocks buildings have been erected for business or residential purposes, and no possible purpose for the exercise of discretion to make a district that is not reasonably compact has been shown, and no effort whatever seems to have been made to make the district mentioned in as compact form as practicable.

The reasons alleged for the rambling territory comprising the thirteenth Senate district with its boundaries of many sides and various angles are wholly immaterial and not recognized by the constitution in the apportionment of Senate districts. A reference to the boundaries of the Senate districts in said county as made by the constitutional convention shows that the county can be divided into districts which are reasonably compact, each having comparatively few sides and angles. Within the limits of a city entitled to many senators the ²¹¹ requirements for compactness would seem to exclude all

possibility of a district in the shape of the thirteenth senatorial district as shown on the diagram: In re Timmerman, 51 Misc. Rep. 192, 100 N. Y. Supp. 57.

The disregard of constitutional provisions in forming the second and thirteenth Senate districts is clear, and they so affect the entire apportionment as to make it necessary to declare the act wholly unconstitutional and void. It is not necessary or wise to discuss the provisions of the act relating to other Senate districts except to say that differences arising from necessity and slight differences in the citizen population of Senate districts and the relative weight of slight differences in population in comparison with consideration of compactness or the reverse, upon which men of judgment and discretion may fairly differ, are matters belonging distinctly to the legislature and not to the judicial branch of the government, and with which this court has no disposition or jurisdiction to interfere.

Every apportionment must stand upon its own particular facts. The rules and principles which we have stated are general, and result from an examination of the constitution and a study of its development. They are applied to the facts on this appeal so far as stated and only so far as stated.

It is difficult and perhaps impossible to state rules by which future apportionments can be measured. This court has already said by Peckham, J., in *Baird v. Supervisors*, 148 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81, that "We have no trouble whatever in detecting the difference between noon and midnight, but the exact line of separation between the dusk of evening and the darkness of advancing night is not so easily drawn": See *People v. McWilliams*, 185 N. Y. 92, 77 N. E. 785.

I concur in the views expressed by Cullen, C. J., as to the effect of the acts of a de facto legislature so long as its members remain actual incumbents of their offices respectively.

The orders should be reversed, with costs to appellants in all courts, but as since the institution of the proceedings the several respondents have gone out of office and the election²¹² itself has been held, no order should be made directing the issue of a writ of mandamus.

CULLEN, C. J. In reaching the conclusion which we have announced in the opinion of Judge Chase, we have not by any means failed to fully weigh and consider the results that

may follow from our decision. While our supreme duty is to enforce the provisions of the constitution upon which, as a foundation, the whole fabric of the government of this state rests, we fully appreciate that government is or should be pre-eminently a practical thing, and that courts should long hesitate to throw the government into confusion and disorder by declaring an act of the legislature invalid, and so declare only when the violation of the constitutional mandate is clear and certain. That the violation of the constitution is too plain to be disregarded is the conclusion to which we have been forced by the reasons stated by my brother Chase; but at the same time we think it not only proper, but our duty, to say that in our opinion the fear that our decision may throw the government of the state into confusion is unfounded. When this appeal was before us immediately prior to the general election last year, in dismissing that appeal we unanimously said that whether the apportionment act of 1906 was constitutional or not, the legislature which might be actually chosen by the electors of the state under that apportionment would be a *de facto* legislature, whose acts would, in all respects, be binding. To that declaration we still adhere, and we understand no one to gainsay it. It is now, however, suggested that when our decision that the apportionment act is unconstitutional is announced, from that time the present legislature will no longer be a *de facto* body. This suggestion is without force either in principle or under the authorities. An act of the legislature if invalid, as violating the constitution, is invalid from the time of its enactment, not merely from the declaration of its character by the courts. But though the appointment or election of a public officer may be illegal, it is elementary law that his official acts ²¹³ while he is an actual incumbent of the office are valid and binding on the public and on third parties: 2 Kent's Commentaries, 295; *People v. Collins*, 7 Johns. 549; *Wilcox v. Smith*, 5 Wend. 231, 21 Am. Dec. 213; *People v. Terry*, 108 N. Y. 1, 14 N. E. 815; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409. In the case last cited there is one of the best expositions of the doctrine of *de facto* officers to be found in the reports. The doctrine is not one of convenience merely but of necessity. In *State v. Williams*, 5 Wis. 308, 68 Am. Dec. 65, it was contended that a statute of the state was invalid because approved by a governor whom the courts subsequently declared not to be entitled to the office. Nevertheless, it was

held that as the statute was approved by an actual incumbent of the office of governor, it was in all respects valid and effective. Of course, an officer who, though *de facto*, is not such *de jure*, may be ousted from the office he illegally holds by proceedings instituted to try his title to the office, and when adjudged a usurper he ceases from that time to be an officer *de facto*. But to have this effect the judgment must be rendered in a proceeding to oust him from office; it is not sufficient for the purpose that his title to office be declared bad in a collateral proceeding. A notable example of this principle is the case of *People v. Schiellain*, 95 N. Y. 124, which was an application for mandamus against the town board of New Lots to canvass the vote and award a certificate to the relator, who claimed to have been elected a justice of the peace at the town meeting. The right of the relator depended on his claim that a statute directing justices of the peace of the town of New Lots to be chosen at the general election was unconstitutional and void, and so the courts held. It happened, however, that one of the defendants in the proceeding was a justice of the peace elected and holding office under the very statute declared invalid. He insisted that if the statute was invalid he was not a justice of the peace nor a member of the town board, and, therefore, the writ should not run against him. This court overruled the objection, saying it was sufficient that Watson, the defendant, who raised the objection, was actually ²¹⁴ in office, and it also said that the decision in the mandamus suit of itself did not oust him. Judge Ruger wrote for the court: "It may be that one of the results following the determination of this appeal will be his removal from office, but that will not be the direct result of our adjudication. Title to his office is not triable in this proceeding and, therefore, cannot be here adjudicated." It was, therefore, entirely possible that had no proceedings been taken against Watson, or had he not voluntarily relinquished office, he might have remained therein despite the adverse decision of the court, and his acts would have been valid. The position of the members of the present legislature is much stronger. The proceeding before us is not to try the title of any member of the legislature to his office, but against certain administrative officers as to the conduct of an election. Therefore, were it possible for the courts to try the title of members of the legislature, this decision would not directly affect that title. But, under the

constitution, each house of the legislature is not exclusive judge of the election and qualification of members. The courts have no jurisdiction to determine the title of any member. In the case of *People v. State Board of Canvassers*, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646, by a divided court it was held that the relator being disqualified under the constitution from election as a senator, the courts would not compel a board of canvassers to give a certificate of his election, but even the majority opinion conceded that the ruling of the court would in no way bind the Senate, when convened, on the question of the relator's rights. As already said, the Senate and assembly elected under the apportionment act and actually assembled constitute in any aspect a de facto legislature. As a de facto body each house has, under the constitution, not only the exclusive power but the exclusive right to judge of the title of any of its members to a seat therein. Whoever either house receives as its legally elected member and entitled to a seat becomes thereby a de jure member of that house, even though the courts, were such a question triable before them, might be of a different opinion.²¹⁵ It follows, therefore, that not only is the present legislature a valid legislature, but that each member thereof, so long as the particular house to which he belongs does not oust him, is as to all the world not only a de facto but a de jure member, and is entitled to all the privileges of a member, the exemption of his person, the right to his salary and the like, and his title to office cannot be challenged before any tribunal except the house itself. Thus there can be no vacancy in any particular district which the governor or other officer can call upon the electors to fill, unless the house ousts the member and declares him not entitled to his seat. All this, however, does not show that our decision is a mere brutum fulmen and of no practical effect. While the court cannot pass on the title of any present member of the legislature, it can control the action of administrative officers in the conduct of the next election that takes place. If the present legislature should pass a new apportionment bill in compliance with the provisions of the constitution, the next general election at which members of either house are to be elected will be held under the new statute. If the legislature fails to discharge this duty, then the election must be held in accordance with the apportionment under the constitution of 1895. In other words, while the courts cannot interfere with the present legislature, they

can compel future elections to be held in compliance with the constitution.

GRAY, J. I should hesitate to agree with the opinion of my brother Chase, as to the unconstitutionality of the apportionment act, if I were not convinced that the amendment of the state constitution, in 1894 had materially changed the rules which should govern the apportionment by the legislature of the representatives of the citizens of the state.

In the case of *People v. Rice*, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836, which involved the apportionment act of 1892 and in the decision of which I took part, I was of the opinion that the then existing constitutional provision vested a certain discretion in the legislative body in exercising its power, with ²¹⁶ which the court should not interfere, when there had been neither a flagrant disregard, nor an unmistakable violation, of the constitutional injunction that the apportionment should be "as nearly as may be" according to the number of citizens.

As may be discovered from the debates in the constitutional convention of 1894, the decision in the *Rice* case moved that body to recommend new provision, or rules, for an apportionment. They were intended to remedy whatever defectiveness in the old rules made possible the inequalities observed in the preceding apportionment act.

It is of great significance, and it necessarily has a most important bearing upon the attitude of the court toward the legislative action, that the article of the constitution (article 3, section 5), expressly provides for a judicial review of any apportionment by the legislature. The legislature now exercises its power subject to a review by the court of its act, which any citizen may invoke. The article, in its present form, as Judge Chase well points out, reduces the discretionary power of the legislature to a minimum. The limitations upon its exercise are relaxed, practically, only with respect to the preservation of county, town and block lines. It is the intention of the people of the state, as declared by the recent amendment of the article of the constitution, that, in the apportionment of districts, there shall be as near an exact equality in the number of inhabitants as is possible from a consideration of nothing else than the constitutional provisions upon the subject; that the districts shall consist of contiguous territory; that they shall be in as compact form as possible, and that divisions of counties, towns or blocks shall only be made in the cases specified. It was to insure that such an apportionment should

be governed by no considerations of convenience, nor rest in a large political discretion, that a review by the court was expressly provided for. That has been made mandatory which before was discretionary. In my opinion, before this amendment of the constitution, it was a grave and a doubtful question whether, in the absence of a gross and plain violation of the constitution, the court was justified in interfering with ²¹⁷ the execution by the legislative department of the government of its duty of apportionment. But, by the amendment, the matter is placed upon a different basis, and the duty is devolved upon the court to review an apportionment, when complained of, and thereby to enforce the constitutional mandates as they are expressed.

For these reasons, I shall concur with Judge Chase's opinion that this apportionment act is violative of the constitutional provisions.

I am, also, in agreement with the chief judge that no serious, or real, embarrassment can arise with respect to governmental or legislative acts. However the lay mind may apprehend confusion as the result of our decision, the legal situation, in my opinion, is clear, and is correctly stated by Judge Cullen.

From the opinion of the court Justices Haight and Werner dissented.

Judicial Investigation of the Constitutionality of legislative apportionments is discussed at length in State v. Cunningham, 83 Wis. 90, 35 Am. St. Rep. 27, and note.

ADAMSON v. CITY OF NEW YORK.

[188 N. Y. 255, 80 N. E. 937.]

STATUTES, Interpretation of.—In Interpreting a Statute Which Defines an Offense Well Known at the Common Law, the courts are entitled to seek aid from common-law definitions of such offense. (p. 865.)

RIOTING, What is.—To a riot it is essential that there be an unlawful assembly of people of threatening attitude, acting in concert with disorder and violence, and determined to accomplish some injury to persons or property in spite of any resistance which may be offered. (p. 865.)

RIOT, What is not.—The fact that an unoccupied dwelling-house was, on an election day, practically demolished by a crowd of young men and boys, estimated to number from eight to twenty, each

carrying away a parcel as soon as he could detach it, and all running as soon as a policeman appeared, does not establish a riot for which a municipal corporation is liable under a statute making it answerable for property destroyed by mob or riot. (p. 866.)

Action against a municipality to recover for damages resulting from a riot. A judgment in favor of the plaintiff in the trial court was reversed on an appeal to the appellate division of the supreme court.

Paul Eugene Jones, for the appellant.

William B. Ellison, corporation counsel, James D. Bell and James W. Covert, for the respondent.

²⁵⁶ HISCOCK, J. Plaintiff was the owner of a two-story frame building in the borough of Brooklyn. It had been unoccupied for three or four months prior to November 5, 1901. ²⁵⁷ which was election day, and during that period had been subjected to various depredations which left it in a somewhat dilapidated condition. Upon the latter day it was practically demolished by a varying crowd of young men and boys estimated by different witnesses to have numbered from eight to thirty. The demolition took place in the daytime and the persons who accomplished it are said by one of the witnesses to have had an ax and a crowbar, and by others simply to have had some rope and pieces of pipe and timber with which to pry the building apart. As soon as one of the trespassers had secured a piece of the house he ran away with it and another took his place. There was no disturbance except such as was naturally incidental to such a proceeding, and there was no evidence of any purpose to accomplish the destruction by violence and in spite of any resistance which might be offered, but, upon the other hand, when a policeman appeared the crowd ran away. At the same time in other portions of the police precinct boys and men were stealing wood for bonfires.

Upon these general facts plaintiff has sought to hold the respondent, the city of New York, liable for the value of his building upon the ground that it was destroyed by a mob or riot, basing his action upon section 21, chapter 685 of the Laws of 1892, known as the general municipal law, which in part reads as follows: "A city or county shall be liable to a person whose property is destroyed or injured therein by a mob or riot for the damages sustained thereby."

The learned appellate division has decided that there was no such evidence of a mob or riot as would entitle the plaintiff to recover, and we agree with this view.

Section 449 of the Penal Code defines riot as follows: "Whenever three or more persons, having assembled for any purpose, disturb the public peace, by using force or violence to any other person, or to property, or threaten or attempt to commit such disturbance, or to do an unlawful act by the use of force or violence, accompanied with the power of immediate execution of such threat or attempt, they are guilty of riot."

²⁵⁸ In interpreting this statute which defines an offense well known at common law, we are entitled to seek aid from common-law definitions of such offense: *People v. Most*, 128 N. Y. 108, 26 Am. St. Rep. 458, 27 N. E. 970.

A frequently quoted definition of the term "riot" is that given by Hawkins in his *Pleas of the Crown*, namely: "A tumultuous disturbance of the peace by three persons or more assembling of their own authority with an intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature and afterward actually executing the same in a violent and turbulent manner to the terror of the people, whether the act intended were of itself lawful or unlawful."

Greenleaf adopts a definition evidently based upon that given by Hawkins, and to the effect that to constitute a riot, "it is necessary that there be three or more persons tumultuously assembled of their own authority with intent mutually to assist one another against all who shall oppose them in the doing either of an unlawful act of a private nature or of a lawful act in a violent and tumultuous manner."

Interpreting the statute upon which plaintiff bases his right of action in the light of the provision quoted from the Penal Code and assisted as we may be by the foregoing common-law definitions, we think that the evidence fails to disclose the existence of a mob or riot at the time plaintiff's property was destroyed. As we use and contemplate those terms, we naturally think of an unlawful assemblage of people of threatening attitude acting in concert with disorder and violence and determined to accomplish some injury to person or property in spite of any resistance which may be offered. It is apparent, of course, that not every illegal interference with property by three or more people would come within the

definition of a mob or riot, but that many such infractions of law would constitute trespass or larceny or some kindred offense. The acts complained of in this case, in our opinion, come within the latter category rather than within the definition of the offense which plaintiff has sought to establish. ²⁵⁹ The boys and men who perpetrated them in constantly shifting numbers were evidently stealing and carrying away the material of plaintiff's house for some ulterior purpose not fully disclosed, and their conduct in dispersing whenever a policeman appeared indicated any other purpose than that of proceeding with force or violence to accomplish their purpose, acting in concert and mutually assisting one another against anyone who should oppose them.

We think the case can clearly be distinguished from those which have been called to our attention as authorizing a recovery.

In *Solomon v. City of Kingston*, 24 Hun, 562, it appeared that a crowd which had assembled at a fire broke into plaintiff's store and carried away his goods, and that these acts were accompanied by violence toward those who were attempting to protect the property against the assembly. It was scarcely contended upon the part of the defendant that the gathering which finally caused the injury to plaintiff's property did not constitute a mob or a riot, but the defense was rather based upon other considerations which are not involved here.

In *Marshall v. City of Buffalo*, 50 App. Div. 149, 64 N. Y. Supp. 411, it was proven that a crowd of men, women, boys and girls appeared upon the premises of the plaintiff with shovels, axes and other tools and commenced to demolish the building and carry the material away in wagons; that from one hundred to two hundred people were engaged in the work of destruction, which continued for three days, until only the foundations were left, and it was held that it might be fairly inferred and found from the evidence that they were executing the common purpose of unlawfully demolishing and removing the building, and that there was a preconcerted plan to that effect upon the part of many people, and that the jury were entitled to draw the conclusion that the buildings in question were unlawfully and with force and violence demolished and ruined by a riotous and disorderly mob in the execution of a common purpose and in defiance of law and order.

The case of *Regina v. Langford*, Car. & M. ²⁶⁰ 602, involved an indictment under a statute for riotously and feloniously demolishing a house. The statute contained no definition of the term "riot" and the court resorted to the one drawn from *Hawkins*, which has already been quoted. It was held that a riot must be attended with circumstances of terror to the people, and that this essential element was established in the case at bar, and hence a conviction was allowed.

In each of these cases there was present an element of concerted action and violence in attacking those who offered resistance to the execution of an unlawful plan, or of a large and tumultuous gathering against public peace and order which carried out its unlawful destruction of property with preparation and deliberation, or of unlawful conduct calculated to inspire terror, and, therefore, coming within the particular statutory definition there applicable, and none of which features are here present.

This case, upon the other hand, comes within the principles adopted in *Duryea v. Mayor*, etc. of New York, 10 Daly, 300, affirmed, 100 N. Y. 625, where it was held that the conduct of a collection of boys and young men who destroyed a building and who showed no intent to resist opposition by the public authorities or private citizens, but, upon the other hand, dispersed at the coming of a single police officer, was to be regarded as malicious mischief and trespass rather than the acts of a mob and riot. The distinguishing facts of that case are quite similar to those presented here, and we think that it outlines a more correct course for us to follow than would be adopted if we should hold that the acts now being complained of were of such a character as to impose a liability upon the municipality for the destruction of property by mob violence.

The order appealed from should be affirmed and judgment absolute rendered upon the stipulation, with costs in all the courts.

Cullen, C. J., Gray, Vann, Werner, Willard Bartlett and Chase, JJ., concur.

Order affirmed, etc.

A Riot is Generally Defined to be a tumultuous disturbance of the peace by a number of persons who assembled of their own authority

and without authority of law, with intent materially to assist each other, against all opposition, in putting their design into execution in a violent manner, whether the object is lawful or unlawful: See the note to *State v. Jenkins*, 94 Am. Dec. 136; *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320; *Higgins v. Minagham*, 78 Wis. 472, 23 Am. St. Rep. 428. As to the duty of the state to interfere to suppress riots, see *Commissioners v. Church*, 62 Ohio St. 318, 78 Am. St. Rep. 718; *Chicago v. Chicago League Ball Club*, 196 Ill. 54, 89 Am. St. Rep. 243; *Chicago v. Manhattan Cement Co.*, 178 Ill. 372, 69 Am. St. Rep. 321. These decisions also discuss the liability of cities for private property destroyed by mobs and rioters.

BROOKLYN UNION GAS COMPANY v. CITY OF NEW YORK.

[188 N. Y. 334, 81 N. E. 141.]

STATUTES Respecting the Price of Illuminating Gas, Construction of.—Under a statute providing that in cities of a specified class no corporation or person shall charge for illuminating gas to exceed a price designated per thousand feet, the maximum price so fixed must be deemed reasonable, and the city, in an action against it for gas furnished to it, is not entitled to defend on the ground that the price charged, though less than that thus specified, is not reasonable. (p. 870.)

Action against the defendant to recover a sum alleged to be due for illuminating gas furnished it by the plaintiff. An application having been made for permission to inspect the books, records and documents of the plaintiff company and for an inventory of its plant, and the court having denied such application, this appeal was prosecuted from the order of denial.

William B. Ellison, corporation counsel, Theodore Connolly and William B. Burr, for the appellant.

William N. Dykman, for the respondent.

336 O'BRIEN, J. This action was brought by the plaintiff against the city of New York to recover the sum of over two hundred and sixty-two thousand dollars for illuminating gas alleged to have been furnished to the defendant by the plaintiff for the purpose of lighting the public buildings and streets of the city. The price charged was at the rate of

ninety cents per thousand cubic feet, and it is alleged on the part of the defendant that this was an excessive and unreasonable charge, considering the expense of producing it and allowing the plaintiff a reasonable profit. An inspection of the pleading discloses that this is the main, if not the only, defense to the action.

The gas was furnished, as is alleged, between the first day of January, 1903, and the sixteenth day of March, 1904. For several years prior thereto the plaintiff had supplied gas to the city, which service was rendered under written yearly contracts made through public lettings conducted under the provisions of the charter. A contract of that nature was made between the plaintiff and defendant for the year 1902, which expired January 1, 1903. In December, 1902, the ³³⁷ proper municipal officer, acting under the provisions of the charter, advertised for bids for the supply of gas for the year beginning January 1, 1903, and ending December 31st of that year. The plaintiff made proposals in writing, wherein was specified the price, and submitted its bid according to the advertisement. Its bid was ninety cents per thousand cubic feet, but when the bid was opened a controversy seems to have arisen between the plaintiff and some of the municipal officers in relation to the price, and the result was that the bid was neither accepted nor rejected until about the eighth day of December, 1903, when the plaintiff was notified that the bids were rejected. No further attempt was made by the city to enter into a formal contract for the supply of gas, but it still continued to use and the plaintiff to supply the gas as before. This resulted in the controversy in question.

In February, 1906, the defendant presented a petition to the court praying that an order be granted allowing the defendant to make an inspection and inventory of the plaintiff's plant, an examination of its books, records and documents showing the cost of coal or other raw material, the wages and salaries paid, the amount of moneys invested and the present value of its plant, and all other items of expenditures and receipts pertaining to the cost of production and distribution of gas during the period in question, it being alleged that such facts were necessary as bearing on the question of the reasonableness of the charge. The court at special term denied the application, and the order was affirmed at the

appellate division, but permission was given to appeal to this court, and two questions were certified for our consideration, viz.:

"1. In this action can the defendant question the lawfulness of the price charged for the gas furnished and consumed by it on the ground that such price is in excess of the fair and reasonable value?"

"2. Is the actual cost to the plaintiff of the production and distribution of the gas a material fact in the controversy?"

The answers to the questions certified depend upon the ³³⁸ construction of a statute, the material part of which is as follows: "In any city in this state having a population of eight hundred thousand or over, no corporation or person shall charge for illuminating gas a sum to exceed one dollar and twenty-five cents per thousand feet, and such gas shall have an illuminating power of not less than twenty sperm candles, or six to the pound, and burning at the rate of one hundred and twenty grains of spermaceti per hour, tested at a distance of not less than one mile from the place of manufacture, by a burner consuming five cubic feet of gas per hour, and shall comply with the standard of purity now or hereafter established by law": Transportation Corporations Law, Laws 1890, c. 566, sec. 70.

The learned corporation counsel contends that this statute simply prescribes a maximum figure beyond which it is not lawful for the plaintiff to pass in presenting bills for gas; that it does not preclude the city in this action from contesting the question whether the price charged is reasonable or not, and that the city is entitled to show, if it can, by the proposed examination that the reasonable price of gas is much less than ninety cents per thousand cubic feet. We do not think that this contention can be sustained. Counsel have presented elaborate arguments on this question and numerous authorities have been cited, which need not be referred to. The question, we think, is a very simple one. The plaintiff is seeking to recover for gas furnished at the rate of ninety cents per thousand cubic feet, while the statute permitted it to charge more, if it thought wise to do so in a business sense. The legislature intended and did by this statute regulate the price of gas in the borough of Brooklyn. It established a maximum price which might be charged. Whatever price the legislature permitted the plaintiff to charge must

be deemed to be reasonable, and, hence, a charge of any sum below the maximum of one dollar and twenty-five cents must be deemed and taken to be a reasonable charge. When the price of a commodity is established by law, it is not competent for the party purchasing it to resist payment on the ground ⁸³⁹ that the law has permitted the seller to make an unreasonable charge. Hence, when the plaintiff furnished and the defendant received and used the gas, the latter was precluded by statute from raising any controversy such as this with respect to the reasonableness of the charge; in other words, the charge must, in view of the statute, be deemed reasonable.

The order appealed from should be affirmed, with costs, and the questions certified answered in the negative.

Cullen, C. J., Edward T. Bartlett, Haight, Vann, Hiscock and Chase, JJ., concur.

Order affirmed.

The Business of Supplying Gas to meet the demands of a community is subject to public regulation in the matter of fixing rates of compensation. And one of the conditions for the exercise of the privilege of conducting a gas business under legislative grant is that in the absence of legislative prescription restricting the rate of compensation for the service rendered, the grant carries by implication the obligation to furnish it at a reasonable rate and price: *Madison v. Madison Gas etc. Co.*, 129 Wis. 249, 116 Am. St. Rep. 944.

WANSEER v. DE NYSE.

[188 N. Y. 378, 80 N. E. 1088.]

JUDICIAL SALES, Title Presumed to be Sold at.—A person who, in good faith, bids for real property at a judicial sale where the particular interest offered is not expressly stated, has a right to assume that the title is marketable, and that he will receive a conveyance of the fee. (p. 872.)

JUDICIAL SALES—Purchaser, When Entitled to be Released for Defect in Title.—One who in good faith bids for real property at a judicial sale, where no particular interest or title is expressly offered, is entitled to be released from his bid on showing that the title is not in fee or is not marketable. (p. 873.)

VENDOR AND PURCHASER.—Marketable Title, What is not. Title is not marketable if it will not be accepted by an ordinarily prudent man when the property is again offered for sale or as security for a loan. (p. 873.)

JUDICIAL SALES—Practice in Compelling Purchaser to Comply with His Bid.—The fact that a person bids upon property at a judicial sale and signs the terms of the sale, by which he agrees to complete his purchase within a specified time, is sufficient on which to move for an order compelling him to perform his agreement. If answering affidavits are read claiming to show that the title is defective, the court may allow the production of such further affidavits relating to title as may be necessary or desirable to present the facts, and the rights of the parties may be fully protected by directing when and upon what conditions further affidavits may be filed. (p. 875.)

SPECIFIC PERFORMANCE.—Adverse Possession of Land may be sufficient to make a title which the purchaser at a judicial sale should be compelled to accept, but the evidence of such possession must be clear. (p. 876.)

JUDICIAL SALES—Marketable Title, When not so Made as to Require the Purchaser to Complete the Sale.—Where property is sold at a judicial sale, and on motion to compel the purchaser to comply with his bid it appears that, more than seventy years before, one F. O. was the owner of the property, and that, about forty years prior to the sale, a conveyance was procured from thirty-nine persons, who were then assumed to be his heirs, but there is no direct evidence of his death nor the heirship of such persons, and no sufficient evidence of adverse possession, the purchaser cannot be compelled to comply with his purchase. (pp. 876, 877.)

Appeal from an order of the appellate division affirming an order made by the trial court directing the appellant to complete his purchase of real property sold at a partition sale.

A. P. Bachman and John Oscar Ball, for the appellant.

Washington Sackmann and Edmund C. Viemeister, for the respondent.

380 CHASE, J. In this state a person who, in good faith, bids upon real property at a judicial sale where the particular interest offered is not expressly stated has a right to assume that he is to receive a conveyance of the fee, and that the title to such real property is marketable. In case the title to such real property is not marketable, such fact is a defense to a motion to compel the purchaser to complete his purchase or to any other proceeding or action based upon such bid: *New York Security etc. Co. v. Schoenberg*, 87 App. Div. 262, 84 N. Y. Supp. 359; affirmed, 177 N. Y. 556, 69 N. E. 1128; *Mott v. Mott*, 68 N. Y. 246; *Crouter v. Crouter*, 133 N. Y. 55, 30 N. E. 726; *Cambrelleng v. Purton*, 124 N. Y. 610, 26 N. E. 907; *Jordan v. Poillon*, 77 N. Y. 518; *Miller v.*

Wright, 109 N. Y. 194; Matter of Fales, 33 App. Div. 611, 53 N. Y. Supp. 1046; affirmed, 157 N. Y. 705, 52 N. E. 1124.

The decision on such a motion should be based upon equitable principles. It does not even as between the parties amount to a determination that the title to the property is perfect or imperfect. The purchaser being entitled to a marketable title should not be compelled to take a title that will not be accepted by an ordinarily prudent man when the property is again offered for sale or as security for a loan.

This court has frequently stated the rights of vendors and vendees in cases involving a marketable title to real property. In *Fleming v. Burnham*, 100 N. Y. 1, 2 N. E. 905, the court say: "A title open to a reasonable doubt is not a marketable title. The court cannot make it such by passing upon an objection depending on a disputed question of fact or a doubtful question of law, in the absence of the party in whom the outstanding ³⁸¹ right was vested. He would not be bound by the adjudication, and could raise the same question in a new proceeding. The cloud upon the purchaser's title would remain although the court undertook to decide the fact or the law, whatever moral weight the decision might have. It would especially be unjust to compel a purchaser to take a title, the validity of which depended upon a question of fact, where the facts presented upon the application might be changed on a new inquiry or are open to opposing inferences. There must doubtless be a real question and a real doubt. But this situation existing, the purchaser should be discharged."

In *Heller v. Cohen*, 154 N. Y. 299, 48 N. E. 527, the court in stating the rules applicable to an action for specific performance say: "To entitle a vendor to specific performance he must be able to tender a marketable title. A purchaser ought not to be compelled to take property, the possession of which he may be obliged to defend by litigation. He should have a title that will enable him to hold his land free from probable claim by another, and one that, if he wishes to sell, would be reasonably free from any doubt which would interfere with its market value. If it may be fairly questioned, specific performance will be refused: *Vought v. Williams*, 120 N. Y. 253, 17 Am. St. Rep. 634, 24 N. E. 195, 8 L. R. A. 591; *Shriver v. Shriver*, 86 N. Y. 575; *Fleming v. Burnham*, 100 N. Y. 1, 2 N. E. 905.

"So, where there is a defect in the record title which can be supplied only by resort to parol evidence, and the title may depend upon questions of fact, the general rule is that the purchaser will not be required to perform his contract: *Irving v. Campbell*, 121 N. Y. 353, 24 N. E. 821, 8 L. R. A. 620; *Holly v. Hirsch*, 135 N. Y. 590, 32 N. E. 709."

The motion in this case is based wholly upon an affidavit of a clerk in the office of the plaintiff's attorney, consisting of a few sentences alleging that the action is brought for partition, and that the premises described in the notice of sale were offered for sale by a referee pursuant to an interlocutory judgment in the action; that the appellant on this appeal became the purchaser for ten thousand one hundred dollars, and paid to the referee ten per cent ³⁸² of the amount of his bid and agreed to pay the remainder thereof on a day specified and that he has failed to make the payment as so agreed. The affidavit further states that the purchaser declined to complete his purchase for the reason "that his counsel is unable to ascertain certain facts relating to the heirs, and their identity, of a former owner of said premises who died seised thereof intestate."

The appellant appeared upon the motion and read two affidavits made by his attorney, in one of which he alleges that the referee is unable to give a marketable title to the property, and in the other of which he alleges that "said property appears to have been a part of a plot of farm land acquired in 1827 by one Francis Oliver, a colored man; that deponent has been and still is unable to find any proof of the death of said Oliver or of proceedings in the surrogate's court of Kings county relative to the estate of said Oliver; that in 1865 and 1866 there were filed in the office of the register of Kings county quitclaim and bargain and sale deeds from some thirty-nine parties, conveying or professing to convey the said property to one Abraham Wanser; that there is nothing in the records or outside, as far as deponent and the title company employed to search the title are concerned, to show that the grantors of said deeds were all the heirs of Francis Oliver, or that there were any steps taken to put a record of such heirs on the public files, so that the purchaser Franklin S. Holmes is now confronted with a title which is clouded by an uncertainty, and which he might be obliged to protect as against unknown heirs entitled to share in the estate of Francis Oliver."

In support of the title the plaintiff then produced an affidavit of a person in which he says that a number of the heirs of Francis Oliver, deceased, in 1865 spoke to him about purchasing the property, and that he agreed with one of such persons that he would pay seven hundred dollars therefor, and that he then gave the money to a justice of the supreme court, and requested him to supervise the transfer of the property and secure for him a good title thereto, and that he was subsequently ³⁸³ told by him that all of the heirs at law of said Francis Oliver, deceased, had signed deeds of said property, and that the same had been recorded. That he thereupon took possession of the property, and about 1893 conveyed it to his wife, the mother of the parties to this action, who is now deceased, and that at no time since the conveyances to him has the title to said property been questioned, or the possession of himself and wife and her heirs been disputed or called in question. He also produced an affidavit made by a son of said justice, who alleges that he had charge of procuring said deeds, and that he verily believes that the grantors named in the several conveyances of record comprise all the heirs at law of said Francis Oliver, deceased.

The record to sustain the order requiring the appellant to complete his purchase consists of said four short affidavits. The statements in the affidavits are very general, and in part on information and belief. None of the papers in the action are before the court, and the property is not even described in the record before us, except by a general statement that it is situated in the town of Flatlands, Kings county, within the borough of Brooklyn, city of New York.

The fact that a person bids upon property at a judicial sale and signs the terms of sale by which he agrees to complete his purchase at a specified time, is doubtless sufficient on which to move for an order compelling the purchaser to perform his agreement. If answering affidavits are read alleging and claiming to show that the title is defective, the special term may allow the production of such further affidavits relating to the title as may be necessary or desirable to bring to the attention of the court the true facts in regard thereto. The rights of the parties can always be fully protected by the court in directing when and upon what conditions further affidavits are to be read.

We do not find that the court erred in allowing further affidavits to be read on behalf of the plaintiff, or that the appellant made known to the court that he desired to produce further affidavits on his part, or that he asked that a referee ³⁸⁴ be appointed to take evidence in regard to said title. The appellant erroneously assumes that it was the duty of the court on its own motion to order a reference, and that testimony taken before a referee would be perpetuated for use against persons other than parties to the action. In the affidavits it is practically conceded that Francis Oliver was the owner in fee of the lands in question in 1827, and although it is generally asserted that Francis Oliver died prior to the giving of the deeds in 1865 and 1866, it does not appear when or where he died, or whether he left descendants. Each of the affiants in the replying affidavits is an old man, and each shows that he has lived in the vicinity of the premises in question for many years—one since 1844 and the other all his life—and that he was acquainted with the Oliver family, but for some reason that is not disclosed not a word is said in regard to the death of said Oliver, or as to his heirs at law, except in general terms, as hereinbefore stated. No record can be found by the appellant of the death of Francis Oliver, or in any way relating thereto, and the deeds given in 1865 and 1866 do not contain recitals showing the history of the Oliver family or of the relationship of the grantors therein to said Francis Oliver or the property. It is not necessary to discuss the question as to the burden of proof as between the appellant and respondent on the motion, not only for the reason that the affidavits were considered at the special term without reference to the burden of proof, but as the affidavits of both parties assume that Francis Oliver was the owner of the fee of the property in 1827, the subsequent record title is not sufficient apart from extrinsic evidence to make the title free from reasonable doubt, unless the possession under said deeds is sufficient to sustain the respondent's claim.

Where the facts are sufficiently clear, adverse possession may alone be sufficient to make a title which a purchaser at a judicial sale should be compelled to accept: *Shriver v. Shriver*, 86 N. Y. 575; *Simis v. McElroy*, 12 App. Div. 434, 42 N. Y. Supp. 290; affirmed, 160 N. Y. 156, 73 Am. St. Rep. 673, 54 N. E. 674; *Freedman v. Oppenheim*, 187 N. Y. 101, 116 Am. St. Rep. 595, 79 N. E. 841; *Messinger v. Foster*, 115 App. Div. 689, 101 N. Y. Supp. 387.

385 The only affidavit relating to adverse possession is general in its terms. The character of the property is not disclosed except that it appears that it has been cultivated. The extent of the cultivation does not appear, and it is not shown whether the lands have been inclosed or marked by visible boundaries. The proof of adverse possession is not shown with that clearness required to make a marketable title based wholly thereon.

It may be that extrinsic evidence can be obtained to show that the deeds of record make a complete and perfect title to the property, and that the possession of the parties to the action and their predecessors in title has been sufficient apart from the record title, or in connection therewith, to sustain an order compelling the purchaser to complete his purchase.

The record, however, is very unsatisfactory, and after a full consideration of all that it contains an ordinarily prudent person would be justified in hesitating about accepting title to the property or loaning money thereon. The order should be reversed, with costs to appellant in this court, and the case remitted to the special term to take further proofs and for a rehearing thereon.

Cullen, C. J., O'Brien, Edward T. Bartlett, Haight, Vann and Hiscock, JJ., concur.

Ordered accordingly.

The Application to Judicial Sales of the rule of caveat emptor is discussed in Hammond v. Chamberlain Banking House, 58 Neb. 445, 76 Am. St. Rep. 106; Hammond v. Cailleau, 111 Cal. 206, 52 Am. St. Rep. 167; Bond v. Montgomery, 56 Ark. 563, 35 Am. St. Rep. 119; Goodbar v. Daniel, 88 Ala. 583, 16 Am. St. Rep. 76; Frost v. Atwood, 73 Mich. 67, 16 Am. St. Rep. 560; Williams v. Glenn, 87 Ky. 87, 12 Am. St. Rep. 461; Redd v. Dyer, 83 Va. 331, 5 Am. St. Rep. 272. The rule does not apply to executory sales of realty by a court of equity: People's Bank v. Bramlett, 53 S. C. 477, 79 Am. St. Rep. 855.

What Constitutes a Marketable Title is discussed in the recent note to Howe v. Coates, 97 Minn. 385, 114 Am. St. Rep. 723. A title to land created by operation of the statute of limitations is generally regarded as a marketable title which will support an action for specific performance: See the note to Menzel v. Hinton, 95 Am. St. Rep. 677; Freedman v. Oppenheim, 187 N. Y. 101, 116 Am. St. Rep. 595.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

PARKS v. McDANIEL.

[75 S. C. 7, 54 S. E. 801.]

EXECUTORS AND ADMINISTRATORS—Care Required of.—

An executor must manage the estate committed to him with the same care and diligence that a prudent and cautious person would bestow on his own concerns, and consequently is liable for losses to the estate due to his negligence. (p. 879.)

EXECUTORS AND ADMINISTRATORS—Payment of Judgment by—Subrogation—Burden of Proof.—If the payment by an executor of a judgment obtained against him is assailed, the question is not merely whether he was negligent in the conduct of the suit leading to the judgment, but whether he acted in such bad faith toward his trust or in such utter disregard of his duty, as would warrant the setting aside of the judgment, or in depriving him of any equitable right to be subrogated to the position of the judgment, or in treating the judgment as of no avail as a protection for its payment. The burden of proof is upon the party assailing the payment of the judgment, at least to show the invalidity of the claim, and that the judgment was the result of the executor's breach of duty. (p. 880.)

EXECUTORS AND ADMINISTRATORS—Payment of Judgment by—Subrogation.—A statute providing that a nonregistered physician cannot recover for his services does not apply in an action against an executor to require him to account for the payment of a judgment obtained against him by such a physician for services rendered his testator. (p. 881.)

P. B. Mayson and J. W. DeVore, for the appellant.

Shepp and Brothers, for the appellee.

^s JONES, J. Mrs. Sallie E. McDaniel, late of Edgefield county, South Carolina, died in November, 1901, leaving a will under which defendant, Winchester McDaniel, qualified as

executor, which, after providing for the payment of funeral and other expenses incident to the settlement of her estate and bequeathing some specific articles of personal property, bequeathed and devised the remainder of her estate, real and personal, to Mrs. Josie Parks, the plaintiff, and Mrs. Lillie Thurmond. Mrs. Parks, having purchased the interest of Mrs. Thurmond in said estate, brought this action against the executor for an accounting and alleges that in such accounting the said executor should be refused credit for the amount paid by him, \$560.76, in settlement of a judgment for said sum recovered against him as executor in favor of J. J. Burch on the ground that he "negligently and with total indifference to the interest of the estate and in utter disregard of his duty as executor," permitted judgment by default to be recovered for a sum largely in excess of what the estate was indebted to the said J. J. Burch. The action resulted in the following decree:

"The only issue in this case is the right of defendant to credit for some \$560.76, alleged to have been paid by him to one J. J. Burch in satisfaction of a judgment recovered by Burch against the defendant as executor of the will of Sallie E. McDaniel. It is not denied that the defendant's allowance of the judgment against him was an act of negligence. He did not contest its justice when he ought to have done so. And now he must show its justice in this action.

"The account is separated into two parts, that for January, February, March, April and June, 1901, rendered in South Carolina, and aggregating \$256, after a credit of \$100; and that for April and May, 1901, rendered in Georgia, aggregating \$274.25.

"The first account is not allowable, under the South Carolina statute.

"The second account is discredited on its face. For thirty-three days' service this doctor charged \$274.25. Only a very small part of that was for medicine. The far greater part of it was for 'extra attention.' The items thus characterized must be eliminated; there is no sufficient testimony to sustain them. It is enough to allow the charges described as 'visits and mileage,' and those for medicine.

"Let the master make the calculation and report the account due. It is so ordered."

The general rule undoubtedly is that where one accepts the trust of an executor he must manage the estate committed to him with the same care and diligence that a prudent and cautious person would bestow on his own concerns, and consequently is liable for losses to the estate due to his negligence: *Taveau v. Ball*, 1 McCord Eq. 456; *Glover v. Glover*, McMull. Eq. 153; *Sollee v. Croft*, 7 Rich. Eq. 34; 3 *Williams on Executors*, 6th Am. ed., 1805; 11 *Ency. of Law*, 911. While ordinarily a fiduciary voluntarily paying a claim against the estate in his charge is fully protected by being subrogated to the rights of claimant, still a court of equity may protect him in the payment of an invalid claim if satisfied that he has acted under the circumstances as a prudent person would do in managing his own affairs. This applies to voluntary payments, but when a payment is made pursuant to the judgment of a court of competent jurisdiction against the fiduciary, it is ¹⁰ not the voluntary act of the fiduciary, but a compliance with a mandate of the court under compulsion. When such a payment is assailed, the question is not merely whether the fiduciary was negligent in the conduct of the suit leading to the judgment, but whether he acted in such bad faith toward his trust or in such utter disregard of his duty as would warrant a court in setting aside the judgment or in depriving him of any equitable right to be subrogated to the position of the judgment creditor, or in treating the judgment as of no avail as a protection for its payment. In such case the burden of proof is upon the party assailing the payment of the judgment, at least to show the invalidity of the claim, and that the judgment was the result of the fiduciary's breach of duty.

In the case of *Tompkins v. Tompkins*, 18 S. C. 1, it was sought to prevent the executors from being allowed credit for payment on a judgment against them in favor of *Jennings, Smith & Co.*, on the ground that said judgment was not authorized by law and was irregular, null and void. The circuit court disposed of the contention by saying at page 15: "It was no part of the inquiry referred to the referee to try the validity of the judgment. It was found that the executors paid it in good faith, they regarded it as a valid claim and it was certainly binding on the estate until it was set aside." Responding to an exception taken to this ruling, the supreme court, at page 28, said: "We see no error in the conclusion reached by the circuit judge in reference to this mat-

ter. Even though there may have been technical informalities in this judgment, yet there is no evidence that the debt on which the judgment was recovered was not a valid claim against the estate which has been extinguished by the executors, and they, therefore, should have credit for the amount paid by them." In 11 Encyclopedia of Law, 911, the case of *Cameron v. Morris*, 83 Tex. 14, 18 S. W. 422, is cited to sustain the proposition that a payment under an order of court, in the absence of fraud, is not a breach of duty, and the executor or administrator is not liable for the ¹¹ amount paid, though the claim was invalid. In *Harrison v. Turnbull*, 95 Va. 721, 64 Am. St. Rep. 830, 30 S. E. 372, 41 L. R. A. 703, it was held that a decree establishing the claims against a decedent's estate and ordering sale of real estate to pay them is a complete bar to an action against the executor for a devastavit, the complaint not impeaching the judgment of fraud.

If we grant that the judgment paid by the executor in this case is not final and conclusive as against all in privity with the executor, in determining the validity of the claim as indebtedness due to J. J. Burch by the estate, but that it is only prima facie evidence of the justice of the claim and its payment, it is manifest that it was a fundamental error in the circuit court to hold that it was incumbent on the executor to show the validity and justice of the claim, whereas he should have held that it was incumbent on the plaintiff to show the contrary. Let us, therefore, consider the evidence with the burden of proof properly placed and in view of the judgment against the executor.

The account disallowed in toto by the circuit court was for medical services rendered and medicines furnished to the testatrix by Dr. J. J. Burch in South Carolina from January 5 to April 12, 1901, aggregating, after a credit of \$100, a balance of \$256. This account was disallowed under the statutes, section 1112 et seq., relating to the qualifications of physicians, etc., to practice in this state. Section 1113 provides: "In no case wherein the provisions of this article shall have been violated shall any person so violating receive a compensation for services rendered." Subject to objection by defendant, it was shown that J. J. Burch is not a registered physician in South Carolina. But the question was not whether J. J. Burch should recover for such services because of the alleged violation of the statute, but whether the executor was guilty of such misconduct as should in equity prevent him

from receiving credit for money paid on a valid judgment. So far as J. J. Burch was concerned, he was not a party to this suit and his right to recover on the account could not be ¹² again called in question. He has been paid. The executor makes no claim as physician and the statute does not apply. If he be regarded as in the shoes of J. J. Burch under the statute, then he must stand as one holding a claim which has been legally adjudged to be a valid claim against the estate. Moreover, the complaint does not allege that J. J. Burch was not entitled to recover because not a registered physician in this state, and that the executor was negligent in not resisting the claim on that ground. Plaintiff sought to have the complaint amended in this regard, but Judge Memminger refused to allow such amendment. The testimony shows that the only objection which the plaintiff ever made to the executor's payment of the claim was that the charges were excessive. We think, therefore, that the circuit court erred in disallowing the executor credit for payment of the judgment because of the statute relating to physicians.

The judgment paid by the executor also included an account for medical services rendered and medicines furnished to Mrs. McDaniel while she was in Georgia, from April 13, to May 16, 1901, aggregating \$274.25. The circuit court held that this account is discredited on its face, as the greater part of it is for "extra attention" at the rate of one dollar per hour, and he holds that there is no sufficient testimony to sustain these items, and accordingly he refused the executor credit therefor. Here again the court gave no effect whatever to the judgment against the executor establishing the correctness of these items. Notwithstanding there was a judgment by default of answer, the statute required the plaintiff to make in that suit proof of his unliquidated account, and it appears that J. J. Burch was examined as a witness as to the correctness of the account, and the judgment recites that plaintiff, Burch, proved his complaint to the satisfaction of the court. In view of this the account could not be said to be discredited on its face.

It being incumbent on plaintiff to at least show the invalidity or incorrectness of the account, let us examine the testimony ¹³ submitted. It was not questioned that Dr. J. J. Burch rendered the special attention for which he charged, as no witness suggested that the account was wrong in that particular. The question was whether the charges for such

special attention were excessive. Dr. D. A. J. Bell, for the plaintiff, testified in substance that he had himself attended Mrs. McDaniel in March and April, 1901, and from his knowledge of her condition he regarded the account as excessive as to the items of extra attention, "unless he is a professional nurse as well as a doctor, and has time to nurse as well as prescribe for his patients." He stated that Mrs. McDaniel's case was not a plain case of kidney disease, but it was not an extraordinary case demanding the constant attention of a physician. He further stated that he did not know what the extra attention was, that in an extraordinary case a doctor may act to some extent as a professional nurse, and would have the right to charge when detained beyond the ordinary time by the patient in extraordinary cases.

On the other hand, in behalf of defendant, Dr. Thomas Jennings testified that he lived within two hundred yards of Mrs. McDaniel; that he attended on her first, then Dr. G. A. Burch, then Dr. Bell, and then Dr. J. J. Burch; that from his knowledge of Mrs. McDaniel's case her condition was such at times as to require this extra attention, and that the charge was not excessive. Dr. F. W. P. Butler testified that the account appeared to be an unusual one, but may be correct and all right, and that it was probable that the services rendered as stated in the account were necessary. Dr. J. H. Carmichael testified that he did not consider the items for special attention an overcharge or unreasonable according to the fee bill. Dr. J. G. Tompkins, sworn for the plaintiff in reply, testified that the extra charges per hour are legal and in accordance with the fee bill of the Edgefield Medical Association, but the frequency of them is very unusual, and that in his practice when the case demands constant attention he advocates the employment of a trained nurse as less expensive to the patient.

¹⁴ It seems to us that a fair inference from the testimony submitted is that the services charged for were rendered at the request and for the benefit of Mrs. McDaniel, and that while the account may seem large and unusual in the matter of special attention, still the charges for services admittedly rendered were not excessive and were in accordance with the medical fee bill prevailing in that community. In view of this it cannot be affirmed with certainty that if the executor had contested the account these items would have been disallowed by the court, and that the judgment rendered

thereon was the result of the executor's negligence and not the result of Dr. Burch's rights in the premises.

The only negligence imputed to the executor is the failure to answer the complaint on the account within the time required by law. It appears that the complaint was served on the executor July 11, 1903; that he employed counsel to defend the suit on August 5, 1903; that his counsel appeared in court on August 6th and opposed the granting of judgment by default, but, as no answer had been served in the time required, the court gave judgment by default on August 7th. Then the executor made a motion before Judge Jos. A. McCullough at the ensuing term of court to open the judgment by default on the ground of his excusable neglect, upon his affidavit stating that he resided twenty miles from Edgefield Courthouse, and that at the time of the service of the summons and complaint, and for some time thereafter, he was in a critical condition, due to a stab received in April before, and was unable to attend to business; that when he was able to notice the papers, although still unwell, he carried them to his attorney on August 5th. This motion was denied by Judge McCullough, who took the view under the affidavits presented that the failure to answer was not due to excusable neglect, because, conceding that the executor was not able to go to Edgefield in person, he had mind enough to appreciate the importance of the case, and could easily have communicated with his attorney by ¹⁵ message or mail in time to answer within twenty days or secure the necessary time to answer.

There was no appeal from Judge McCullough's order, and it is in no wise under review now, and we are bound to assume that it was a proper exercise of discretion under section 195, regulating the practice of relieving a party from a judgment taken against him through excusable neglect, etc. But the question before us is not one under section 195, but one addressed to the conscience of a court of equity, whether the negligence of the executor was such as resulted in the judgment rendered, and whether the circumstances are such as should deprive him of credit for a payment he was compelled to make. We are of the opinion that the credit claimed by the executor should have been allowed.

The decree of the circuit court is reversed, and it is further ordered and adjudged that the defendant executor in his accounting be allowed credit for the sum paid in settle-

ment of the judgment in the case of *J. J. Burch v. Winchester McDaniel*, as executor.

Executors and Administrators are required to exercise only ordinary care and reasonable diligence in managing the estate they represent: *Moore v. Eure*, 10 N. C. 11, 9 Am. St. Rep. 17. They are not bound to exercise any higher responsibility than that which is imposed upon any other agent or trustee: *Estate of Kohler*, 15 Wash. 613, 55 Am. St. Rep. 904. They are required only to pursue such course in the management of the intestate's assets as a judicious man, looking alone to his own interests, would, under the circumstances, pursue in his own affairs: *Harris v. Orr*, 46 W. Va. 261, 76 Am. St. Rep. 815; note to *Tarver v. Terrance*, 12 Am. St. Rep. 311.

CITY OF LAURENS v. ANDERSON.

[75 S. C. 62, 55 S. E. 136.]

CONSTITUTIONAL LAW—Exemption from License Tax.—A statute exempting all soldiers and sailors of the Confederate states who enlisted from a certain state and who were honorably discharged from paying a license for carrying on any business or profession in any city, town, or village within the state is unconstitutional as unwarranted class legislation, and as not affording to every person the equal protection of the laws. (p. 886.)

Ferguson & Featherstone, for the appellant.

Dial & Todd, for the appellee.

⁶² GARY, J. The exceptions assign error on the part of his honor, the presiding judge, in declaring the following statute unconstitutional, to wit:

"Be it enacted by the General Assembly of the State of South Carolina, That all soldiers and sailors of the Confederate States, who enlisted from this state, and who were honorably discharged from such service, shall hereafter be exempt from any license for the carrying on of any business or profession within this state, or any city, town or village ⁶³ therein: Provided, That such soldiers and sailors shall file with the clerk of the court of the county in which he resides, the proper evidence of his service in the Confederate War: Provided, further, That no partnership shall exist in any such business or profession with any person not a bona fide soldier or sailor of the said Confederate States": 24 Stat. 441.

The defendant was tried in the mayor's court upon the charge of running a beef market and grocery store without license. He pleaded that he was exempt from the payment of a license tax under the provisions of said act. The mayor ruled that the statute was unconstitutional, and imposed a sentence upon the defendant, from which he appealed to the circuit court.

The respondent contended that the statute was in violation of the following constitutional provisions:

Article 1, section 5, of the constitution of this state, which provides that no person shall be denied the equal protection of the laws.

Section 1 of the fourteenth amendment of the United States constitution, which prohibits any state from denying to any person the equal protection of the laws.

Article 10, section 1 of the constitution of South Carolina, which contains the provisions that "the General Assembly shall provide by law for a uniform assessment and taxation, and shall prescribe regulations to secure a just valuation for taxation of all property . . . : Provided, That the General Assembly may provide . . . for a graduated license on occupations and business."

Article 4, section 2 of the United States constitution, which is as follows: "The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states."

The presiding judge ruled that the act was in violation of the first and second, but not of the third and fourth, of said provisions.

The respondent gave notice that in case it was necessary, it would rely upon the additional grounds that there was ⁶⁴ error in overruling the third and fourth of said objections.

We will proceed, first, to state the general principles touching the subject of classification under the state and federal constitutions.

The case of *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255, 41 L. ed. 666, decides that the classification must not be arbitrary—that is, "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed"; also, that such classification must be "based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a merely arbitrary selection."

In *American Sug. Ref. Co. v. Louisiana*, 179 U. S. 89, 21 Sup. Ct. Rep. 43, 45 L. ed. 102, the court, in discussing the provisions of the constitution as to the equal protection of the laws, says: "The power of taxation under this provision was fully considered in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. Rep. 533, 33 L. ed. 892, in which it was said not to have been intended to prevent a state from changing its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property altogether; may impose different specific taxes upon different trades or professions; may vary the rates of excise upon various products; may tax real and personal estate in a different manner; may tax visible property only and not securities; may allow or not allow deductions for indebtedness. 'All such regulations and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature or the people of the state in framing their constitution.' "

The court, in *Sutton v. State*, 96 Tenn. 696, 36 S. W. 697, 33 L. R. A. 589, says that legislation, to be constitutional, "must possess each of two indispensable qualities: First, it must be so framed as to extend to and embrace equally all persons who are or may be in the like situation and circumstances; ⁶⁵ and, secondly, the classification must be natural and reasonable, not arbitrary and capricious."

In *Cooley's Constitutional Limitations*, 482, we find the following statement of the principle: "Privileges may be granted to particular individuals, when by so doing the rights of others are not interfered with; . . . but every one has a right to demand that he be governed by general rules, and a special statute which without his consent singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not in the province of free government. Those who make the laws 'are to be governed by promulgated, established laws, not to be varied in particular cases, but to have one rule for the rich and poor, for the favorite at court and the countryman at the plough.' "

The court, in *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863, 10 S. E. 285, 6 L. R. A. 621, uses this language: "The rights of every individual must stand or fall by the same rule of law that governs every other member of the

body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens and not of others, when there is no public necessity for such discrimination, is unconstitutional and void." In the case of *Standard Oil Co. v. Spartanburg*, 66 S. C. 37, 44 S. E. 377, there was an ordinance requiring dealers in oil to pay a license tax, and providing that it should not apply to dealers handling oil on which the license had been paid. The court, in declaring the ordinance unconstitutional because there was no reasonable ground for such classification, said: "It cannot be successfully contended that the exemption from payment of license tax was intended for the benefit of the municipality, for the tendency of the classification was to lessen its revenues. Nor can it be argued that the exemption was in any sense an encouragement to commerce, for the merchants and dealers under this classification ^{as} conducted their business in no respect different from those who paid the license tax. It can scarcely be insisted that it was for the benefit of those who paid the tax, as its tendency was to create a larger number of competitors in business with them, especially when we have before us one of the parties who paid the tax objecting to its legality. We are irresistibly forced to the conclusion that the exemption was intended as a mere favor to those included within the classification and that it was, therefore, unconstitutional."

We will proceed next to review some of the authorities in which the question before the court was similar to that now under consideration.

In the case of *State v. Garbroski*, 111 Iowa, 496, 82 Am. St. Rep. 527, 82 N. W. 959, 56 L. R. A. 570, the court had under consideration the constitutionality of an act granting immunity from a license tax to peddlers who had served in the army of the United States, during the Civil War. The court said: "The classification here attempted rests solely on a past and completed transaction, having no relation to the particular legislation enacted. All citizens are divided into two classes—those who served in the army and navy thirty-five years ago, and all those who did not. True, as suggested, the veterans came from no particular class; but the trouble with this statute is that it attempts to make of them a class in legislation, in the operation of

which there can be no substantial distinction between them and others. In present conditions and circumstances, there are no differences between them in their relation to society and the administration of the law, and other citizens of the state. . . . The work of a peddler calls for qualities such as a soldier or sailor acquires in the service. Equality in right, privilege, burdens and protection is the thought running through the constitution and laws of the state; and an act intentionally and necessarily creating inequality therein, based on no reason suggested by necessity or difference in condition or circumstances, is opposed to the spirit of free government, and expressly prohibited by the constitution. . . . The classification ⁶⁷ attempted by this statute is based on no apparent necessity, or difference in conditions or circumstances that have any relation whatever to the employment in which the veteran of the Civil War is authorized to engage without paying license. It savors more of philanthropy (worthy of the highest commendation, in its proper sphere) than of reasonable discrimination, based on real or apparent fitness for the work to be done."

In the case of *State v. Shedroi*, 75 Vt. 277, 98 Am. St. Rep. 825, 54 Atl. 1081, 63 L. R. A. 179, the court was called upon to determine whether the statute was constitutional which provided that persons residents of that state who served as soldiers in the Civil War and were honorably discharged, were exempt from the payment of a license tax. In that case the court used this language: "Upon what basis does the attempted classification rest? There is no basis upon which it can rest, except that persons in one class served as soldiers in the Civil War, and were honorably discharged, and those of the other class did not so serve, or were not honorably discharged. This classification is dependent solely on a condition of things long since passed, and not on a present condition or situation, nor on a substantial distinction having reference to the subject matter of the law enacted. The veterans were originally from no particular class, and when discharged from the army they returned to no particular class—they again became a part of the general mass of mankind, with the same constitutional rights, privileges, immunities, burdens and responsibilities as other citizens similarly circumstanced in law in the same jurisdiction. Assuming that thus to have served as a soldier, and to have received an honorable discharge, may well merit reasonable considerations at the hands of the state

in recognition of patriotism and valor in defense of a common country, yet such considerations cannot exceed those constitutional limits established for the welfare and protection of the whole, for equal protection of the laws requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions,⁶⁸ both in the privileges conferred and the liabilities imposed. . . . It cannot be said that the service as a soldier in the war and the receipt of an honorable discharge bear any relation to the business of a peddler as defined by the law under consideration. There is no difference between the present conditions and circumstances of such veterans and those of other citizens regarding the relations to the law, or the attempted classification. In fact, according to their relations, they are of the same class, and any attempted classification between them is but a mere arbitrary selection and based upon no reasonable grounds."

The statute hereinbefore set out shows upon its face that it denies to those not included within its provisions the equal protection of the laws. It provides only for soldiers and sailors who enlisted from this state and were honorably discharged, but ignores the veterans of other wars, as well as those soldiers and sailors of the Confederacy who enlisted from other states and were honorably discharged. In fine, there is not a single feature of the act upon which a classification can be based, without violating the provisions of the state and federal constitutions.

These views render it unnecessary to consider the additional grounds upon which the respondent gave notice that it would rely.

It is the judgment of this court that the judgment of the circuit court be affirmed.

POWER TO CONFEE EXEMPTIONS OR BENEFITS IN CON- SIDERATION OF PAST SERVICES.

I. Exemption from Payment of License Tax, 890.

II. Benefits for Past Services, 893.

I. Exemption from Payment of License Tax.

Very few cases exist involving the question of the constitutionality of statutes which provide for the exemption from the payment of license tax on the ground of past services, such as service in some war, but such cases as do discuss this question unhesitatingly declare such statutes unconstitutional and void. Thus a statute requiring all peddlers to be licensed and exacting license taxes from all

but residents of the state who have served in the war for the suppression of the Rebellion and have been honorably discharged, discriminates in favor of them in a manner which amounts to a denial to other persons of the equal protection of the laws, and thereby violates the fourteenth amendment to the constitution of the United States, and is void: *State v. Shedroi*, 75 Vt. 277, 98 Am. St. Rep. 825, 54 Atl. 1081, 63 L. R. A. 179. As germane to the subject under consideration the court in the case just cited said that: "By the law in question, the legislature has made a classification by placing persons resident of the state, who served as soldiers in the Civil War, and were honorably discharged, in one class, and all other citizens together in another class. All persons engaged in the business of peddling, whether they belong to the one class or the other, must have a license in force or be subject to a penalty, but a license tax is required to be paid by persons in the latter class, while a license may be had by all in the former class without the payment of such tax. The classification, therefore, is one of taxation. From one class a tax on their goods so authorized to be sold is exacted for the privilege of doing business as a peddler, while the other class may carry on the same business in the same manner, sell the same kind and quality of goods in the same territory, without the payment of such tax. . . . Upon what basis does the attempted classification rest? There is no basis upon which it can rest except that persons in the one class served as soldiers in the Civil War and were honorably discharged, and those of the other class did not so serve, or were not honorably discharged. This classification is dependent solely on a condition of things long since past, and not on a present situation or condition, nor on a substantial distinction having reference to the subject matter of the law enacted. The veterans were originally from no particular class, and when discharged from the army they returned to no particular class—they again became a part of the general mass of mankind, with the same constitutional rights, privileges, immunities, burdens and responsibilities as other citizens similarly circumstanced in law in the same jurisdiction. Assuming that thus to have served as a soldier and to have received an honorable discharge may well merit reasonable considerations at the hands of the state in recognition of patriotism and valor in defense of the common country, yet such considerations cannot exceed those constitutional limits established for the welfare and protection of the whole, for equal protection of the laws requires 'that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and liabilities imposed': *Magoun v. Illinois Trust etc. Bank*, 170 U. S. 283, 18 Sup. Ct. Rep. 594, 42 L. ed. 1037"; *State v. Shedroi*, 75 Vt. 277, 98 Am. St. Rep. 828, 54 Atl. 1081, 63 L. R. A. 179. A statute which requires a license fee to be paid by all persons who peddle in the country, except veterans of the Civil War, is unconstitutional and

void, since it grants to one class of citizens privileges or immunities that on the same terms do not belong to all: *State v. Garbroski*, 111 Iowa, 496, 82 Am. St. Rep. 524, 82 N. W. 959, 56 L. R. A. 570. In this case it was said that: "In requiring the license fee from one class of persons for peddling in the country, not exacted from another following the same vocation, there was an unwarranted discrimination, rendering the statute void. It undertakes to grant to certain citizens, or classes of citizens, privileges or immunities that on the same terms do not belong to all. The constitution aims at equality of rights, privileges and capacities, and the state has no favors to bestow, except such as, from the nature of the case, cannot be possessed and enjoyed by all. As said by Judge Cooley: 'Privileges may be granted to particular individuals, when by so doing the rights of others are not interfered with; but everyone has the right to demand that he be governed by general rules, and a special statute which singles his case out to be regulated by different laws from those that are applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free government. Those who make the laws are to govern by promulgated established laws not to be varied in particular cases, but to have one rule for the rich and poor, for the favorite at court and the countryman at the plow': Cooley's Constitutional Limitations, 6th ed., sec. 482. Or as declared in *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863, 10 S. E. 285, 6 L. R. A. 621: 'The right of every individual must stand or fall by the same rule of law that governs every other member of the body politic, under similar circumstances, and every private or partial law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not all others, when there is no public necessity for such discrimination is unconstitutional and void. The classification attempted by this statute is based on no apparent necessity, or difference in conditions or circumstances that have any relation whatever to the employment in which the veteran of the Civil War is authorized to engage without paying license. It savors more of philanthropy (worthy of the highest commendation, in its proper sphere) than of reasonable discrimination, based on real or apparent fitness for the work to be done'": *State v. Garbroski*, 111 Iowa, 496, 82 Am. St. Rep. 527, 82 N. W. 959, 56 L. R. A. 570.

In Georgia it has been held, without discussing any constitutional question, that a statute exempting disabled or indigent Confederate soldiers from the payment of a license tax is valid, and that such statute is applicable to such soldiers as are either disabled or indigent, and it need not be made to appear in a given case that the soldier is both disabled and indigent, nor that his disability was brought about by service in the army: *Holliman v. Mayor of Hawkinsville*, 109 Ga. 107, 34 S. E. 214. In that state, if the evidence shows that

the petitioner was a disabled Confederate soldier and entitled to an exemption as such, an injunction may be granted restraining a sale of his personal property levied on to satisfy a business license tax assessed against him: *Coxwell v. Goddard*, 119 Ga. 369, 46 S. E. 412. Or a disabled or indigent Confederate soldier, holding the proper certificate from an ordinary, may, except as to such kinds of business as he is not by virtue of such certificate authorized to engage in, lawfully conduct as many lines of business as he is able to carry on in his own name and upon his own account, without paying to the municipality a license tax upon any particular business carried on, or upon any subordinate branch thereof, and his agent or employé lawfully operating under such soldier's certificate is not amenable to the city for doing business without a license: *Hartfield v. City of Columbus*, 109 Ga. 112, 34 S. E. 288.

II. Benefits for Past Services.

In some cases the broad statement is made that a statute declaring that persons who have served in the army or navy in the war of the Rebellion and have been honorably discharged therefrom shall be preferred for appointment for employes to positions in every public department and upon all public work of the state and of the cities and towns therein over persons of equal qualifications is constitutional: *Goodrich v. Mitchell*, 68 Kan. 765, 104 Am. St. Rep. 429, 75 Pac. 1034, 64 L. R. A. 945; *State v. Miller*, 66 Minn. 90, 68 N. W. 732; *In re Wortman*, 2 N. Y. Supp. 324. In the latest case upon the subject, that of *Shaw v. City Council of Marshalltown*, 131 Iowa, 128, 104 N. W. 1121, the court maintained the view that a statute providing for preference of honorably discharged soldiers and sailors of the Civil War, residents of the state, in appointment, employment, and promotion in the public service, over others of equal qualifications, is not violative of the fourteenth amendment to the federal constitution, declaring that no state shall make or enforce any law abridging the privileges or immunities of the citizens of the United States, as such privileges and immunities are those of the citizens of the United States as distinguished from citizens of the state; also that a state constitution declaring that the general assembly shall not grant to any citizen or class of citizens privileges or immunities not equally belonging to all is not violated by a state statute thus providing for preference to honorably discharged soldiers and sailors of the Civil War. In this case Mr. Chief Justice Sherwin said that "but little need be said concerning the national constitution. The fourteenth amendment declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. The privileges and immunities here protected are those of citizens of the United States as distinguished from the citizens of a state, and the fourteenth amendment deals only with the rights of citizens of the United States as such.

"Does the statute in question contravene the provisions of section 6, article 1 of the state constitution which says that the general assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all? Whether it does or not clearly depends upon the answer that shall be made to the further question whether the right of appointment to a minor municipal office is a privilege within the meaning of the constitution. That the right to hold office, as one of the privileges protected by the constitution, was not contemplated by its framers, is manifest from the constitution itself. The right of suffrage is given to male citizens only (section 1, article 1), and there are provisions expressly limiting the right to hold certain offices to the male citizens of the state. The constitution itself implies that women may become citizens of the state, and they undoubtedly are, and yet it will not be claimed that they are entitled to hold office under this provision of the constitution: See *Minor v. Hoppersett*, 21 Wall. 162, 22 L. ed. 627; *Huff v. Cook*, 44 Iowa, 639; Opinion of Justices, 115 Mass. 602. The precise meaning of the words 'privileges and immunities' is not very definitely settled by the decisions. In speaking of the words as used in the constitution of the United States, Mr. Justice Curtis in *Connor v. Elliott*, 18 How. 591, 15 L. ed. 497, said: 'We do not deem it needful to attempt to define the meaning of the words 'privileges' in this clause of the constitution. It is safer, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined in each case, upon a view of the particular rights asserted and denied therein.' In *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3230, the question was considered by Mr. Justice Washington, who said in part: 'What are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental, which belong of right to citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent and sovereign.' This statement of the general meaning of the words has been approved by the supreme court of the United States, and, while the language was used with reference to the constitution of the United States, it is none the less applicable to the constitution of this state, so far as the word 'privileges' is concerned. The right to hold office can be no more a natural and personal right, nor more sacred, than the right of suffrage, and it is the general holding of the courts that the right of suffrage is not a natural and personal right, but a political and civil right. It owes its existence to the constitution of civil government, and not to the personality of the individual, nor does the right necessarily follow and become an attribute of citizenship, as we have already pointed out. It is a right which is conferred, withheld or limited at the pleasure of the people,

acting in their sovereign capacity. Once granted, it may be taken away by the same power that granted it, and it is not therefore, a natural right, which is held to be inalienable like the rights of conscience. . . . A public office has in it no element of property, but it is rather a personal public trust, created for the benefit of the state, and not for the benefit of the individual citizens thereof. Nor are the prospective emoluments of a public office property in any sense, for the salary or other perquisites may be reduced or otherwise regulated by law at all times, unless such change is forbidden by the constitution: *Bryan v. Cattell*, 15 Iowa, 538; *Ex parte Lambert*, 52 Ala. 79; *Taylor v. Beckham*, 178 U. S. 548, 20 Sup. Ct. Rep. 890, 44 L. ed. 1187; *Donahue v. County of Will*, 100 Ill. 94.

“The state has the same freedom of employment that belongs to the individual, and no one will contend that the individual may not employ any person whom he wishes to employ, or that he may not choose his employ  s from a certain class. If it were otherwise, liberty of contract would be destroyed, and legislation in that direction would be clearly unconstitutional. The right to pursue any lawful calling in a lawful way is undoubtedly a fundamental right; but there is a marked distinction between this right and the so-called right to be employed by a particular person or in a particular line of service. For the purpose of government, the counties, cities, and towns of the state are its agents and under its control; and what the state may constitutionally do with reference to public matters it may direct its agents to do, and by the act in question the state has simply said that it will employ in all public departments and upon all public works only those of a certain class of its citizens, other things being equal. Nor do we believe that the act is class legislation, within the accepted meaning of the term. It imposes no special obligation or burdens on those who are excluded from its benefits, and, as we have seen, privileges may be granted to particular individuals without reserve when by so doing the rights of others are not interfered with. It does not forbid the right to the acquisition or enjoyment of property, nor prevent the disposal of person or property, which may be conceded to be among the natural rights, and to be protected by the natural liberty of the individual. That equality of rights, privileges, and capacities should be the aim of the law no one will question. But we are not here called upon to deal with the question of inequality in privileges or immunities, for the right to hold a public office or to be employed by the state in any capacity is not a privilege within the meaning of the constitution; and, if our conclusion on this question is right, it follows that there can be no inequality or injustice in the statute under consideration, for the sufficient reason that no right protected by the constitution has been invaded. And consequently our conclusion that the statute does not contravene either the constitution of the United States or the constitution of this state is not in conflict with

the cases cited by the appellee on the question of the equality of privileges and immunities, among which is the case of *State v. Garbroaki*, 111 Iowa, 496, 82 Am. St. Rep. 527, 82 N. W. 959, 56 L. R. A. 570. It is fundamental that the legislature has the power to legislate on all subjects, unless it is expressly or impliedly prohibited from so doing by the constitution, and the act of the legislature which is assailed must be plainly at variance with the constitution before the court will so declare it. All doubtful questions will be resolved in favor of the validity of the act: *Stewart v. Board of Supervisors*, 30 Iowa, 9, 1 Am. Rep. 238; *Huff v. Cook*, 44 Iowa, 639. See, also, *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. Rep. 358, 49 L. ed. 643.

"That the principal question involved in this case is not entirely free from doubt may be conceded, but after a full examination of the principles involved and the reasoning of the cases supporting our conclusions, we are satisfied that the act is not unconstitutional. Furthermore, similar acts have been sustained in several of our sister states, and, while the constitutional question under consideration has not been considered in many of the decisions they nevertheless lend support to our conclusion in a general way. The leading case is *In re Wortman*, 2 N. Y. Supp. 324. This decision was followed by the New York courts until the state constitution was amended in 1894, giving preference of employment to veterans: *People v. Stratton*, 80 N. Y. Supp. 269; *People v. Tobey*, 153 N. Y. 381, 47 N. E. 800; *People v. Wright*, 150 N. Y. 444, 44 N. E. 1036; *People v. Lathrop*, 142 N. Y. 113, 36 N. E. 805; *Lewis v. Board*, 51 N. J. L. 240, 17 Atl. 112; *Ingram v. Board*, 63 N. J. L. 542, 43 Atl. 445; *MacDonald v. Newark*, 55 N. J. L. 267, 26 Atl. 82; *State v. Miller*, 66 Minn. 90, 68 N. W. 732; *Goodrich v. Mitchell*, 68 Kan. 765, 104 Am. St. Rep. 429, 75 Pac. 1034, 64 L. R. A. 945; *Opinion of Justices*, 166 Mass. 589, 34 L. R. A. 58; *Opinion of Justices*, 145 Mass. 587, 13 N. E. 15. The constitution of Kansas differs from our own with respect to granting privileges. The Kansas Bill of Rights contains the provision 'that no special privileges or immunities shall ever be granted by the legislature which may not be altered, revoked, or repealed by the same body, and this power shall be exercised by no other tribunal or agency.' And it is probably true that the *Goodrich* case is not an authority on the constitutional question that we have before us."

In Massachusetts, also, a majority of the supreme court has ruled that a statute authorizing veterans to apply for examination for any position in the public service classified under the civil service statutes and rules, and providing that if they pass such examination, they shall be preferred in appointment to all male persons not veterans, is constitutional: *Opinion of the Justices*, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58. But in that state it has also been maintained that the legislature cannot constitutionally provide that pub-

The offices which it has created shall be filled by veterans in preference to other persons, whether the veterans are or are not found or thought to be actually qualified to perform the duties of the offices by some impartial and competent officer or board charged with the duty of making the appointments: *Brown v. Russell*, 166 Mass. 14, 55 Am. St. Rep. 357, 43 N. E. 1005, 32 L. R. A. 253. In this case it was said that "the principal question of law in this case, broadly stated, is therefore as follows: Can the legislature constitutionally provide that certain public officers and employments which it has created shall be filled by veterans in preferment to all other persons, whether the veterans are or are not found or thought to be actually qualified to perform the duties of the offices and employments by some impartial and competent officer or board charged with some public duty in making the appointments. If such legislation is not constitutional as regards public offices, the question incidentally may arise whether a distinction can be made between public offices, and the employments by the public which are not offices. Public offices are created for the purpose of effecting the ends for which government has been instituted, which are the common good and not the profit, honor, or private interest of any one man, family, or class of men. In our form of government, it is fundamental that public offices are public trusts, and that the persons to be appointed should be selected solely with a view to the public welfare. In offices which are created by the legislature, where the method of appointment is not prescribed by the constitution, the legislature, if no limitation is put upon its power by the constitution, can take upon itself the responsibility of selecting the persons to be appointed, or can confer the power of appointment upon public officers or boards, or upon the inhabitants of cities, towns or districts, but we think that it is inconsistent with the nature of our government, and particularly with articles 6 and 7 of our Declaration of Rights, that the appointing power should be compelled by legislation to appoint to public offices persons of a certain class in preference to all others, without the exercise on its part of any discretion, and without the favorable judgment of some legally constituted officer or board designated by law to inquire and determine whether the persons to be appointed are actually qualified to perform the duties which pertain to the offices": *Brown v. Russell*, 166 Mass. 14, 55 Am. St. Rep. 357, 43 N. E. 1005, 32 L. R. A. 253. This case is, of course, at variance with cases heretofore cited holding that a statute providing that veterans, regardless of any inquiry into their qualification, shall be preferred for appointment as officers or employes in positions in every public department and upon all public work of the state and of the cities and towns therein over persons of equal qualifications, is constitutional, and not in conflict with any express provisions of the state or federal constitution: *Shaw v. City Council of Marshall-*

town, 131 Iowa, 128, 104 N. W. 1121; *Goodrich v. Mitchell*, 68 Kan. 765, 104 Am. St. Rep. 429, 75 Pac. 1034, 64 L. R. A. 945.

The present New York constitution prescribes that appointments and promotions in the civil service of the state, and of the civil divisions thereof, shall be made according to merit and fitness to be ascertained as far as practicable by examinations, which so far as practicable shall be competitive, with the provision that honorably discharged soldiers and sailors of the late Civil War shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made, and it has been decided that such constitutional provision gives no undue preference to such veterans over other citizens of the state in such examinations, whether competitive or non-competitive, but its meaning is that when, as a result of such examinations, a list is made up, consisting of those whose merit and fitness have been duly ascertained, then the veteran is entitled to preference without regard to his standing on the list, and as thus understood such constitutional provision will be upheld: *Matter of Keymer*, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447. But a statute providing in effect that as to such veterans competitive examinations for appointment in the civil service shall not be deemed practicable or necessary in cases where the compensation or other emolument of the office does not exceed four dollars per day, is in conflict with such constitutional provision and consequently void: *Matter of Sweeley*, 12 Misc. Rep. 174, 33 N. Y. Supp. 369, affirmed without opinion, 146 N. Y. 401, 42 N. E. 543; *Matter of Keymer*, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447.

While such constitution provides for a preference of veterans in appointment and promotion in the civil service within the state and does not, in terms or otherwise, provide that they shall be continued in the public service in preference to other employes, the legislature, while it cannot enact laws repugnant to such provision of the constitution, may legislate further in that direction, if, in its judgment, it shall seem wise so to do; and as it created the civil service system in that state substantially as it is now, and before any constitutional provision existed on the subject, it is within its power to place a limit upon the removal of veterans employed in the public service, and a statute providing that no person holding a position by appointment or employment who is an honorably discharged soldier or sailor of the late Civil War "shall be removed from such position or employment except for incompetency or misconduct shown after a hearing upon due notice upon stated charges and with a right to such employe or appointee to a review by writ of certiorari" is constitutional and valid, and does not extend the preferences of veterans beyond that accorded them by the constitution: *Stutzbach v. Coler*, 168 N. Y. 416, 61 N. E. 697.

GRIFFIN v. GRIFFIN.

[75 S. C. 249, 55 S. E. 317.]

VENDOR AND PURCHASER—Void Sale Under Mortgage Power—Subrogation.—If a grantee in good faith takes a deed from a purchaser under a power of sale contained in a mortgage believing his title to be good, and such deed proves ineffectual, such grantee is entitled to be subrogated to the rights of the mortgagee to the amount of the purchase money paid to him, and the mortgagor, or one claiming under him, is entitled to have the mortgage debt credited with the amount bid at the sale under the power. (p. 900.)

Wilson & Du Rant, for the appellants.

J. F. Rhame and W. C. Davis, for the appellee.

250 WOODS, J. This appeal is from an order overruling a demurrer to the complaint. The complaint alleged in substance that on February 4, 1884, Moses Levi undertook to sell at public auction six-elevenths of the land therein described under the power contained in a mortgage given to him by the defendant, Joseph D. Griffin, and under this attempted sale subsequently executed to Ferdinand Levi, who was the highest bidder at the sale, what purported to be a deed of conveyance, for the consideration of six hundred and fifty dollars; but that no title really passed, for the reason that the deed was executed by Moses Levi in his own name instead of in the name of the mortgagor; that on February 14, 1891, Ferdinand Levi undertook to convey the same interest in the land to Moses Levi, for the consideration of six hundred and fifty dollars, and that thereafter, on July 16, 1891, Moses Levi conveyed by deed to the plaintiff, for the consideration of one thousand dollars, all his right, title, interest in the land, embracing not only the six shares covered by the attempted sale under the mortgage but other shares subsequently acquired; that plaintiff "purchased the said premises from the said Moses Levi under the honest belief that by the sale thereof to him he would be vested with a perfect, legal title thereto"; that Moses Levi died on the twenty-sixth day of January, 1899, and David Levi and Abe Levi are executors of his will; and that there is due and unpaid on the mortgage the sum of two thousand five hundred and eighty-five dollars, with interest from January 16, 1883, at the rate of ten per cent per annum. Under these allegations, the plaintiff asks to be subrogated to the rights of Moses Levi and Ferdinand Levi to the extent of

the ²⁵¹ sum of one thousand dollars paid by him for the land, and interest thereon, and that he have judgment of foreclosure for that amount.

A demurrer to the original complaint in the cause was sustained by this court (70 S. C. 220, 49 S. E. 561), but as a result of the views expressed in the former opinion the plaintiff amended in two important particulars: the personal representatives of the deceased mortgagee have been made parties defendant, and the allegation has been made that the plaintiff bought from Moses Levi under the belief that he was obtaining a good title. The executors of Moses Levi have made no objection to the sufficiency of the complaint, and in making them parties the plaintiff has brought before the court all who can possibly have any interest in the mortgage. The interest in the cause of the mortgagor, Joseph M. Griffin, and those who claim under him, is necessarily confined to the validity and amount of the mortgage as a present lien on the land; they are not concerned with the question whether the plaintiff is entitled to be subrogated to the rights of Moses Levi, mortgagee, for any defense they may have against the original mortgagee would be effectual against his assignee or one subrogated to his rights. The executors of the mortgage being before the court, any judgment rendered with respect to the interest in the mortgage claimed by the plaintiff must forever preclude them from further demands against the defendants based on the mortgage to the extent of the amount thereof that may be adjudged to belong to the plaintiff.

But, waiving this, the allegations of the complaint, if true, entitle the plaintiff to subrogation in any view that can be taken. It is not necessary to the plaintiff's right of subrogation to allege and prove that either Ferdinand Levi or Moses Levi honestly believed the sale to be valid and the title made under it good, for the deeds being actually ineffectual to convey the title, the mortgage was not discharged by it, and when the plaintiff paid his money and took the deed from the mortgagee, not as a speculative volunteer, but in good faith believing his title to be good, he was entitled ²⁵² to have from the mortgagee the benefit of the mortgage to the extent of the purchase money paid by him. On this point the case of *Sims v. Steadman*, 62 S. C. 300, 40 S. E. 677, is conclusive. The correlative equity of the mortgagor and those holding under him is to have credit on the mortgage debt for at least six hundred and fifty dollars, the amount of the original bid, as the pro-

ceeds of the sale of the land, even if at the resale now demanded the land should bring less than that sum, for the reason that the mortgagor was in no way responsible for the failure to pass a good title by the deeds made under the former auction sale.

It is the judgment of this court that the judgment of the circuit court be affirmed.

The Right to Subrogation is the subject of an extended note to *American Bonding Co. v. National etc. Bank*, 99 Am. St. Rep. 474.

SKIPPER v. SEABOARD AIR LINE RAILWAY.

[75 S. C. 276, 55 S. E. 454.]

CONSTITUTIONAL LAW—Carriers—Interstate Commerce.—Statutes requiring carriers by rail to trace freight or express shipped over their lines and the line of the connecting carrier, and making the initial carrier liable for shipment over its own and connecting lines unless a receipt from the connecting carrier is produced, and making the bill of lading issued by the initial carrier prima facie evidence of liability for the loss of or damage to goods in course of transportation, do not unlawfully regulate interstate commerce. (p. 908.)

Glenn & McFadden and T. Y. Williams, for the appellant.

E. Moore, and D. R. Williams, for the appellee.

²⁷⁶ POPE, C. J. The action here was brought against the defendant for three hundred and eighty-two dollars and twenty cents, as damages for the loss ²⁷⁷ of certain contents from a trunk which was delivered to the defendant for transportation beginning at Chester, South Carolina, and ending at Anglewood, Illinois; said trunk containing the baggage belonging to three persons traveling on tickets issued by the defendant from said Chester, South Carolina, to Anglewood, Illinois.

The answer of the defendant admitted that on the 28th of July, 1904, the tickets were bought and paid for by the plaintiff over the defendant's line of railway from Chester, South Carolina, to Atlanta, Georgia, and thence over other connecting lines of railway to Anglewood, Illinois. The defendant also admitted receiving the plaintiff's trunk and the delivery

to her of a check therefor, and that the contract was that the defendant would transport said trunk from Chester, South Carolina, to Atlanta, Georgia, and deliver the same to its connecting lines over which the plaintiff was traveling. It further admits that said trunk was in apparent good order. As to what condition it was in when received by the plaintiff at Anglewood, Illinois, the defendant had no knowledge or information sufficient to form a belief. The defendant further alleges that said trunk was in good order when delivered by it to the Western and Atlantic Railway Company.

The case came on for trial before special Judge O. W. Buchanan, at Lancaster, South Carolina. Both sides introduced testimony.

The plaintiff's witnesses testified as to the number and value of the articles abstracted from the trunk, and that the trunk when delivered at Anglewood, Illinois, had the lock broken and as to the damages which resulted from the loss of such articles.

The defendant's witnesses testified to the condition of the contracts evidenced by the tickets issued to the plaintiff by the defendant, and also to correspondence between the attorneys for plaintiff and railway authorities. After the charge of his honor, the jury returned the verdict of three hundred and sixty-three dollars and eighty-five cents in favor of the plaintiff.

²⁷⁸ After entry of judgment on said verdict, the defendant appealed on ten grounds, but the appellant confines its argument to certain constitutional questions of law. The points raised by the defendant resolve themselves into an attack upon the constitutionality of sections 1710 and 2176, volume 1, Code of Laws of 1902, and Act No. 1 of the Laws of 1903 of this state. The contention of defendant is that each of said sections of the code and said act of 1903 is unconstitutional, null and void, because when applied to interstate carriers or carriage of baggage such as this, each and all of them impose a burden on interstate commerce, and thus violate the commerce clause of the federal constitution. The following are copies of the sections and act referred to:

Section 1710: "When under contract for shipment of freight or express over two or more common carriers, the responsibility of each or any of them shall cease upon delivery to the connecting line 'in good order,' and if such freight or express has been lost, damaged, or destroyed, it shall be the

duty of the initial, delivering or terminal road, upon notice of such loss, damage or destruction being given to it by shippers, consignee, or their assigns, to adjust such loss or damage with the owners of said goods within forty days, and upon failure to discharge such duty within forty days, after such notice, or to trace such freight or express, and inform the said party so notifying, when, where and by which carrier the said freight or express was lost, damaged or destroyed, within said forty days, then said carrier shall be liable for all such loss, damage or destruction in the same manner and to the same extent as if such loss, damage or destruction occurred on its lines: Provided, That, if such initial, terminal or delivering road can prove that, by the exercise of due diligence, it has been unable to trace the line upon which such loss, damage or destruction occurred, it shall thereupon be excused from liability under this section."

Section 2176: "In case of the loss or damage to any article or articles delivered to any railroad corporation for transportation over its own and connecting roads, the initial corporation, ²⁷⁹ or corporations first receiving the same, shall, in every case, be liable for such loss or damage, but may discharge itself from such liability by the production of a receipt, in writing, for the said article or articles from the corporation to whom it was its duty to deliver such article or articles in the regular course of transportation. In which event, the said connecting road or roads shall be severally so liable, but may in succession and in like manner discharge themselves respectively therefrom; but if any such corporation shall willfully fail or refuse, upon reasonable demand being made to it by any party interested in the production of such receipt, to produce the same, then it shall not be entitled to claim the benefit of such exemption in any action against the said railroad corporation to render it liable for such loss or damage."

Acts of 1903, 1, 2: "An Act to further define connecting lines of common carriers and to fix their liabilities.

"Section 1. Be it enacted by the General Assembly of the State of South Carolina, That all common carriers over whose transportation lines, or parts thereof, any freight or baggage or other property received by either of such carriers on a contract for through carriage recognized, acquiesced in or acted upon by such carriers, shall in this State, with the respect to the undertaking and matters of such transportation, be con-

sidered and construed to be connecting lines, and be deemed and held to be the agents of each other, each the agent of the others, and all the others the agents of each, and shall be held and deemed to be under a contract with each other and with the shipper, owner and consignees of such property for the safe and speedy through transportation thereof from one point of shipment to destination; and such contract as to the shipper, owner or consignee of such property shall be deemed and held to be the contract of each of such common carriers; and in any of the Courts of this State, any through bill of lading, waybill, receipt, check or other instrument issued by either of such carriers, or other proof showing that either of them has received such freight, ^{also} baggage or other property for such through shipment or transportation, shall continue prima facie evidence of the subsistence of the relations, duties and liabilities of such carriers as herein defined and prescribed, notwithstanding any stipulation or attempted stipulations to the contrary by such carriers, or either of them.

"Section 2. For any damages for injury, or damage to or loss, or delay of any freight, baggage, or other property sustained anywhere in such through transportation over connecting lines, or either of them, as contemplated and defined in the next preceding section of this act, either of such connecting carriers which the person or persons sustaining such damages may first elect to sue in this State therefor, shall be held liable to such person or persons, and such carrier so held liable to such person or persons shall be entitled in a proper action to recover the amount of any loss, damage or injury it may be required to pay such person or persons from the carrier through whose negligence the loss, damage or injury was sustained, together with costs of suit."

The subject is not only intensely interesting in its consideration, but it is of great practical importance, for, as was well said by Mr. Justice Woods, in *Willett v. Southern R. R.*, 66 S. C. 477, 45 S. E. 93: "With the immense traffic and the resulting complicated business methods of modern American railroads, and the connection of these railroads with one another, to impose upon the owner of property passing over connecting lines the burden of making affirmative proof that the loss occurred on a certain one of these lines would be practically relieving of liability railroads handling freight as connecting lines; for the owner could rarely make the required proof, and when he could make it, in most instances, the ex-

pense of doing so would be greater than the value of the goods."

In considering the power of state to legislate upon the question of interstate commerce, the supreme court of the United States has held, "That an attempt on the part of a state to prohibit a carrier, as to an interstate shipment, from limiting its liability to its own lines, would be a regulation ²⁸¹ of interstate commerce and, therefore, void," in construing sections 2317, 2318 of the Georgia Code in the case of *Central of Georgia R. R. Co. v. Murphey*, 196 U. S. 194, 25 Sup. Ct. Rep. 218, 49 L. ed. 444. These two sections of the Georgia Code provide that if the carrier to which application is made, "shall fail to trace said freight and give said information in writing within the time prescribed therein, said carrier shall be liable for the value of the freight lost, damaged or destroyed in the same manner and to the same amount as if said loss, damage or destruction occurred on its line." Thus it is seen that the judgment against the initial line was rendered absolute, and must be therefore considered as an infringement by the state of Georgia on the commerce clause of federal constitution. In the text of this decision (*Central of Ga. R. R. v. Murphey*, 196 U. S. 194, 25 Sup. Ct. Rep. 218, 49 L. ed. 444), the United States supreme court has distinctly recognized and upheld its two former decisions in *Chicago etc. Ry. Co. v. Solan*, 169 U. S. 133, 8 Sup. Ct. Rep. 289, 42 L. ed. 688, and *Richmond etc. Ry. Co. v. R. A. Patterson Tobacco Co.*, 169 U. S. 311, 18 Sup. Ct. Rep. 335, 42 L. ed. 759.

If the two sections of our code and the act of 1903 complained of are violative of the constitution of the United States, of course they are void. The appellant here sought to obtain from the circuit judge a decision of the unconstitutionality of these provisions of our law. The circuit judge refused to hold them unconstitutional, and he now appeals to us to reverse the judge's decision.

The case of *Chicago etc. Ry. Co. v. Solan*, 169 U. S. 133, 8 Sup. Ct. Rep. 289, 42 L. ed. 688, was an action to upset a section of the code of Iowa which provided: "No contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of persons, which would exist had no contract, receipt, rule or regulation been made or entered into." The jury found a verdict for one

thousand dollars, which was appealed from, but the judgment was affirmed in 95 Iowa, 260. Justice Grey, in delivering the opinion of the United States supreme court on an appeal from the ²⁸³ Iowa court, said (page 135): "By the law of this country as declared by this court, in the absence of any statute controlling the subject, any contract by which a common carrier of goods or passengers undertakes to exempt himself from all responsibility of himself or his servants is void as against public policy, as attempting to put off the essential duties that rest upon every public carrier by virtue of his employment, and as tending to defeat the fundamental principles on which the law of common carriers was established to the securing of the utmost care and diligence in the performance of their important duties to the public." Justice Grey further says in his opinion: "The question of the right of a railway corporation to contract for exemption from liability for its own negligence is, indeed, like other questions affecting its liability as a common carrier of goods or passengers, one of those questions not of merely local law, but of commercial law or of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the state in which the cause of action arises. But the law to be applied is none the less the law of the state, and may be changed by its legislature, except so far as restrained by the constitution of the state or by the constitution or laws of the United States. . . . Railway corporations, like all other corporations and persons doing business within the territorial jurisdiction of a state, are subject to its law. It is in the law of the state that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measure by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate transportation are as much entitled, while within a state, to the protection of that state, as those who travel on domestic transportation. A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable according to the law of the state for acts of nonfeasance or of misfeasance ²⁸³ committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation should he in-

flict injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they had been inflicted, the state has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not in themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits. . . . The statute now in question, so far as it concerns liability for injuries happening within the state of Iowa—which is the only matter presented for decision in this case—clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty resting upon them by virtue of their employment as common carriers to use the utmost care and diligence in the transportation of passengers and goods.”

So in the case of *Richmond etc. Co. v. R. A. Patterson Tobacco Co.*, 169 U. S. 311, 18 Sup. Ct. Rep. 335, 42 L. ed. 759, Mr. Justice White, as the organ of the court, in speaking of a contract, says, on page 14: “Evidence thereof is but the instrument by which the fact that ²⁸⁴ the will of the parties did meet is shown. . . . It is, of course, elementary that where the object of a contract is the transportation of articles of commerce from one state to another that no power is left in the states to burden or forbid it; but this does not imply that, because such want of power obtains, there is also no authority on the part of the several states to create rules of evidence governing the form in which such contract when entered into within their borders may be made, at least

until Congress, by general legislation, has undertaken to govern the subject. . . . Of course, in a latitudinarian sense, any restriction as to the evidence of a contract relating to interstate commerce may be said to be a limitation of the contract itself. But this remote effect, resulting from the lawful exercise by a state of its power to determine the form in which contracts may be proved, does not amount to a regulation of interstate commerce."

Justice White therein refers to the case we have just quoted from so liberally—*Chicago etc. Ry. Co. v. Patrick L. Solan*.

It will thus be seen that it is perfectly legitimate for our legislature, in absence of any national legislation, to make such rules and regulations as it may seem proper, provided it does not destroy or seriously hamper the subjects of interstate commerce.

In the body of our statutes it will be observed that great care has been taken to leave the way open for the conduct of interstate commerce. We have only provided rules of evidence, and in doing this the decisions of the United States supreme court hold us perfectly justified. We, therefore, overrule all of these objections to the constitutionality of said statutes.

It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, J. I concur. There is a vital distinction between our statute and the Georgia statute, which was ²⁸⁵ condemned in *Central of Georgia R. R. Co. v. Murphey*, 196 U. S. 194, 25 Sup. Ct. Rep. 218, 49 L. ed. 444, as an unlawful interference with interstate commerce. The Georgia statute made the initial carrier absolutely liable if it failed within thirty days after application to inform the shipper in writing when, where, how and by what carrier the freight was lost or damaged, together with the names of witnesses to establish such facts; whereas, our statute (section 1710) provides that the carrier shall be excused from liability upon proof that by the exercise of due diligence it has been unable to trace the line upon which the loss or damage occurred. The Georgia statute prevented a carrier from availing itself of a valid contract exempting from liability for loss or damage occurring beyond its own line except upon an onerous condition, which in many cases it could not meet; whereas, the South Carolina statute excuses the carrier if the loss did not occur on its own line and it could not after due dili-

gence comply with the requirement of the statute. Section 2176 provides that the carrier may discharge itself from liability by the production of a receipt in writing for the articles from the connecting carrier, and the act of 1903 makes the bill of lading, etc., issued by the carrier for the freight, etc., prima facie evidence of liability for loss or damage to the goods in course of transportation.

The effect of these statutes as applied to interstate shipments is not to regulate interstate commerce, or to burden it, or materially interfere therewith, but to afford a reasonable protection to the shipper, in view of the great difficulty in the way of his proving where the loss occurred, and the relative ease and effectiveness with which the carrier might with reasonable diligence ascertain the facts and communicate to him.

Mr. Justice Woods concurs in both the above opinions.

The Statute Extending the Liability of a Carrier for the negligence of connecting carriers when it receives goods for shipment to points without that state, beyond the terminus of its line, is not unconstitutional: *Marshall etc. Grain Co. v. Kansas City etc. R. R. Co.*, 176 Mo. 480, 98 Am. St. Rep. 508.

ALDRICH v. ALDRICH.

[75 S. C. 369, 55 S. E. 887.]

PARTITION—Vacating Award of Commissioners.—The value fixed by commissioners in partition on lands to be divided should be set aside only in extreme cases, as where fraud or misconduct can be imputed to the commissioners. (p. 912.)

PARTITION—Vacating Award of Commissioners.—The award of commissioners in partition of lands will not be disturbed unless it is made clearly to appear that they exceeded their authority or were guilty of corruption or partiality. (p. 913.)

PARTITION—Vacating Award of Commissioners.—The award of commissioners in partition of lands will not be vacated because of the unsecured bid of one not a party to the record. (p. 916.)

B. T. Rice, for the appellants.

D. S. Henderson, for the appellee.

370 JONES, J. The executor of Mrs. Martha Ayer Aldrich brought this action to obtain a construction of her will,

to adjust the rights and equities of the parties beneficiary thereunder, and to partition the lands known as "The Oaks" among her devisees, they to account for the value of advancements in the final division.

Judge Gage made a decree, to which no exception has been taken, construing the will as intending that her children devisees should share equally after deducting advancements, and ordering that a writ of partition be issued to five commissioners, two to be named by the plaintiffs, two by the defendants, and the fifth by the clerk, directing them to ascertain and report the value of certain lands specifically devised by testatrix to her daughters, Miss Rebecca Aldrich and Mrs. Mary Aldrich Allen, and the value of certain lands given by the testatrix in her lifetime to her daughters, Mrs. Sarah Aldrich Richardson and Mrs. Cornelia Aldrich Duncan, valuation to be made as of the time of their gift by the testatrix, directing also that \$2,700 be charged against the share of Mrs. Allen, and \$1,500 against the share of her daughter, Mrs. Daisy Aldrich Bonham, as advances made to them respectively and referred to in the will. The plaintiff, Alfred Aldrich, and the defendant, Mrs. Rosa Aldrich, having admitted receiving advancements exceeding the value of their shares, claimed no further interest in the estate. The decree of Judge Gage concluded as follows: "That after recommending what lands shall be sold for the purpose of paying the specific bequests and legacies mentioned in the will, and the costs of proceeding, that said commissioners do forthwith divide the undivided residue of the lands of said estate between the said Robert Aldrich, Rebecca ³⁷¹ Aldrich, Sarah Aldrich Richardson, Mary Aldrich Allen, Daisy Aldrich Bonham and Cornelia Aldrich Duncan, equally after deducting from the share of each for equality of partition the value of advancements heretofore made them, ascertained by the commissioners as hereinbefore directed, or as recited in said will. That any of the parties have leave to apply at the foot of this decree for such further orders as may be necessary to carry the same into effect."

The commissioners appointed under this order were J. C. Griffin, J. R. Harden, W. W. Moore, N. F. Kirkland, Jr., and W. I. Johns, and after being sworn and viewing the land the commissioners made their return—a majority report by the first four named commissioners and the minority report of Commissioner Johns. The majority report val-

ued the tract conveyed to Mrs. Richardson in the lifetime of the testatrix at \$2,960, and the tract conveyed to Mrs. Duncan at \$3,040, and recommended that Mrs. Duncan pay Mrs. Richardson \$40, so as to make the sum advanced to each \$3,000. Each of these tracts contained about four hundred acres and were, therefore, valued at about \$7.50 per acre. Commissioner Johns, making the minority report, valued these lands as not exceeding \$4 to \$5 per acre at the time of the gift of them by the testatrix. With respect to these valuations three contentions were raised before Judge Prince in behalf of Mrs. Richardson and Mrs. Duncan by exceptions to the return of the commissioners: 1. That the commissioners violated the order of Judge Gage requiring valuations as of the time of the conveyance; 2. In not appraising without reference to improvements subsequently placed thereon by the grantees; 3. That the valuation was excessive. Judge Prince overruled these exceptions and sustained the majority report. The appellants, Mrs. Richardson and Mrs. Duncan, renew their contention by exceptions to this court.

The first and second grounds of objection were properly overruled by Judge Prince, as there was no evidence offered ⁵⁷² to show that the commissioners violated the order of Judge Gage in this particular; on the contrary, it appeared by the oath of Kirkland, one of the commissioners, that the commissioners did value these lands as of the date of their acquisition by the defendants, which was before any improvements were placed thereon by the defendants. The third objection is very satisfactorily disposed of by Judge Prince in his language, which we quote in full:

"As to the third ground of objection alleging excessive valuation, which has been supported by a number of affidavits: while it is true that a return to a writ in partition may be assailed in this way, and in a proper case may be set aside and the written partition recommitted to the same or some other commissioners, yet it is not a practice to be favored, and should be done only in extreme cases, such for instance, the authorities say, as where fraud or misconduct can be imputed to the commissioners. I find nothing of the sort in this case. It is simply a matter of opinion among the various parties who have testified pro and con, and the affidavits are as numerous and strong on the one side as on the other, and as the affiants are nearly all strangers to me, I have

no means of judging of the weight I should attach to their several statements. The tribunal designated by the law for the ascertainment of values and the equal division of the lands is the commissioners in partition, and their judgment must be held in higher esteem than any other. They are supposed to be not only good and true men of sound judgment and discretion, chosen with reference to their special fitness for the duties assigned to them and selected upon the highest principles of fairness to all parties, two chosen by the plaintiffs, two by the defendants, and the fifth by the clerk of the court, all sworn to fairly and impartially perform the duty imposed upon them. The tribunal thus selected is calculated to inspire confidence, and in the absence of anything going to impeach the bona fides of their acts, their decision should be final. It is rarely the case that in the division of a large estate among a great many parties ³⁷³ that all will be satisfied with the return of the commissioners, and if their decision can be set aside simply because some are dissatisfied with the result and produce affidavits of those who differ in opinion with the commissioners as to values, the same thing would be gone over and over again and again as long as honest men differ in opinion and there would be no end to the litigation. The law I think well settled in conformity with the foregoing views: *Geer v. Wind's Exrs.*, 4 Desaus. Eq. 85, where it is held that 'the return of commissioners in the division of land on writ of partition will be supported by the court unless clearly shown to be erroneous and unjust.' 'In the absence of any evidence, the court is bound to assume that the commissioners, in compliance with their sworn duty, acted fairly and impartially, and made such partition as in their judgment was best for the interest of all parties concerned': *Riley v. Gaines*, 14 S. C. 454. For these reasons, exceptions 1 and 2 are overruled. I have hesitated much in coming to this conclusion, for the reason that I have been profoundly impressed with the strength and force of the argument of counsel for the defendants.

"There is another reason why I do not feel at liberty to sustain the first two exceptions, and it is this: In my opinion, the decree of his honor, Judge Gage, practically constitutes the commissioners in partition arbitrators to ascertain and report the value of the lands advanced these excepting de-

fendants. Their return, therefore, should not be disturbed unless for reasons that would set aside an award of arbitrators appointed under the rule of court. The award of arbitrators will not be disturbed by the court unless it is made clearly to appear that they exceeded their authority, or were guilty of corruption or partiality. In this case no such showing is made. Besides, in *Buckler v. Farrow*, Rich. Eq. 178. in speaking of the commissioners in partition, the court uses this language: 'The commissioners are the agents of the parties, acting under the authority of the court, and they are as much bound by their return, made ³⁷⁴ in due form, fairly and impartially, as a plaintiff and defendant would be by any award of arbitrators under a rule of court.' There is no doubt that this is true, and if true, the burden of showing the mala fides of the commissioners is on those who attack their return. 'An award will not be set aside except for corruption or partiality in the arbitration or for some manifest error made by them': *Askew v. Kennedy*, 1 Bail. 46."

It is urged by appellant that the court erred in holding that the return of commissioners could not be assailed except for fraud or misconduct; whereas, it should have been held that said report could be assailed for mistake and manifest injustice, and that the preponderance of the proof was that the said return was unjust. Even if it should be conceded that a preponderance of the evidence outside the report of the commissioners on the lands given Mrs. Richardson and Mrs. Duncan was too high, it was proper to sustain the valuation made by the commissioners, unless the court was satisfied that the valuation was so grossly incorrect and unequal as to warrant an inference that the commissioners acted from an unfair or improper motive. It is a matter of common knowledge that men of experience may honestly differ as to the value of lands. So long, therefore, as the valuation by commissioners may be accounted for on this ground it should be sustained, and it is not sufficient to overthrow a valuation by commissioners merely to show that in the opinion of other honest and experienced men the true value is higher or lower than that made by the commissioners under oath. The rule in England, as stated in *Freeman on Cotenancy and Partition*, section 525, is that "it is improper for the court to interfere with the valuation of commissioners, unless there be some mistake in it so gross as to induce the court to think that the commissioners have acted from unjust, corrupt or fraudulent motives." *Am. St. Rep.*, Vol. 117—58

tives." Such is the rule in this state, and the courts apply substantially the same rule in vacating the return of commissioners in partition as are applied in vacating ³⁷⁵ awards of arbitrators appointed under order of court. In *Greenville County v. Spartanburg County*, 62 S. C. 105, 40 S. E. 147, it is declared that to avoid an award it is necessary to show that the arbitrators exceeded their power; or were guilty of fraud, corruption or partiality; or were influenced by some gross and palpable mistake of law or fact. It is true that the return of commissioners in partition is not absolutely final, and is to be submitted to the court for confirmation; still, in confirming or rejecting said return, the court will not retry matters of valuation which it was the duty of the commissioners to determine, but will consider the objections and evidence presented against the return only with a view to ascertain whether the return is the result of the fair and impartial judgment of the commissioners and within their power to make.

After setting off to Miss Rebecca Aldrich one hundred (100) acres of "The Oaks" tract, including the ancestral home of Aldrichs, and fifty (50) acres of said tract in addition to the "Shuck" tract of one hundred and fifty (150) acres to Mrs. Allen, as to which no contention has arisen, the majority of the commissioners appraised the residue of "The Oaks" tract, consisting of about three hundred and fifty-two (352) acres, at fifteen (\$15) dollars per acre, and allotted to Robert Aldrich two hundred (200) acres thereof, valued at three thousand (\$3,000) dollars, and to Mrs. Bonham one hundred (100) acres, valued at fifteen (\$1,500) dollars which, with fifteen hundred (\$1,500) dollars of property previously advanced, made her portion three (\$3,000) thousand dollars, and recommended a sale of the remaining fifty-two acres of "The Oaks" tract. Commissioner Johns, in his minority report, valued these lands at twenty-five (\$25) dollars per acre, and states his reasons therefor as follows: "My valuation of twenty-five (\$25) dollars per acre of 'The Oaks' place is based expressly upon the fact that upon a careful examination of the lands I find that it is covered with very fine pine timber, and is very near the town of ³⁷⁶ Barnwell, and also is a magnificent tract of land with little or no waste land. And upon the fact that I offered to the majority of the board of commissioners to take the entire tract of three hundred and sixty-seven (367) acres (same being left after said spe-

cific devises to Mrs. M. A. Allen and Rebecca Aldrich) at the price of twenty-five (\$25) dollars per acre, and pay the cash for same upon examination of deeds."

It appears that about two hundred and twenty-five (225) acres of this land is woodland, as stated in the affidavit of W. W. Duncan. In support of the motion to vacate the return of commissioners, the appellants submitted a number of affidavits, among them one by commissioner Johns, declaring his willingness to take the residue of "The Oaks" tract at twenty-five (\$25) dollars per acre, another, H. W. Richardson, declaring that he would purchase one hundred (100) acres of said tract, either woodland or cultivated land, at twenty-five (\$25) dollars per acre, another by D. C. Burckhalter, declaring that he would be willing to purchase one hundred (100) acres of said woodland at twenty-five (\$25) dollars per acre, and another by W. L. Cave, that he would purchase the entire woodland of said tract at twenty-five (\$25) dollars per acre and pay cash therefor, either at public or private sale. In overruling the objection to the valuation of the commissioners, Judge Prince decided as follows: "What I have said as to the valuation by the commissioners of lands owned by Mrs. Richardson and Mrs. Duncan, in considering the first two exceptions, applies with much greater force to objections raised in exceptions 3 to 7, inclusive, as to the valuation of the lands allotted by the commissioners to Robert Aldrich and Mrs. Daisy A. Bonham. It was clearly within the province of the commissioners to go upon these lands, fix their value and assign them by tracts to the parties entitled thereto. This they have done, and the presumption is that they have done so honestly and fairly. This presumption must obtain until ³⁷⁷ overthrown by a clear preponderance of the evidence. I cannot find that the preponderance of the evidence is against the valuation fixed by the commissioners. There are numerous affidavits pro and con, but they satisfy me that honest men not only may, but will often, differ in opinion. In thus holding I am not unmindful of the affidavits of those who say they will pay twenty-five dollars per acre for certain of these lands, nor have I forgotten the minority return of W. I. Johns, one of the commissioners. It must be noted that the witnesses, except Mr. Johns, say they will bid twenty-five dollars per acre for only a given number of acres. This may be true, and a limited number of acres may be really worth that price, when the tract, taken as a whole, may not be worth more than

the amount fixed by the commissioners. But it should be specially noted that there is not in the affidavits anywhere any evidence that either of these parties, including Mr. Johns, is in such financial condition as to be able to make good his offer. Again, it should be remembered that neither of these persons are parties to this action, and the court has no jurisdiction over them as to compel compliance with their several offers."

The appellants, by their exceptions, raise two main contentions as to the allotment of "The Oaks" tract: 1. That said lands were valued excessively low by the commissioners and their return should be set aside; 2. That the offer of a substantial bid for the land in advance of the valuation by the commissioners should shake the proposed allotment and bring the land to sale, under the authority of *Moore v. Williamson*, 10 Rich. Eq. 323, 73 Am. Dec. 93.

The first contention has been disposed of by what has been said in reference to attacking the return of commissioners. The evidence did not satisfy the circuit court that the commissioners were guilty of any fraud, corruption or partiality in making said valuation, and we cannot say that the preponderance of the evidence is against the view of the circuit court.

³⁷⁸ In the case of *Moore v. Williamson*, 10 Rich. Eq. 323, 73 Am. Dec. 93, the court held that a party dissatisfied with the rate at which land is recommended by commissioners in partition to be assigned to another may always bring the property to sale by making and securing a bid for a material advance in price over the value assessed by the commissioners. In the present case no party to the suit has made and secured a bid for the land, and we know of no precedent in this state which allows such privilege to one not a party. Parties have interest in the question whether the land shall be partitioned in kind or sold for partition. The court has jurisdiction over such parties, and may, by proper orders, require a deposit of money or bond to secure such bids, or may otherwise secure the bids in the disposition of the interest of the party in the premises. If, therefore, the doctrine of *Moore v. Williamson*, 10 Rich. Eq. 323, 73 Am. Dec. 93, be regarded as an exception to the general rule already announced as to the grounds upon which the return of commissioners may be overthrown, we are unwilling to extend the exception by allowing

such return to be vacated by the unsecured bid of one not a party to the record.

The foregoing views control and overrule all the material exceptions.

The judgment of the circuit court is affirmed.

The Report of Commissioners to Make Partition may be set aside on the ground that they erred in making allotments, but will be confirmed unless the partition is based on wrong principles, or it is shown by a clear and decided preponderance of evidence that they have made a very unequal or unfair partition or allotment: *Ransom v. High*, 37 W. Va. 838, 38 Am. St. Rep. 67. And the concurrent finding of the master and chancellor upon the facts is entitled to the same weight as the verdict of a jury. When such finding is that a partition cannot be made advantageously to the parties, otherwise than by a sale, it is error for the chancery court of appeals to remand the cause for the appointment of commissioners to examine the premises and report upon the practicability of a partition in kind: *Wilson v. Bogle*, 95 Tenn. 290, 49 Am. St. Rep. 929.

DILLINGHAM v. CITY COUNCIL OF SPARTANBURG.

[75 S. C. 549, 56 S. E. 381.]

HIGHWAYS—Contracts for Working—Advertisements for Bids.—A statute providing that the county commissioners "may" advertise in the county newspaper for working highways by contract should not be construed as "shall" or "must"; and a city council having the same powers over streets as county commissioners have over highways is not required to advertise for bids in the county newspaper for paving streets as a condition precedent to the exercise of the power to contract therefor. (p. 919.)

MUNICIPAL CORPORATIONS—Contracts for Street Paving. A contract made by city officers for paving streets after refusing all bids made after advertisement, and, upon further negotiations with the two lowest bidders, they receiving lower bids from them, will not be set aside, or its performance enjoined at the suit of a taxpayer who is not injured, but in fact benefited, thereby. (p. 922.)

MUNICIPAL CORPORATIONS—Contracts for Street Paving—Indemnity Bond.—If a city making a contract for street paving in its call for bids, requires that the contractor to whom the award is made shall furnish a bond to guarantee the faithful performance of the work and to defend, indemnify and save harmless the city against any suit, loss, damage or expense by reason of any negligence or default, want of skill or care on the part of the contractor, and requiring him to guarantee and keep in repair such pavement for one year, and retaining ten per cent of the total amount of such contract for one year, such requirement does not cut off full and free competition in bidding, nor does it render the contract void.

as tending to cause the contractor to increase the amount of his bid, and thus increase the burden on the taxpayers. (pp. 922, 923.)

MUNICIPAL CORPORATIONS—Contracts for Street Paving—Patented Material.—A city may legally advertise for bids and contract for paving streets with patented material if all the competition is permitted of which the situation allows. If a city exercising its power to make public improvements in good faith decides to contract for the use of patented articles, there is created no monopoly and no abatement in competition beyond what necessarily results from the rights and privileges given the patentee under his patent. (p. 925.)

J. G. Evans and C. P. Sanders, for the petitioner.

S. Wilson and S. J. Simpson, for the respondent.

⁵⁵⁰ JONES, J. By this proceeding in the original jurisdiction of the supreme court the plaintiff, as a citizen and taxpayer of the city of Spartanburg, sought to enjoin ⁵⁵¹ the performance of a contract entered into between the city council of Spartanburg and the Southern Bitulithic Company for the paving of certain streets of that city with bitulithic pavement. At a special session of this court, held July —, 1906, judgment was rendered denying the application for permanent injunction and dissolving the temporary injunction previously granted. The reasons for that judgment remain to be given.

Pursuant to the provision of section 2021, volume 1 of the Civil Code, the city of Spartanburg issued coupon bonds to the amount of \$100,000 for improving and paving the streets, which bonds were negotiated, and the money arising therefrom was turned into the city treasury as a fund for such street improvement. The city council advertised for sealed proposals for the paving of certain streets with vitrified brick, bitulithic or bituminous macadam, or asphalt block, the material to be used to be selected by the city council after the opening of the bids, reserving the right to reject any and all bids.

The advertisement was made in "Engineering News of New York," "Engineering Record of New York," and "Manufacturers' Record of Baltimore," as the best means of reaching contractors and engineers, able and competent to do the class of work desired. No formal advertisement was made in any newspaper published in Spartanburg county, as it was regarded wholly unnecessary; but the newspapers of the city of Spartanburg made frequent references to the fact that the paving was to be done under contract and the contract

was to be let by bids. In accordance with said advertisements and the specifications made by the city council, sealed bids were received and considered on March 26, 1906, as follows:

1. By Warren Brothers, for bitulithic pavement at \$2 per square yard.

2. By Southern Bitulithic Company, for bitulithic pavement at \$1.97 a square yard.

552 3. By G. O. Tenny, for vitrified brick, tar filler, \$2.18 per square yard; for vitrified brick, cement filler, \$2.14 per square yard.

4. By Southern Paving and Construction Company, for vitrified brick, 6" base, tar filler, \$2.21 per square yard; for vitrified brick, cement filler, \$2.11 per square yard.

5. By Barber Asphalt Company, bituminous macadam, \$1.99 per square yard; should brick be used for car track, \$2.09 per square yard.

The two lowest bidders were Southern Paving and Construction Company for brick pavement, and the defendant company for bitulithic pavement. Representatives of these companies were sent for and heard relative to a reduction of the price bid; whereupon the defendant company offered to reduce the price ten cents per yard on bitulithic pavement, and the Southern Paving and Construction Company offered to reduce the price of extras to the figures offered by defendant company, and any reduction that might be received in freight rates. The city council at first decided to reject all bids; but upon reconsideration the contract committee was instructed to take up the matter with the two lowest bidders and see if better bids could not be secured. At an adjourned meeting held the next day, the Southern Paving and Construction Company offered to place brick pavement for \$2.06 per square yard, and the defendant company offered to place bitulithic for \$1.75 per square yard. The contract was awarded to the defendant company.

1. The first ground upon which plaintiff assails the validity of the contract is the failure of the city council to advertise for bids in some newspaper published in Spartanburg county. No statute has been cited or found which requires advertisement for competitive bidding as a condition precedent to the making of a valid contract by the city of Spartanburg for street improvement. The charter of the city of Spartanburg having expired in 1901, that city was chartered under the general laws of the state providing for the incorporation of cities

of more than ⁵⁵³ five thousand inhabitants, approved February 19, 1901 (23 Stat. 648). Section 15 of this act, now appearing as part of section 1985 of the Civil Code, provides: "The said city or town council shall have power, and it shall be their duty, to keep in repair all the streets, ways and bridges within the limits of said city, and for such purpose they are invested with all the powers, rights and privileges within the limits of said city that are now given, or that may hereafter be given, to the county board of commissioners of the several counties of this state as to the public roads."

It is contended that the power of the city of Spartanburg with respect to repairing and improving its streets by contract is, as to the matter of advertising in a county newspaper, governed by the provisions of section 1381 of the Civil Code, in reference to the working of public roads under the contract system. That section provides: "If the county board of commissioners conclude to adopt the contract system for working, maintaining and operating the several sections of highways, roads, bridges and ferries in the several townships in their respective counties, or any part thereof, the county supervisor, as soon as practicable thereafter, *may* [italics ours] advertise in the newspaper published in the county, once a week for three weeks, and by notices posted in two or more conspicuous places in the several townships, or the township to be worked by the contract system, for bids from responsible persons for the performance of the work as above set forth, and shall furnish specifications of all such work or contracts as have been advertised. Any and all bids made shall be in writing, sealed, and addressed to the county supervisor, and by him opened in the presence of and submitted to the county board of commissioners, and it shall be the duty of said board to accept the lowest bid made by a responsible person or party: Provided, The county board of commissioners shall have power to reject any and all bids; and said board is hereby empowered to hire overseers and laborers, and have the work performed ⁵⁵⁴ as in its judgment may be most expedient and for the best interest of the county, . . . etc."

It is argued that "may," above italicized, should be construed as "shall" or "must," that the duty of advertising in a county newspaper is not merely directory, but is mandatory, and that a failure to so advertise renders the contract void.

It is true, that "may" in a statute is frequently construed "must" or "shall," especially where the public is interested in the thing to be done, and where such construction is necessary to give effect to the clear intention of the legislature: *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. ed. 47. The original county government act of 1893 (21 Stat. 481), in section 11, contained the word "shall" instead of "may"; but by the amendatory act of 1896 (22 Stat. 237), in section 25, corresponding to section 11 in the original act, "may" was substituted for "shall," and thus became incorporated as section 1381, *supra*. In view of this change of language by the legislature, it cannot be said that the clear intention of the legislature was to make it the imperative duty of county and city officers to advertise in a county newspaper for competitive bids for road or street improvement to be let by contract to the lowest responsible bidder. On the contrary, the natural inference is that the legislative intent was to allow such officers a discretion.

But if it should be conceded that it is the duty of such officers to advertise in a county newspaper for competitive bids when such work is to be let out by contract, it does not follow that a contract made without such advertising is void, unless the statute requires such as a condition for the exercise of the power to contract. It is only "where the power to let such contracts is dependent upon conditions and restrictions of this nature that a failure to comply with such necessary conditions constitutes sufficient ground for relief by injunction against the construction of the proposed improvement or awarding a contract therefor"; 2 High on Injunctions, 2d ed., sec. 1251. This is illustrated by cases cited for petitioner. For example, in *State v. Toole*, 555 Mont. 22, 91 Am. St. Rep. 386, 66 Pac. 496, 55 L. R. A. 644, the advertisement inviting proposals was not published according to law, and the contract was held unauthorized because the statute provided that "before any contract is let the board must advertise," etc. So, in *Inge v. Board of Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20, 33 South. 678, it was held that a compliance with mandatory provisions of the statutes as to advertising was essential to the power to contract when the statute provided that such contract shall be let to the lowest responsible bidder after advertising for bids, and that "said board shall have no power to pledge the credit of the city except as herein provided." But there are no such positive

statutory limitations on the power of the city council of Spartanburg to contract for the street improvement in question, and petitioner's contention in this regard furnishes no ground for injunction.

2. It is further contended by the petitioner that the contract was void because not let to the lowest bidder, as shown by bids received and considered on March 26, 1906; and that it was illegal for the city council, after rejecting all bids on that day, to enter into further negotiations with the lowest bidders, instead of reopening the matter to full competition among all the bidders. We see no ground for interference on this account. It will be observed that no one claiming to be the lowest bidder is objecting. The plaintiff only is objecting in his right as a taxpayer, and it is incumbent on him to show some injury threatened to him as such by the contract in question. The contract, as matter of fact, was awarded to the lowest bidder, and the subsequent negotiations, instead of being injurious to the taxpayers, were in their interest, and very advantageous to them in securing a substantial reduction from said lowest bid, amounting to a saving to the taxpayers of twenty-two cents per square yard, or about thirteen thousand dollars on the contract.

3. The petitioner also contends that the call for bids was so framed as to cut off full and free competition, in ⁵⁵⁶ that there was a requirement that the contractor to whom the award is made shall furnish a bond in the sum of twenty-five thousand dollars to guarantee the faithful performance of the work, to defend, indemnify and save harmless the city council against any suit, loss, damage or expense by reason of any negligence or default, want of skill or care on the part of the contractor, his agents or employés, etc., in the performance of said work, requiring the contractor to guarantee and keep in repair said pavement for one year, and retaining ten per cent of the total amount of the contract for one year. It is contended that these provisions rendered the contract void, since they naturally tended to cause the contractor to increase the amount of his bid and thus increase the burden on the taxpayers. On this point petitioner cites *Portland v. Bituminous Paving Co.*, 33 Or. 307, 72 Am. St. Rep. 713, 52 Pac. 28, 44 L. R. A. 527; *Alameda Macadamizing Co. v. Pringle*, 130 Cal. 226, 80 Am. St. Rep. 124, 62 Pac. 394, 52 L. R. A. 264. The first-mentioned case was an action upon a bond given by defendant in a street paving transaction, and

conditioned upon defendant's keeping the pavement in repair for five years, and decides that a city having power to repair its streets and to assess the cost against abutting property is empowered only to make provision for repairs demanded by present exigencies, and it is ultra vires for it to levy the estimated cost of anticipated future repairs against the property of individuals, and that such city has no power to incorporate in a street paving contract a condition that the contractor shall keep up repairs for a period of five years; the effect of such provision being to increase the contract price and impose upon abutting owners an added burden on account of anticipated repairs. The second named case was an action to foreclose a street assessment lien upon abutting property, and decides that a municipal ordinance requiring a contractor for street improvements to file a bond guaranteeing the work for one year from injury by ordinary use, is unauthorized, increasing the burden of the property owners. These cases depend upon the law of the particular ⁵⁵⁷ states involved, which denies to city authorities the power to assess abutting property owners for the cost of future anticipated street repairs, and can have no application to the present controversy and the facts of this case. The defendant company voluntarily signed the bond in this case and makes no objections to its provisions. The plaintiff, as taxpayer, is not interested to impeach or restrain the transaction unless some burden is thereby illegally placed upon him. The money arising from the sale of the bonds issued for improvement of the streets and sidewalks of Spartanburg will undoubtedly have to come finally from the taxpayers in paying for interest and final redemption of the bonds, but the fund was provided for the specific purpose of meeting anticipated street improvement. We regard the provisions of the contractor's bond as a reasonable and suitable guaranty for the faithful performance of the contract, within the discretionary power of the city council to require, and advantageous to the plaintiff as taxpayer in safeguarding the expenditure of the city funds. If such provision should naturally tend to increase the cost of the improvement, the taxpayer has an ample quid pro quo in the guaranty that the work shall be carefully and skillfully done according to the specifications.

4. The petitioner finally contends that the city council had no power to contract for the use of patented articles in improving the streets, as it tended to create a monopoly and

destroy competition. This contention is based upon the fact that the construction of bitulithic pavement under the specifications and contract involved the use of "Warren's No. 24 Puritan Brand Hard Bituminous Cement, Warren's Puritan Brand No. 21 Bituminous Water Proof Cement, and Warren's Quick Drying Bituminous Flush Coat Composition," articles or materials covered and protected by letters patent issued by the United States and controlled by Warren Brothers' Company, and Southern Bitulithic Company. The contention is that there can be no real competition when the specifications require ⁵⁵⁸ the use of an article which is the subject of monopoly. On this proposition petitioner cites many cases, among which are *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205; but see modification in *Kilvington v. City of Superior*, 83 Wis. 222, 53 N. W. 487, 18 L. R. A. 45; *Fishburn v. Chicago*, 171 Ill. 238, 63 Am. St. Rep. 236, 49 N. E. 532, 39 L. R. A. 482; *Seigel v. Chicago*, 223 Ill. 428, 79 N. E. 280; *Fineran v. Central Bith. P. Co.*, 116 Ky. 495, 76 S. W. 415; *Monaghan v. Indianapolis (Ind.)*, 75 N. E. 33; *City of Atlanta v. Stein*, 11 Ga. 789, 36 S. E. 932, 51 L. R. A. 335; *Smith v. Syracuse Imp. Co.*, 161 N. Y. 484, 55 N. E. 1077; *Burgess v. Jefferson*, 21 La. Ann. 143; *State v. City of Elizabeth*, 35 N. J. L. 351; *Nicholson Paving Co. v. Painter*, 35 Cal. 699; but see modification in *Perine etc. Co. v. Quackenbush*, 104 Cal. 684, 38 Pac. 533. A contrary view is supported, however, by numerous citations, among which are *Hobart v. Detroit*, 17 Mich. 246, 97 Am. Dec. 185; *Holmes v. Common Council*, 120 Mich. 226, 77 Am. St. Rep. 587, 79 N. W. 200, 45 L. R. A. 121; *Barber Asphalt Paving Co. v. Hunt*, 100 Mo. 22, 18 Am. St. Rep. 530, 13 S. W. 98, 8 L. R. A. 110; *Field v. Barber Asphalt Pav. Co. (C. C.)*, 117 Fed. 925; *Hastings v. Columbus*, 42 Ohio St. 585; *In re Dugro*, 50 N. Y. 513; followed in *Baird v. New York*, 96 N. Y. 567.

The view we take renders it unnecessary to make detailed reference to the various cases pro et contra on this subject. The keystone of the argument in support of the Wisconsin line of cases is that where the statute requires competitive bidding, after advertising, as a condition precedent to the power of the municipality to contract for street improvement, the statute is violated when the city ordinance or contract specifications require the use of a patented or monopolized article, because there can be no real competition when the bidding is practically restricted to the individual or cor-

poration controlling the patent; on the other hand, the fundamental reason supporting the Michigan line of cases is that even where the statute requires competitive bidding, it is not violated, or does not apply, when all the competition is allowed which the situation permits; that a ⁵⁵⁰ municipality should not be denied the right, for the benefit of its citizens, to avail itself of useful inventions and discoveries, even though protected by patents; and that, when a city exercising its power to make public improvements in good faith decides to contract for the use of patented articles, there is created no monopoly and no abatement in competition beyond what necessarily results from the rights and privileges given the patentee by the federal government. The question is admittedly close, but we incline to the latter view as best supported by reason and the weight of authority.

With respect to the competition allowed in this case, it must be remembered that the sharpest competition was sought and provided for among contractors for various kinds of pavement, including brick, asphalt block, and bitulithic pavement, specifications for each class of pavement were made, and the city council in the advertisement reserved the right, accorded by law, to reject any bid, and also to reserve the right to decide upon the material to be used after the opening of bids, and did not determine to have bitulithic pavement until it appeared that the bid therefor was the lowest made for any specified kind of pavement. Furthermore, it appears that the city council, in order to enable any bidder to secure the material and process covered by such patents, secured from patentees in advance their offer to furnish said material to any bidder at a fixed price, together with an explanation of their methods and material for construction. It is not doubtful that, if an award had been made to another competitor bidding for bitulithic pavement upon the faith of the offer of the patentee on file with specifications, such holder would have a right to demand and receive such materials upon compliance with the offer. In view of these facts, there was allowed all the competition which in the nature of things was possible. But a conclusive reason for sustaining the validity of the contract in question is that there is no statute in this state which compels the city of Spartanburg to submit this matter to competitive bidding.

There is nothing in the record to suggest fraud or abuse of discretion on the part of the city council, and, as the award-

ing of the contract to the defendant company was within the power of the city council, there is no equity to restrain the performance of the contract.

A Provision in a City Charter that certain contracts shall be let to the lowest responsible bidder is mandatory, and a compliance therewith is essential to the validity of such contracts: *Inge v. Board of Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931.

A Municipal Ordinance Requiring a Contractor for street improvements to file a bond guaranteeing the work for one year from injury from ordinary use is unauthorized, increases the burdens of property holders, and renders the contract and assessment invalid: *Alameda Macadamizing Co. v. Pringle*, 130 Cal. 226, 80 Am. St. Rep. 124. See, too, *Portland v. Bituminous Pav. Co.*, 33 Or. 307, 72 Am. St. Rep. 713; *Inge v. Board of Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20.

CASES

IN THE

SUPREME COURT

OF

SOUTH DAKOTA.

GARRIGAN v. KENNEDY.

[19 S. Dak. 11, 101 N. W. 1081.]

CONSTITUTION, Provisions of, When Mandatory.—The provision of the constitution of South Dakota that no law shall embrace more than one subject, which shall be expressed in its title, is mandatory. (p. 930.)

STATUTES Which Contain but One Subject.—An act purporting to provide for the licensing, regulation, and restriction of the business of the manufacture and sale of spirituous and intoxicating liquor contains but one subject, which is sufficiently expressed in its title, though it imposes penalties and liabilities upon persons engaged in the liquor traffic, and provides proceedings for their enforcement, including the right and remedies of a married woman to recover damages for the selling of intoxicating liquors to her husband. (p. 932.)

INTOXICATING LIQUORS, Damage Due to the Selling of, When Sufficiently Proven.—If, in an action against a saloon-keeper and his sureties, evidence is received tending to show that the husband of the plaintiff during the last months of his life was in the habit of becoming intoxicated and spending nearly all his time and earnings in the saloon of the defendant, and purchasing and drinking liquor there, from which he became and was kept intoxicated until he committed suicide, leaving no means of support to the wife and child, the jury was warranted in finding that the liquor sold by the defendant saloon-keeper caused the decedent to neglect his family and to end his life, and hence supports a verdict in favor of the plaintiff for damages. (p. 933.)

APPELLATE PRACTICE—Evidence, When will not be Reviewed.—When a party has given sufficient legal evidence to sustain a verdict, the appellate court will not review the evidence nor reverse the verdict. (p. 933.)

INTOXICATING LIQUORS, Suicide, When may be Found to have been Due to the Selling of.—If a man is practically intoxicated for a long time, during which he is furnished liquors at a saloon, and the intoxication is followed by suicide, the jury, in an action by the wife of the decedent against the saloon-keeper and his sureties, are justified in finding that the suicide was due to the action of the saloon-keeper in furnishing such liquors, and therefore in awarding damages to the widow. (p. 934.)

EVIDENCE to Show Damages.—In an Action Against a Saloon-keeper and His Sureties by a widow to recover damages for the death of her husband through his suicide, evidence that she had a son dependent on her for support, and that her husband, when sober, had a shop of his own and furnished proper support for his wife and son, is properly admitted. (p. 934.)

DAMAGES—Loss of Support After Death of Husband.—In an Action by a Widow Against a Saloon-keeper and His Sureties for damages resulting from the suicide of her husband through intoxication, she is entitled to recover for the loss of support after his death. (p. 935.)

INTOXICATING LIQUORS, Suicide Due to Use of.—Though a Man is Sober at the Time He Commits Suicide, his wife may recover against a saloon-keeper and his sureties for such death, if it was approximately caused by the selling and furnishing of intoxicating liquors to the decedent at dates prior to such suicide. (p. 935.)

JURY TRIAL.—The Omission of the Court to Instruct upon any given question or issue is not reversible error unless it was first requested to instruct thereon. (p. 936.)

Robertson & Dougherty and Kittredge, Winans & Scott, for the appellants.

Joe Kirby, for the respondent.

14 CORSON, P. J. This is an action by the plaintiff, as widow of Michael Garrigan, deceased, to recover of the defendants damages for the loss of support for herself and child, caused by the intoxication of her husband by intoxicants sold him or given to him by the defendant Kennedy. Verdict and judgment were in favor of the plaintiff, and the defendants have appealed.

It is alleged in the complaint, in substance, that the plaintiff was the widow of Michael Garrigan, deceased, and that she had dependent on her for support a minor son; that the defendant Kennedy was a licensed saloon-keeper in the town of Dell Rapids, and that defendants Smith and Gillman were sureties upon his bond as such saloon-keeper; that for a long time prior, and at all times subsequent to the first day of July, 1900, and up to the time of the death of the said Michael Garrigan, he was a person in the habit of getting intoxicated, and was for the greater part of the last year of his life in a state of habitual intoxication by and from the use of intoxicating liquors; that at divers and sundry times prior and subsequent to July 1, 1900, and up to the time of the death of said Garrigan, and while he, the said Garrigan, was in the habit of getting intoxicated and at divers and sundry times while he, the said Garrigan, was intoxicated, the defendant

Kennedy did directly and indirectly, by himself as well as by his clerks, agents, and servants, sell, furnish, give, and deliver spirituous liquors to the said Garrigan; that said intoxicating liquors so sold by said defendant Kennedy to the said Garrigan were sold to him to be used as a beverage, and were by him used for such purpose in the saloon aforesaid, as well as elsewhere; that by reason of the use of such liquors aforesaid the said Garrigan was kept practically ¹⁵ in a state of continued intoxication up to the time of his death, and was rendered an inebriate, and incapable of attending to his business and supporting his wife and child; that the said Garrigan was a barber by trade, and possessed a shop of his own in Dell Rapids, and was, when sober, enabled to earn large sums of money and support said wife and child in a respectable and becoming manner; that by reason of said intoxication, induced by intoxicating liquors sold to him by the said Kennedy, he was for a long time prior and at all times subsequent to the first day of July, 1900, rendered incapable of continuing his business, and incapable of carrying the same on, and was rendered thereby incapable of supporting his said wife and child; that by reason of the use of said intoxicating liquors as aforesaid the mind of said Garrigan gave way, and he became despondent and insane, and did, upon April 1, 1901, while in said condition, induced by the use of intoxicating liquors purchased from the said Kennedy, take his own life; that the plaintiff brings the action to recover of the said defendant damages which she has suffered by reason of the facts aforesaid for herself as well as for her said child, Walter Garrigan, now dependent on her for support; that by reason of the death of said Garrigan the plaintiff and her said minor child have been left without means of support other than that obtained by her own personal exertions, that by reason of the facts aforesaid the plaintiff has been damaged in the sum of five thousand dollars. Wherefore the plaintiff demands a judgment against the said Kennedy for the sum of five thousand dollars and against the said Smith and Gillman, as sureties, in the sum of two thousand dollars, together with costs and disbursements of the action. To the complaint is annexed, and made a part thereof, a copy of the bond executed by the said Kennedy and sureties in the usual form.

¹⁶ The defendants, in their answer, admit the allegations that the plaintiff is the widow of Michael Garrigan deceased; that she has a minor son; that the defendant Kennedy has been

and is a duly licensed vender of spirituous liquors, as alleged in the complaint, and that said defendants executed the bond as set forth in the complaint; that Michael Garrigan was a barber by trade during the time mentioned in the complaint, and that he committed suicide on or about the first day of April, 1901, and they deny each and every allegation in the plaintiff's complaint contained which is not therein expressly admitted. The case was tried to a jury, which returned a verdict in favor of the plaintiff for two thousand dollars. The defendants seek a reversal of the judgment on the grounds:

1. That the act providing for the licensing, restriction, and regulation of the business of the manufacture and sale of spirituous and intoxicating liquors, constituting chapter 72, page 203, of the Laws of 1897, and being now article 6 of chapter 27 of the Political Code, is in violation of section 21, article 3 of our state constitution, which provides: "No law shall embrace more than one subject, which shall be expressed in its title," in that the law contains two subjects, and but one is expressed in its title; that it contains one subject which relates solely to the licensing, restriction, and regulation of the business of the manufacture and sale of spirituous and intoxicating liquors, and another relating to an entirely new and independent cause of action, wholly unknown to the common law, which contains all the necessary provisions regarding parties, evidence, and procedure.
2. That the evidence is insufficient to justify the verdict, and that the court erred in refusing to grant defendants' motion to direct a verdict in their favor, for the reasons therein stated.
3. That ¹⁷ the court erred in the admission of testimony.
4. That the court erred in refusing and giving instructions to the jury.

It is contended by the defendants that the provision of our state constitution relating to the subject of titles to legislative acts is mandatory, and it prohibits the legislature from passing an act embracing more than one subject, and imposing upon it the duty of expressing the subject in the title. While we agree with the contention of counsel that the constitutional provision is mandatory, we are unable to agree with them in their conclusion that the act in controversy contains two subjects not expressed in the title. The act itself provides for the licensing, restriction and regulation of the business of the manufacture and sale of spirituous and intoxicating liquors. The provisions referred to, as stating the second subject, clearly come within the provisions for restricting and regu-

lating the business. One method of restricting and regulating the business would naturally be the imposing of penalties and liabilities upon parties engaged in the manufacture or sale of intoxicating liquors, and in providing a method by which such penalties and liabilities on the part of persons so engaged in the traffic are to be enforced. The contention of the appellants that the prohibition of the sale or gift of intoxicating liquors to certain classes of persons mentioned in sections 11 and 16 creates entirely new causes of action, and the establishment of this very arbitrary and unfair rule of proceedings has nothing to do with, and is not germane to, the act providing a method of licensing, restriction and regulation, and that the title to the act does not in any manner indicate these portions of it, is untenable. This is altogether too narrow a construction of the constitutional provision, and under ¹⁸ the contention of the counsel but few acts of the legislature could be sustained.

It will be noticed that the title to the act we are considering is broad and comprehensive, and that it provides for the licensing, restriction, and regulation of the business. Section 16 of the act, therefore, providing that a married woman may recover damages resulting from the sale of intoxicating liquors to her husband, is clearly in the nature of a restriction of the sale; and the same may be said of section 11, which provides that it shall be unlawful for parties engaged in the sale of intoxicating liquors to sell to an intoxicated person, to a person in the habit of getting intoxicated, or to minors: *State v. Morgan*, 2 S. Dak. 32, 48 N. W. 314; *State v. Becker*, 3 S. Dak. 29, 51 N. W. 1018; *State v. Ayers*, 8 S. Dak. 517, 67 N. W. 611; *Stuart v. Kirley*, 12 S. Dak. 245, 81 N. W. 147. This court, in construing statutes claimed to be in conflict with this provision of the constitution, has uniformly held that this provision must have a liberal construction, and, where the act or provisions of the act claimed to be in violation of the constitution are not shown to be clearly in conflict with this provision of the constitution, the act will be upheld. In *State v. Morgan*, 2 S. Dak. 32, 48 N. W. 314, this court says: "Upon a critical examination of these cases, however, it will be seen that, while it is necessary to construe this provision so as to prevent the evils intended to be met, yet it is desirable to avoid the opposite extreme, so as not to embarrass the legitimate exercise of its powers, and compel a needless multiplication of bills, designed to meet the same object." The court quotes

with approval the following from *State v. Miller*, 45 Mo. 495: "The courts, in all the states where a like or similar provision exists, have given a ¹⁰ liberal interpretation, and have endeavored to construe it so as not to limit or cripple legislative enactments any further than what was necessary by the absolute requirements of the law." This court adds: "The objection to an act upon the ground that it embraced more than one subject, and that it was not sufficiently expressed in its title, should be grave, and the conflict between the statute and constitution plain and manifest, before courts will be justified in declaring it unconstitutional and void."

Our attention has been called to a number of cases decided in Michigan and other states construing a clause similar to that contained in our constitution, but none of them contained a title as broad and comprehensive as the title to the act in question. Without taking time to review the various authorities cited by counsel, it must suffice to say that, in our opinion, the provisions of the act of 1897, called to our attention as being in conflict with the constitutional provisions, are clearly within the rule requiring the subject to be expressed in the title. We are clearly of the opinion, therefore, that the provisions of the act in controversy do not violate this clause of the constitution. It may be further stated that the provisions of the act of 1897 have been before this court in numerous cases, and their constitutionality has either not been questioned or has been uniformly sustained: *State v. Zophy*, 14 S. Dak. 119, 86 Am. St. Rep. 741, 84 N. W. 391; *State v. Williams*, 11 S. Dak. 64, 75 N. W. 815; *State v. Donaldson*, 12 S. Dak. 259, 81 N. W. 299; *State v. Bradley*, 15 S. Dak. 148, 91 Am. St. Rep. 666, 87 N. W. 590; *State v. Buechler*, 10 S. Dak. 156, 72 N. W. 114; *State v. Bradford*, 12 S. Dak. 207, 80 N. W. 143; *Nordin v. Kjos*, 13 S. Dak. 497, 83 N. W. 573; *State v. Bradford*, 13 S. Dak. 201, ²⁰ 83 N. W. 47; *State v. Dunning*, 14 S. Dak. 316, 85 N. W. 589; *Town of Britton v. Guy*, 17 S. Dak. 588, 97 N. W. 1045; *Paulson v. Langness*, 16 S. Dak. 471, 93 N. W. 655; *State v. Sanford*, 15 S. Dak. 153, 87 N. W. 592; *Sandige v. Widmann*, 12 S. Dak. 101, 80 N. W. 164; *Stafford v. Levinger*, 16 S. Dak. 118, 102 Am. St. Rep. 686, 91 N. W. 462.

It is further contended by the appellants that the evidence is insufficient to justify the verdict, in that no actual damage has been proven on the part of the plaintiff; that no facts have been given in evidence on which the jury could estimate the damage, if any, sustained by the plaintiff; that the

plaintiff has not proven any facts which would entitle her to recover; that the plaintiff has not proven such facts as would constitute a cause of action. Upon examination of the evidence, read in connection with the admissions in the answer, we are of the opinion that there were sufficient facts presented to the jury to fully sustain the verdict rendered by it. It was shown that Garrigan during the last few months of his life was in the habit of becoming intoxicated, and spent all, or nearly all, of his earnings in procuring intoxicating liquors, part of which, at least, were purchased in the saloon of the defendant Kennedy; that he continued drinking up to about the time he committed suicide on April 1, 1901; that at the time of his death he left no means of support for his widow and minor child, and that she has been dependent, since his death, upon her own exertions for support; and that Garrigan, when sober, was able to earn about one hundred dollars per month, and was thereby enabled to provide suitable support for his wife and child. The jury would naturally draw from this evidence the conclusion that the intoxicating liquors sold and furnished Garrigan by the defendant Kennedy caused him to neglect the support of his family in his lifetime,²¹ and eventually to commit suicide, thus depriving his widow and son of that support to which they were entitled as wife and son. The question as to the amount of damages sustained was one properly for the jury under the fact presented by the evidence (*District of Columbia v. Woodbury*, 136 U. S. 450, 10 Sup. Ct. Rep. 990, 34 L. ed. 472; *Mulford v. Clewell*, 21 Ohio St. 191), and clearly, if the jury's inferences and conclusions were properly drawn from the facts proven and admitted by the defendants, the verdict cannot be said to have been unsupported by the evidence. Where a party has given sufficient legal evidence to sustain the verdict, this court will not review the evidence or reverse such verdict: *Jeansch v. Lewis*, 1 S. Dak. 609, 48 N. W. 128.

It is strenuously contended by the appellants that the evidence was insufficient to justify the jury in concluding that the liquor sold to Garrigan by the defendant Kennedy was the cause of his suicide, and that there was no evidence tending to prove that he had been furnished any intoxicating liquors by the defendant Kennedy for some time prior to his suicide, and therefore the intoxicating liquor sold by the defendant Kennedy was not the proximate cause of his suicide. It is quite apparent from the testimony introduced that Garrigan was

practically intoxicated the larger portion of his time between December, 1900, and the time of his death, and that during that time the defendant Kennedy furnished him with more or less of intoxicating liquors producing his intoxication. The natural result of such continued intoxication would be to weaken and destroy the mind of Garrigan, and lead him to commit suicide. The jury were authorized, therefore, to draw the inference from the facts proved and admitted that the sale of intoxicating ²³ liquors by Kennedy to Garrigan was the proximate cause of his death. The question of what constitutes proximate cause was so fully considered by the late territorial supreme court, speaking by Mr. Justice Tripp, in the case of *Pielke v. Chicago etc. Ry. Co.*, 5 Dak. 444, 41 N. W. 669, that we do not deem a further discussion in this opinion necessary. We are therefore of the opinion that the jury was justified in finding from all the evidence in the case that Garrigan's death was proximately caused by the intoxicating liquors furnished him by the defendant Kennedy and others. The testimony of Mrs. Garrigan regarding the support of her son was, in our opinion, competent, and the court committed no error in overruling defendants' objections thereto; and the same may be said of the testimony as to the facts that Garrigan had a shop of his own, and was a competent barber, and, when sober, furnished proper means of support for his wife and child.

This brings us to the instructions to the jury and the instructions requested by counsel for defendants and refused by the court. The requested instructions were as follows: "You are instructed, as a matter of law, that if you find from the evidence that defendant Kennedy sold intoxicating liquor to Michael Garrigan after the first day of July, 1900, and you further find that such liquor contributed to his inability to support his wife and child, and that the said Michael Garrigan took his own life on the first day of April, 1901, then the plaintiff is not entitled to recover anything for loss of support after April 1, 1901. . . . In this action the undisputed evidence shows that Michael Garrigan committed suicide by shooting himself with a revolver on Monday afternoon, the first day of April, 1901, while sober, and hence the plaintiff is not entitled to recover ²³ anything for the loss of her support after that time." The first instruction requested was clearly erroneous, in that the court was requested to instruct the jury that "the plaintiff is not entitled to re-

cover anything for loss of support after April 1, 1901." If the sale of intoxicating liquors to Garrigan resulted in his suicide, and was the proximate cause of the same, then the plaintiff was entitled to recover damages she might sustain by reason of the loss of support caused by his death: *Stafford v. Levinger*, 16 S. Dak. 118, 102 Am. St. Rep. 686, 91 N. W. 462. As was stated in *Mead v. Stratton*, 87 N. Y. 493, 41 Am. Rep. 386: "The injury to the means of support was one of the main grounds of the action and when the party is deprived of the usual means of maintenance which he or she was accustomed to enjoy previously, by or in consequence of the intoxication or the acts of the person intoxicated, the action can be maintained. . . . If the injury which had resulted to the deceased in consequence of his intoxication had disabled him for life, or to such an extent as to incapacitate him for labor and for earning a support for his family, it would, no doubt, be embraced within the meaning and intent of the statute. That death ensued in consequence thereof furnishes much stronger ground for a claim for a loss of support; and a different rule in the latter case would make provision for the lesser and temporary injury, while that which was greater and most serious would be without any remedy or means of redress. Such could not have been the intention of the lawmakers, and the statute was designed to embrace and most manifestly cover and include all injuries produced by the intoxication, and which legitimately result from the same." The second requested instruction is also clearly objectionable. Whether ²⁴ Garrigan was sober or intoxicated at the time he committed suicide was not material, providing his suicide was the result of his previous intoxication. If such was the result, then such intoxication was the proximate cause of his death, and this was a question for the jury to determine upon all the evidence in the case.

The defendants excepted specially to portions of paragraphs 7 and 9 of the judge's charge to the jury of its own motion. The portions of the paragraphs excepted to are as follows: "So it is only in regard to the damages arising from the want of support that the jury are entitled to return damages. In that regard you have a right to return damages if you believe that Mr. Garrigan was a person in the habit of becoming intoxicated, and that this defendant Samuel Kennedy, by himself, agent, or servants, sold or gave him intoxicating liquor, after the 1st of July, 1900, that contributed to his ha-

bitual intoxication, and you further believe that such habitual intoxication injured the plaintiff and her son in their means of support. . . . If you find for the plaintiff she will be entitled to recover such reasonable sum of money not to exceed two thousand dollars, as in your judgment will compensate her for the actual damage, if any, to her means of support, caused by sales of intoxicating liquor by defendant, his agents or servants, to the plaintiff's husband." It is contended by the appellants that by that portion of instruction No. 7 the court left to the jury, without any limitation whatever as to time, the question of the assessment of damages, and that by that portion of the charge contained in paragraph No. 9 to which exception was taken the jury was authorized to return damages in any sum not exceeding two thousand dollars, and that nothing whatever was said to the jury ²⁵ in regard to the suicide of Garrigan in any part of the charge, and that the jury were not in any manner instructed that the plaintiff was not entitled for loss of support from April 1, 1901. It is true the court did not, in express terms, instruct the jury that they could not find for the plaintiff damages for any loss of support after the 1st of April, 1901, and it could not have properly so instructed the jury. The court did not instruct the jury that they could not find against the defendants for any damages resulting after the death of Garrigan, unless they were satisfied that his death was caused by intoxicating liquors furnished to him by the defendant Kennedy. The objection that the court failed to charge the jury that the plaintiff could not recover for any damages sustained by her by reason of the death of Garrigan, unless they were satisfied that his death was caused by intoxicating liquors furnished to him by the defendant Kennedy, is not available to the defendants, for the reason that they failed to request any such instruction. The omission of the court to instruct upon any given question or issue will not be regarded as reversible error unless it has been requested to give the instructions it is claimed it has omitted: *Dell Rapids Merc. Co. v. City of Dell Rapids*, 11 S. Dak. 116, 74 Am. St. Rep. 783, 75 N. W. 898; *Winn v. Sanborn*, 10 S. Dak. 642, 75 N. W. 201; *Frye v. Ferguson*, 6 S. Dak. 392, 61 N. W. 161. It is true that counsel asked for an instruction: "If you find . . . that said Michael Garrigan took his own life on the first day of April, 1901, then the plaintiff is not entitled to recover anything for loss of support after April 1, 1901"; but

this does not suggest to the court or call for instructions such as is claimed the court should have given by the appellants. It is true the court left to the jury, without any limitation ²⁶ whatever as to time, the question of assessing damages. In this the court was clearly correct. He had previously instructed the jury that the legal duty devolved upon the husband to support his wife and family, and that the licensed saloon-keeper who contributed to the impairment of the husband's power and ability to support his family is liable for the damages the wife might sustain. It was therefore competent for the jury, under the instructions of the court, to determine the damages the wife had sustained in her means of support for herself and minor child, and to consider the question whether or not the intoxicating liquors furnished Garrigan by the defendant Kennedy was the proximate cause of his death, and consequently deprived the plaintiff of her support due from her deceased husband to herself and son; and, as before stated, the defendants requested no such instructions upon this subject, and are not in a position, therefore, to complain of the failure of the court to instruct the jury upon these questions. The instructions of the court were eminently fair, and presented to the jury the law of the case in such manner as to enable the jury to intelligently pass upon the questions presented for consideration.

Finding no error in the record, the judgment of the circuit court and order denying a new trial are affirmed.

Under a Civil Damage Act providing that a married woman may maintain a suit on a liquor dealer's bond for all damages sustained by her or her children by reason of the sale of liquor, a widow may recover on such bond for loss of support caused by the death of her husband resulting from a sale of liquor to him: *Stafford v. Levinger*, 16 S. Dak. 118, 102 Am. St. Rep. 686.

The Suicide of an Intoxicated Person creates a liability, under the civil damage acts, against him who supplied the liquor. Thus a wife of one who takes his own life while under the influence of liquor may recover from the vendor thereof: See the note to *Mastad v. Swedish Brethren*, 85 Am. St. Rep. 451.

The Sufficiency of the Title to Statutes, within the constitutional requirements is discussed at length in the notes to *Crookson v. County Commissioners*, 79 Am. St. Rep. 456; *Lewis v. Dunne*, 79 Am. St. Rep. 267; *Bobel v. People*, 64 Am. St. Rep. 456.

FOWLER v. WILL.

[19 S. Dak. 131, 102 N. W. 598.]

QUITCLAIM DEED, Effect of as Against Prior Unrecorded Warranty Deed.—An unrecorded warranty deed has precedence over a subsequently executed and recorded quitclaim deed purporting to remise, release, and quitclaim the grantor's interest in the premises. (p. 940.)

A. E. Hitchcock, for the plaintiff.

C. W. McDonald and R. H. Null, for the defendant.

¹³¹ FULLER, J. This action to determine conflicting claims to real property resulted in a judgment quieting title in the defendant ¹³² H. P. Will, subject to a lien for certain taxes in favor of plaintiff, and both parties have appealed.

In the absence of a brief or oral argument on the part of the defendant H. P. Will, the only question is whether the trial court erred in holding an unrecorded warranty deed valid and effectual as against a recorded quitclaim deed executed later by the same grantor, and which purports only to "remise, release, and quitclaim" his interest in the premises. Speaking of such an instrument in *Parker v. Randolph*, 5 S. Dak. 549, 59 N. W. 722, 29 L. R. A. 33, we say: "The record was therefore sufficient to put the defendant Lane on inquiry, as a grantee in a quitclaim deed is not a bona fide purchaser. Such deed simply conveys all the interest, if any, which the grantor has in equity at the time of its execution." Under our recording act, a subsequent purchaser in good faith, whose conveyance is first duly recorded, has authority to question the validity and destroy the effect of a warranty deed previously executed by a common grantor; but a quitclaim deed in no sense purports to convey title—not even by inference—and is not essentially a grant, in contemplation of the statute: Rev. Civ. Code, 1903, sec. 986. In *Winkler v. Miller*, 54 Iowa, 476, 6 N. W. 698, the view of the court is thus expressed: "Where a person purchases of another who is willing to give only a quitclaim deed, he may properly enough be regarded as bound to inquire and ascertain, at his peril, what outstanding equities exist, if any. His grantor virtually declares to him that he will not warrant the title, even as against himself, and it may be presumed that the purchase price is fixed accordingly." From the case of

Peters v. Carter, 80 Mich. 124, 20 Am. St. Rep. 508, 45 N. W. 73, we quote approvingly in Parker v. Randolph, ¹³³ 5 S. Dak. 549, 59 N. W. 722, 29 L. R. A. 33, as follows: "Under the cloak of quitclaim deeds, schemers and speculators close their eyes to honest and reasonable inquiries, and traffic in apparent imperfections in titles. The usual methods of conveying a good title—one in which the grantor has confidence—is by warranty deed. The usual method of conveying a doubtful title is by a quitclaim deed. The rule is wise and wholesome which holds that those who take by quitclaim deed are not bona fide purchasers, and take only the interest which grantors had. This rule is adopted in the United States supreme court and in the courts of many of the states. It is therefore immaterial whether Cartier had notice or knowledge of complainants' title. He must be held to have purchased at his own risk, and Douville, having no title, conveyed none to him." To the effect that persons taking by quitclaim deed are not bona fide purchasers without notice, the authorities are numerous and convincing. Thorn v. Newson, 64 Tex. 161, 53 Am. Rep. 747, is an authority to the point that one taking a quitclaim deed is not protected by the recording act, as a bona fide purchaser, and the court say: "While nonregistered deeds are declared void by the statute as to subsequent purchasers for value and without notice, still the doctrine is well settled that a subsequent purchaser, although for value and without actual notice, who takes under strictly a quitclaim deed—that is, one by which the chance of title, and not the land itself, is conveyed—will not be accorded the protection of the statute, for the obvious reason that he contracted for the interest only that his vendor then had in the land. If the vendor had previously divested himself of the title to a portion or all of the land, to the extent of the divestiture there would be no right remaining in the vendor to pass ¹³⁴ by the quitclaim to the vendee. It is, then, the interest of the vendor for which he contracts, and it is to such interest only that he is entitled under the quitclaim deed." In Bayer v. Cocherill, 3 Kan. 282, where a deed "remised, released, and quitclaimed" certain real estate, portions of which the grantor had previously sold to a third person, but for which no deed had been delivered, it was held that the conveyance was nothing more than a quitclaim, and that only the actual interest which the grantor had at the time was conveyed. The author of the article on

"Deeds," 13 Cyclopaedia, 527, says: "There should be some title or interest, in law or equity, in the grantor, to enable him to convey, and the grantees, under a release or quitclaim, will take nothing, where the grantor has no interest which he can convey." *Reed v. Knights*, 87 Me. 181, 32 Atl. 870, is a case substantially the same as this, and the court say: "But defendant read in evidence a quitclaim deed from plaintiff's grantor dated in 1881, claimed to cover the locus in dispute. Suppose it did. Plaintiff's grantor had previously conveyed the same to plaintiff in 1875 by warranty deed, recorded in 1893, and defendant's quitclaim therefore passed no title to him, for the grantor had none to part with; and the fact that plaintiff's deed was not recorded makes no difference."

For further cases holding that a quitclaim deed comprehends no more than is actually owned by the party executing it, and, as to interest already gone, is of no effect, see *Steele & Son v. Sioux Valley Bank*, 79 Iowa, 339, 18 Am. St. Rep. 370, 44 N. W. 564, 7 L. R. A. 524; *Benton v. Sentell*, 50 La. Ann. 869, 20 South. 297; *Gest v. Packwood (C. C.)*, 34 Fed. 368, 13 Saw. 202; *Johnson v. Williams*, 37 Kan. 179, 1 Am. St. Rep. 243, 14 Pac. 537; *Arlington Mill & Elevator Co. v. Yates*, 57 ¹³⁵ Neb. 286, 77 N. W. 677. Although the granting clause in the deed construed by this court in the case of *State v. Kemmerer*, 14 S. Dak. 169, 84 N. W. 771, recites that defendants "do convey, grant, remise, release, and quitclaim all their right, title, estate, interest, property, and equity in and to the following described property," it was held that such instrument did not pass the after-acquired title of the grantor.

Plaintiff, not being entitled to the protection afforded by the registration act, took nothing by the quitclaim deed executed long after the premises had been disposed of by warranty deed, and the judgment of the lower court is affirmed.

Corson, Presiding Judge, Dissented, maintaining that in no prior decision had the court committed itself to the doctrine upheld by the majority in opinion in the case, and that it was contrary to the decisions of the supreme court of the United States and of other national courts, citing *Moelle v. Sherwood*, 148 U. S. 21, 13 Sup. Ct. Rep. 426, 37 L. ed. 350; *United States v. California & O. L. Co.*, 148 U. S. 31, 13 Sup. Ct. Rep. 458, 37 L. ed. 354; *Boynton v. Hagarty*, 120 Fed. 819, 57 C. C. A. 301.

The Operation and Effect of Quitclaim Deeds are discussed in the note to *Babcock v. Wells*, 85 Am. St. Rep. 854. Such deeds are not an assertion of title of any particular, or of any, title, and do not of themselves operate as an estoppel against either grantor or grantee as to the nature or extent of the title: *Olmstead v. Tracy*, 145 Mich. 299, 116 Am. St. Rep. 299.

IOWA NATIONAL BANK v. SHERMAN.

[19 S. Dak. 238, 103 N. W. 19.]

JURY TRIAL—Witnesses, Right to Disregard Testimony of.—A jury may disregard, as not entitled to credit, the uncorroborated testimony of interested witnesses where the circumstances are such as to reasonably allow of suspicion. (p. 943.)

JURY TRIAL—Interested Witnesses, Right of Jury to Pass Upon Credibility of Though They are Uncontradicted.—Where a bank sues on a promissory note on which its right to recover depends upon its being a bona fide and innocent holder, and it appears that the president and cashier of the bank are officers and stockholders of the corporation which transferred the note, and that it was discounted by the bank without inquiry, the proceeds being placed to the credit of the transferring corporation against which there was a large overdraft, the question whether the plaintiff was a bona fide purchaser should be submitted to the jury, though the testimony of its president and cashier to that effect is not contradicted by other witnesses. (p. 944.)

J. Kirby, for the appellants.

Boyce & Warren, for the respondent.

²³⁸ FULLER, J. The facts in this case, now before us on rehearing, are stated in 17 S. Dak. 396, 106 Am. St. Rep. 778, 97 N. W. 12, where it appears ²³⁹ that the action is upon a promissory note executed by appellants to the Janney Manufacturing Company, and transferred to the respondent bank, before maturity, in the due course of business. As a complete defense appellants pleaded the breach of an express warranty, failure of consideration, and fraudulent representations as to certain farm machinery in settlement for which the note was executed, and the last two paragraphs of the answer are as follows: "That the said Janney Manufacturing Company, at the time it entered into said contract with these defendants, knew that said machines were defective, and not suited for the purpose for which they were manufactured, but wrongfully and fraudulently, and for the

purpose of defrauding these defendants, did make such representations and statements, and thereby induced these defendants to execute to it their note as aforesaid; that said plaintiff had full knowledge at all times that said note had been obtained from these defendants by fraud and without consideration therefor; that the alleged consideration therefor had wholly failed; and that, if the plaintiff has said note, it has the same only as the agent of the said Janney Manufacturing Company, and as parties to said fraudulent transactions, and for the further purpose of harassing these defendants and enable the said Janney Manufacturing Company to better carry out the purpose of its fraudulent design." Upon the theory that respondent is a bona fide purchaser of the note for value, and before maturity, as shown by the uncontroverted testimony of its president and cashier, the trial court directed a verdict in its favor for the full amount claimed. In appellants' former brief there is a cursory statement to the effect that the case should have gone to the jury on account of the interest of such ²⁴⁰ witnesses in the result of the action, but the point was not argued by counsel, and we failed to consider the same as thoroughly as some other questions more confidently relied upon for a reversal. Now, all the testimony relative to this vital issue of bona fides was adduced by interested bank officials, and the fact that its cashier was a stockholder and secretary of the Janney Manufacturing Company, and its president the manager of the fiscal affairs of such corporation, acting in the capacity of treasurer, director, and stockholder, when considered with the other circumstances in the case, might be sufficient to justify the jury in discrediting their testimony on the ground of interest, and in that event the evidence offered by appellants and rejected by the court would constitute a complete defense. According to the daily custom of these closely related corporations, this note, duly indorsed, was presented to the teller of the bank, who discounted the same without any inquiry, and placed the proceeds thereof to the credit of the Janney Manufacturing Company, against which at that time there was an overdraft of nearly fifteen thousand dollars. Respondent's ownership of the note and the obligation of the Janney Manufacturing Company, as an unrestricted indorser, creates a mutual interest, which in case of failure to collect would result in material loss either to the bank, of which the witnesses are managing officers, or to the manu-

facturing company, in which they are interested, not only as its treasurer, secretary, and directors, but as holders of two-fifths of all its capital stock. The case of *McGill v. Young*, 16 S. Dak. 360, 92 N. W. 1066, is an authority to the point that the jury may disregard, as not entitled to credit, the uncontroverted testimony of interested witnesses, where the circumstances are such as to reasonably allow ²⁴¹ the inference of suspicion; and in support of the proposition we say: "In *Honegger v. Wettstein*, 94 N. Y. 252, the testimony was not directly contradicted, and the court therefore refused to submit the question of the credibility of the witness to the jury. On appeal this ruling was assigned as error, and in disposing of it the court of appeals says: 'We also think that the court erred in refusing to submit to the jury the question made as to the credibility of the witness Ochninger. Although not contradicted, he was an interested party, and had a direct interest in increasing the fund in the hands of the receiver and preventing its payment to the plaintiff.' The same view of the law was taken by the court in *McNulty v. Hurd*, 86 N. Y. 547. The case of *Joy v. Diefendorf*, 130 N. Y. 6, 27 Am. St. Rep. 484, 28 N. E. 602, is analogous to the case at bar. The principal defense relied on in that case to defeat the action was that the plaintiff was not a bona fide holder of the note. The court, in its opinion, says: 'The evidence given on the part of the defendant was sufficient to warrant the conclusion that the note had been obtained from him through fraud practiced upon him by Henderson and Van Valkenburgh, and the burden was thus cast upon the plaintiff to show that he was a bona fide purchaser: *Vosburgh v. Diefendorf*, 119 N. Y. 357, 16 Am. St. Rep. 836, 23 N. E. 801, and cases cited. This burden the plaintiff met by his own evidence as to the circumstances attending the purchase, and his knowledge of the party from whom he obtained it, and the credibility of his testimony was for the jury to determine. That question was decided in *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676. The case was upon a note obtained by the same parties from this defendant, and grew out of the same transaction as the note in suit, and was transferred to the Bank ²⁴² of Henderson. The question of the good faith of the bank's purchase depended entirely upon the evidence of its cashier, and it was held that his relation to the bank and his interest in the transaction brought him within the rule

that the credibility of a party or an interested witness is a question for the jury to determine.' " To the same effect are the following cases: *Blount v. Medbery*, 16 S. Dak. 562, 94 N. W. 428; *Seehorn v. American Nat. Bank*, 148 Mo. 256, 49 S. W. 886; *Dysart v. Terrell*, 70 S. W. 986. The relation of these officers to the respective corporations interested in the collection of the note, the proceeds of which were applied in partial satisfaction of an existing indebtedness, and their manner of doing business, as shown by the record, suggests the likelihood of knowledge on the part of the bank that the makers of the note had a valid defense, and the credibility of such witnesses and their testimony ought to have been determined by the jury.

Disaffirming our former opinion in this particular only, the judgment appealed from is reversed, and a new trial granted.

The Evidence of a Witness may be Disregarded, though he is not contradicted, if he is a party or is interested, and therefore the court must submit to the jury the question of his credibility. Hence where a plaintiff seeks to recover as a bona fide purchaser of a note which was obtained from the maker by fraud, and testifies to facts tending to show that he is such a holder, the question of his good faith cannot be withdrawn from the jury: *Joy v. Diefendorf*, 130 N. Y. 6, 27 Am. St. Rep. 484.

FARNHAM v. COLMAN.

[19 S. Dak. 342, 103 N. W. 161.]

MANDAMUS does not Lie to Review the Action of an Inferior Tribunal on account of error therein. (p. 946.)

CONTEMPT—Inferior Tribunals are Without Inherent Power to Punish for Contempt.—This rule applies to a justice of the peace engaged in the preliminary examination of a criminal charge. (pp. 949, 950.)

Chambers Kellar, James G. Stanley, Polley & Stewart and Ivan W. Goodner, for the appellants.

William H. Parker, state's attorney, R. C. Hayes, attorney general, and Aubrey Lawrence, for the respondent.

³⁴³ FULLER, J. This appeal is from an order of the circuit court quashing an alternative writ of mandamus issued therefrom ³⁴⁴ against a justice of the peace engaged in con-

ducting a preliminary examination under an information charging appellants with the crime of murder. In the alternative form the writ commanded the respondent magistrate to compel the state's attorney, William H. Parker, by punishment for contempt, to produce at the hearing certain statements or dying declarations pursuant to previously served subpoena duces tecum which the witness, though called, sworn, and examined, had refused to obey. It appears from the petition that the cross-examination of one of the witnesses for the state disclosed that Richard Galvin, the victim of the homicide, after all hope of life was abandoned, and with the realization of immediately impending death, had made a dying declaration which was taken in shorthand by two competent persons, one of whom was the state's attorney's stenographer, and the same, after being typewritten, was signed by such declarant, whose death occurred soon afterward. It is conceded that the state's attorney, when called as a witness, was, and now is, in actual possession of, and wholly able to produce, both the signed statement of Richard Galvin, since deceased, and the shorthand notes taken by the stenographers; that counsel for appellants urgently requested respondent to compel their production by punishing the witness for contempt, and that such magistrate refused to resort to such procedure. If there are any other essential facts, they may be stated as well in connection with the principles and usages of law applicable to a case of this character. Nor need anything be said concerning the propriety of resorting to the extraordinary remedy of mandamus to require a public prosecutor to produce before a committing magistrate evidence on behalf of the accused after all ³⁴⁵ the witnesses for the state have been sworn and examined. Were it to be assumed that the respondent had the same authority to fine or imprison the state's attorney for contempt that is given him to discharge from custody or hold appellants to answer for the crime of murder, it would of necessity follow that his power to refuse to impose the penalty for contempt is equally ample, and, having thus decided in this instance, there could be no interference on the part of the circuit court by means of mandamus. In other words, had the magistrate power to punish the witness, he had power to refuse to do so, and mandamus from a court having no supervisory jurisdiction does not lie to review the action of such inferior tribunal: *Territory v. Nowlin*, 3 Dak. 349, 20 N. W.

430; *Ex parte Burtis*, 103 U. S. 238, 26 L. ed. 392; *Matlock v. Smith*, 96 Tex. 211, 71 S. W. 956; *Montgomery v. Palmer*, 100 Mich. 436, 59 N. W. 148; *High on Extraordinary Legal Remedies*, secs. 153-158. In derogation of the common law, section 141 of the Revised Code of Criminal Procedure provides that "when the examination of the witnesses on the part of the state is closed, any witness the defendant may produce must be sworn and examined," and counsel for appellants contend that under the statute and the constitution their clients were deprived of an absolute and unqualified right to the production of the evidence demanded. Formerly all inquiry at preliminary examinations might be confined to the prosecution, and, as a matter of strict legal right, the accused was not entitled to offer evidence in his own behalf; but in some jurisdictions it seems to have been considered entirely proper to permit him to make an unsworn statement and have his witnesses examined under oath. Consistent with the theory that the constitutional right of the accused ²⁴⁶ "to meet the witnesses against him face to face, and to have compulsory process served for obtaining witnesses in his behalf," does not apply to a preliminary examination, Mr. Justice White makes the following observation: "The contention at bar that, because there had been no preliminary examination of the accused, he was thereby deprived of his constitutional guaranty to be confronted by the witnesses, by mere statement, demonstrates its error": *Goldsby v. United States*, 160 U. S. 70, 16 Sup. Ct. Rep. 216, 40 L. ed. 343. In the recent case of *State v. Belding*, 43 Or. 95, 71 Pac. 330, Chief Justice Moore, in delivering the opinion of that court, by which a judgment inflicting the death penalty is affirmed, employs the following language: "When a defendant in a criminal action is examined before a magistrate, the state is expected to produce sufficient testimony to prove that a crime has been committed, and also to make a prima facie showing that the person accused thereof is apparently guilty. By this means the defendant, without offering any testimony in exculpation, is generally enabled to ascertain the nature of the indictment likely to be returned against him, and also to anticipate the extent and character of the testimony that will probably be produced in support of the charge; thus enabling him intelligently to prepare for his defense. . . . The guaranty of the organic law of the state that the accused in a criminal prosecution shall have the right to meet the

witnesses face to face is satisfied when at some stage of the trial the defendant is confronted with the witnesses and given an opportunity to cross-examine them."

While it is clear that the refusal of the magistrate to compel obedience to the subpoena duces tecum did violence to no constitutional guaranty, and that mandamus from the circuit ³⁴⁷ court will never lie to reverse the judicial action of such officers, we prefer to rest this decision upon the well-grounded principle that inferior tribunals are without inherent power to punish for contempt, and that the extraordinary jurisdiction which the writ of mandamus commanded respondent to exercise is not given by statute. In holding that a United States court commissioner, sitting as a committing magistrate, has no power under the laws of Minnesota to punish a witness for contempt, Judge Nelson says: "It is claimed by counsel that the power to examine gives the right to subpoena witnesses, and, as an incident to it, the power to enforce obedience to the subpoena by arrest and punishment for contempt. To arrest and punish for contempt is the highest exercise of judicial power, and belongs to judges of courts of record or superior courts. Where jurisdiction exists there can be no review. A pardon by the executive is in most cases the mode of release. This power is not, and never has been, an incident to the mere exercise of judicial function, and such power cannot be upheld upon inferences and implications, but must be expressly conferred by law. . . . But there is authority of the courts of the United States directly upon this question. In *Re Perkins*, on habeas corpus before Circuit Court Judge Gresham, the particular question raised here was decided. Judge Gresham said: 'It is a stretch of language to say that the punishment of a witness for contempt, and by a commissioner, is a necessary part of the usual mode of process against offenders, or essential to the exercise of any power expressly conferred on him by the federal law.' So, in *Ex parte Doll*, 7 Phila. 595, Fed. Cas. No. 3968, before the late United States Judge Cadwalader, Doll had been arrested on complaint made by an officer of ³⁴⁸ the internal revenue for failing to appear and testify in relation to his income. At the examination before the commissioner, an order was made that 'Doll produce his books before the commissioner, or be committed for contempt.' On refusal to comply, he was committed. Upon hearing the power of the commissioner to arrest and punish for contempt was raised. The judge, in dis-

charging the prisoner for the irregular proceeding of the commissioner, *inter alia*, said that 'he very much doubted even the power of Congress to invest a commissioner with the authority in a proceeding originally instituted before him to summarily commit a citizen for an alleged contempt. This was an exercise of the judicial power of the United States, which, under the constitution, could not be intrusted to an officer appointed and holding his office in the manner in which these commissioners were appointed and held their offices.' In the celebrated case of *Kilbourn v. Thompson*, involving the question of the power of the Congress to arrest and punish a witness for contempt (103 U. S. 168, 23 L. ed. 377), in refusing to answer questions before a committee of the house, Justice Miller, speaking for the court, among other things said: 'The constitution says that no person shall be deprived of his life, liberty, or property without due process of law; and it has been repeatedly held by the United States supreme court that this means a trial in which the rights of the party shall be decided by a court of justice appointed by law, and governed by the rules of law previously established'": In *re Mason* (D. C.), 43 Fed. 510. Although the recorder of the city of Hoboken, New Jersey, had all the powers that justices of the peace throughout the state possessed as committing magistrates, the court, in discharging on habeas corpus a prisoner ³⁴⁹ found guilty of contempt, employs the following language: "To punish by a commitment for contempt is a power belonging only to judges of certain courts, and does not arise from the mere exercise of judicial functions. The power is great, and its exercise without review, where there is jurisdiction, and hence our duty to be careful not to extend it beyond the recognized bounds of the common law. The recorder did not commit in default of sureties to keep the peace, or to answer before the oyer or sessions, but his commitment was in execution by way of punishment. That power, so far as it may be exercised by judicial officers, is an incident to a court, belonging alike to courts of civil and criminal jurisdiction, but not extending, at common law, below such as are courts of record recognized in the common law. The general doctrine of the English law is that all courts of record may fine or imprison for contempts in the face of the court. . . . And as early as *Griesley's Case*, 8 Coke, 38, it was resolved, in the common pleas, that courts which are not of record cannot impose a fine or com-

mit any to prison for contempts. A power to fine or imprison in such cases, although necessary for the proper discharge of the duties of a court not of an inferior jurisdiction, and for the maintenance of its independence and dignity, should not belong to all persons, bodies, or tribunals who may have a judicial duty to perform. The common law wisely did not recognize it in courts below those of record; and we would be doing violence to the liberty of the citizen to encourage its existence in any of our own courts, except that, in their very nature, or from analogy to their English models, or in their constitution, are courts of record, with jurisdictions not beneath the character of those so treated in the common law":³⁵⁰ Matter of Peter Kerrigan, 33 N. J. L. 344. The head-note, fully supported by the opinion, in the Matter of George N. Farnham, 8 Mich. 89, is as follows: "A magistrate having jurisdiction, under chapter 194 of the Compiled Laws, to examine and commit for trial, or to hold to bail, persons charged with crimes not cognizable before a justice of the peace has no power to commit a witness for refusing to testify on such examination. He has no powers except such as are expressly conferred by this chapter."

Sections 140 and 512 of the Revised Code of Criminal Procedure make it obligatory on the part of the magistrate to issue a subpoena for any witness required by the defendant, and, if any books, papers, or documents are needed, such subpoena must direct the witness to produce them at the preliminary hearing. Section 518 is as follows: "Disobedience to a subpoena, or a refusal to be sworn or to testify may be punished by the court or magistrate, as for a criminal contempt, in the manner provided in the Code of Civil Procedure." Section 495 of such code, which provides the means of producing witnesses, is the provision of the Civil Code fixing the penalty for contempt, and reads as follows: "The punishment for the said contempt shall be as follows: When the witness fails to attend, in obedience to the subpoena, except in case of a demand and failure to pay his fees, the court or officer may fine the witness in a sum not exceeding fifty dollars. In other cases the court or officer may fine a witness in a sum not exceeding fifty dollars nor less than five dollars, or may imprison him in the county jail, there to remain until he shall submit to be sworn, testify or give his deposition." Now the writ granted and subsequently quashed by the circuit court³⁵¹ was not a mandamus to com-

pel the witness to "submit to be sworn, testify, or give his deposition," but, according to its recitals, to "compel the said witness, William H. Parker, by punishment for contempt, to produce at said hearing all of said statements, dying declarations, and stenographic notes," and the statute has provided no penalty for disobedience that can be exercised by the examining magistrate.

It follows that the alternative writ of mandamus was properly quashed and the order appealed from is affirmed.

CORSON, P. J., Concurring Specially. I concur in the conclusion that the order of the circuit court should be affirmed on the last ground stated in the opinion, namely, that our statute providing for the punishment of contempts has not provided for punishing as for a contempt a refusal of a witness to produce documents called for under a subpoena duces tecum issued by a committing magistrate. The respondent, therefore, in denying plaintiff's motion to punish the witness for his refusal to produce the statement described in the alternative writ of mandamus by proceedings for contempt, did not violate any duty imposed upon him by the statute or the common law.

COURTS, TRIBUNALS, AND PERSONS AUTHORIZED TO PUNISH CONTEMPTS.

I. Courts of Record and of General Jurisdiction.

- a. The Power is an Incident to Judicial Authority, 950.
- b. National Courts, 952.

II. The Inferior Courts.

- a. The General Rule, 953.
- b. Probate and Surrogate Courts, 954.
- c. Justices of the Peace and Other Magistrates of Similar Rank, 955.
- d. Municipal Courts, 955.

III. Judges of Courts, 956.

IV. Various Agencies of Courts.

- a. Commissioners and Referees, 957.
- b. Notaries Public, 958.
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V. Restriction of the Power of Courts to Contempts of Their Own Authority, 958.

VI. Jurisdiction is not Devested by Implication, nor the Granting of Concurrent Authority or Remedy, nor the Making of an Act Criminal, 959.

VII. Legislative Control of, 959.

I. Courts of Record and of General Jurisdiction.

- a. The Power is an Incident to Judicial Authority.—It is difficult to conceive of judicial proceedings without some power in the

tribunal conducting them to preserve order during their progress and to enforce respect to judgments and orders resulting therefrom. The most effective remedy for both is by punishment for contempt. The power of inflicting such punishment may well be regarded as an essential element of judicial authority, necessarily conferred by a general grant thereof. Therefore, if, as in the several states of the United States, courts are created by their constitutions and judicial power is given to them, this includes the power to punish for contempt. In this sense, the power of courts with reference to the subject of contempt is said to be inherent. This power is sometimes held to have been adopted as a part of the common law: *Stephenson v. Hanson*, 67 How. Pr. 75. In truth, this is an essential, as well as an incidental, power, and authority being given to the tribunal or body to exercise judicial functions, this power is included as one of such functions without any special or express grant or enumeration. It is not material what the court is called nor of what department of jurisprudence it is the minister. Its jurisdiction may be civil or criminal; at law or in equity; or it may be of a special character, not falling within either of these classifications, as where it is of probate or divorce, or of insolvency, bankruptcy, or admiralty. In either case, it necessarily has power, if it is a court of record or of general jurisdiction, and perhaps even when it is not, if it is a court mentioned in the constitution and is therein given power to exercise judicial functions in cases of the class in which it assumes to act: *Easton v. State*, 39 Ala. 551, 87 Am. Dec. 49; *Coleman v. Roberts*, 113 Ala. 323, 59 Am. St. Rep. 111, 21 South. 449, 36 L. R. A. 84; *Welsh v. Lloyd*, 5 Ark. 367; *Neel v. State*, 9 Ark. 259, 50 Am. Dec. 209; *Ex parte Jones*, 5 Cal. 494; *People v. Dwinelle*, 29 Cal. 632; *In re Shortridge*, 99 Cal. 526, 37 Am. St. Rep. 78, 34 Pac. 227, 21 L. R. A. 755; *Hughes v. People*, 5 Colo. 436; *Cooper v. People*, 13 Colo. 337, 22 Pac. 790, 6 L. R. A. 430; *People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787; *People v. Times-News P. Co.*, 35 Colo. 253, 84 Pac. 912; *Holcomb v. Cornish*, 8 Conn. 375; *Ex parte Edwards*, 11 Fla. 174; *State v. White*, T. U. P. Charl't. 123; *Howard v. Durand*, 36 Ga. 346, 91 Am. Dec. 767; *Swafford v. Berrong*, 84 Ga. 65, 10 S. E. 593; *Bradley v. State*, 111 Ga. 168, 78 Am. St. Rep. 157, 36 S. E. 630, 50 L. R. A. 691; *Clark v. People*, 1 Ill. 340, 12 Am. Dec. 177; *People v. Wilson*, 64 Ill. 195, 16 Am. St. Rep. 528; *Clark v. Burke*, 163 Ill. 334, 45 N. E. 235; *Dahnke v. People*, 168 Ill. 102, 48 N. E. 137, 39 L. R. A. 197; *State v. Tipton*, 1 Blackf. 166; *Ex parte Smith*, 28 Ind. 47; *Little v. State*, 90 Ind. 338, 46 Am. Rep. 224; *Holman v. State*, 105 Ind. 513, 5 N. E. 556; *Dunham v. State*, 6 Iowa, 245; *In re Millington*, 24 Kan. 214; *State v. Rose*, 74 Kan. 260, 85 Pac. 803, 6 L. R. A., N. S., 843; *Arnold v. Commonwealth*, 80 Ky. 300, 44 Am. Rep. 480; *Newport v. Newport L. Co.*, 92 Ky. 445, 17 S. W. 435, 13 Ky. Law Rep. 532; *State v. Judge Civil Dist. Ct.*, 45 La. Ann. 1250,

40 Am. St. Rep. 282, 14 South. 310; *Mariner v. Dyer*, 2 Me. 165; *Morrison v. McDonald*, 21 Ma. 550; *Ex parte Maulsby*, 13 Md. 625; *Cartwright's Case*, 114 Mass. 230; *Langdon v. Wayne Ct. Judges*, 76 Mich. 358, 43 N. W. 310; *Nichols v. Judge Super. Ct.*, 130 Mich. 187, 89 N. W. 691; *State v. First Dist. Ct.*, 52 Minn. 283, 53 N. W. 1157; *Ex parte Adams*, 25 Miss. 883, 59 Am. Dec. 234; *Watson v. Williams*, 36 Miss. 331; *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624, 76 S. W. 79; *Kregel v. Bartling*, 23 Neb. 848, 37 N. W. 668; *Nebraska C. H. S. v. State*, 57 Neb. 765, 78 N. W. 267; *Back v. State (Neb.)*, 106 N. W. 787; *State v. Matthews*, 37 N. H. 450; *In re Cheesman*, 49 N. J. L. 115, 60 Am. Rep. 596, 6 Atl. 513; *Yates v. Lansing*, 9 Johns. 395, 6 Am. Dec. 290; *People v. Fancher*, 4 Thomp. & C. 467; *State v. Woodfin*, 5 Ired. 199, 42 Am. Dec. 161; *Ex parte Moore*, 63 N. C. 397; *Hale v. State*, 55 Ohio St. 210, 60 Am. St. Rep. 691, 45 N. E. 199, 36 L. R. A. 254; *Smith v. Speed*, 11 Okla. 95, 66 Pac. 511, 55 L. R. A. 402; *State v. Bourne*, 21 Or. 218, 27 Pac. 1048; *In re Irwin's Estate*, 9 Pa. Dist. Rep. 282; *Kennebec Mills Co. v. Walker*, 19 S. C. 104; *In re Taber*, 13 S. Dak. 62, 82 N. W. 398; *In re Cooper*, 32 Vt. 253; *Rudd v. Darling*, 64 Vt. 456, 25 Atl. 479; *Carter v. Commonwealth*, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310; *State v. Few*, 24 W. Va. 416, 49 Am. Rep. 257; *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; *United States v. New Bedford Bridge Co.*, Fed. Cas. No. 15,867, 1 Wood & M. 401; *United States v. Smith*, Fed. Cas. No. 16,342, 1 Cranch C. C. 127; *Ripon R. W. v. Schreiber*, 101 Fed. 810; *The Laurens*, Fed. Cas. No. 8121, Abb. Ad. 302; *United States v. Hudson*, 7 Cranch, 32, 3 L. ed. 259; *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. Rep. 77, 32 L. ed. 405; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. Rep. 900, 39 L. ed. 1092; *In re Pater*, 5 Best & S. 299, 32 L. J. M. C. 142, 10 Jur. N. S., 972, 10 L. T. 376, 12 Week. Rep. 823, 9 Cox C. C. 544.

b. *The National Courts.*—It has been said in at least one of the national courts that the power to punish for contempt is not incident to the mere exercise of judicial functions, and hence must be expressly conferred: *In re Mason*, 43 Fed. 510. This position is, we think, not maintainable upon principle, and certainly is not in accord with the great weight of authority upon the subject, as we have shown by the decisions cited in the preceding subdivision. The authority of the courts of the United States, unlike that of the courts of the several states, is not subject to express constitutional grant including the designation of their jurisdiction, the only provisions on the subject to be found in the national constitution being those in sections 1 and 2 of article 3. By section 1 the judicial power of the United States is vested in one supreme court, and in such inferior courts as the Congress may from time to time establish. The question as to what such judicial power shall extend was answered in section 2. Nevertheless, the authority of those courts

to punish for contempt has by the highest of them, and we think correctly, been spoken of as inherent: *United States v. Hudson*, 7 Cranch, 32, 3 L. ed. 259; *Ex parte Robinson*, 19 Wall. 505, 22 L. ed. 205; *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. Rep. 77, 32 L. ed. 405; *Ex parte Savin*, 131 U. S. 267, 9 Sup. Ct. Rep. 699, 33 L. ed. 150. From a very early date, however, it has been the subject of enactments professing to control, and perhaps to authorize, it. Thus, section 17 of chapter 20 of the judiciary act of 1789 purported to invest the courts of the United States with power to punish by fine and imprisonment, at the discretion of such courts, all contempts of authority in any case on hearing before them; but by chapter 99 of the acts of Congress of 1831, it was declared that this power should not be construed to extend to any causes except misbehavior of any person or persons in the presence of such courts, or so near thereto as to obstruct the administration of justice, or misbehavior of any of the officers of said courts, in their official transactions, or disobedience or resistance of any officer of said courts, party, jury, witness or other person or persons of any legal process, order, rule, decree, or command of such courts. This provision has been substantially incorporated in section 725 of the Revised Statutes. While we believe the question of whether the limitations attempted to be expressed by these states are applicable to the supreme court has never been determined by that tribunal, there is no doubt that it and all the judicial tribunals created by acts of Congress have power to punish for contempt, and that the power of the latter is subject to the statutory limitations thus imposed: *United States v. New Bedford Bridge Co.*, Fed. Cas. No. 15,867, 1 Wood. & B. 401; *In re Pitman*, Fed. Cas. No. 11,184, 1 Curt. 186; *Vose v. Redd*, Fed. Cas. No. 17,011, 1 Woods, 647; *Mallory Mfg. Co.*, 20 Fed. 409; *In re Nevitt*, 117 Fed. 448, 54 C. C. A. 622; *Cuyler v. Atlantic etc. R. Co.*, 131 Fed. 95; *Moss v. United States*, 23 App. D. C. 475; *In re Swan*, 150 U. S. 637, 14 Sup. Ct. Rep. 225, 37 L. ed. 1207; *In re Williamson*, 26 Pa. 9, 67 Am. Dec. 374.

II. The Inferior Courts.

a. *The General Rule.*—The authority of the inferior courts in this country generally rests upon statute, and not being conferred by the constitution, there is no doubt that, as the legislature might have failed to create them or to give them any authority at all, it may refuse to give them authority to punish for contempt. In England, the power to punish is exercised by and conceded to all the superior courts (*Ex parte Fernandez*, 6 Hurl. & N. 717, 30 L. J. C. P. 321, 7 Jur., N. S., 529, 571, 4 L. T. 296, 324, 9 Week. Rep. 559, 832, 10 Com. B., N. S., 3; *In re McAleece*, 7 I. R. C. L. 146), but the inferior courts were formerly regarded as unsafe custodians of the power, and it was denied to them: *Brass Crosby's Case*, 2 W. Black. 754; *Hammond v. Howell*, 1 Mod. 184. The more recent

view appears to be that this power is inherent even in the inferior courts, subject to the power of the superior courts to interfere and prevent any usurpation of jurisdiction: *In re Pater*, 5 Best & S. 299, 33 L. J. M. C. 142, 10 Jur., N. S., 972, 10 L. T. 376, 12 Week. Rep. 823, 9 Cox C. C. 544. In the United States, a considerable number of the state courts entertain the old prejudice against the proceedings of inferior courts, and insist that their mere creation and the conferring of judicial power upon them do not pass with and as an incident to it the power to punish contempts: *State v. White*, T. U. P. Charlt. 123; *Morrison v. McDonald*, 21 Me. 550; *In re Kerrigan*, 33 N. J. L. 344; *Rutherford v. Holmes*, 66 N. Y. 368; *Farnham v. Coleman*, 19 S. Dak. 342, ante, p. 944, 103 N. W. 161, 1 L. R. A., N. S., 1135. This opinion is no longer supported by the weight of authority. The opposing decisions are sufficiently numerous to warrant us in affirming that the true rule ought to be, and is, that the mere grant of judicial authority includes with it the authority to compel due decorum to be observed in the presence of the court, and due respect and obedience to be yielded to its process, orders, and judgments, and finally, that the power to punish contempt does not depend on the grade of the court, but upon the fact that it is invested with judicial authority, and that this authority cannot be practically exercised unless attended with this power: *Murphy v. Wilson*, 46 Ind. 537; *Robb v. McDonald*, 29 Iowa, 330, 4 Am. Rep. 211; *Watson v. Williams*, 36 Miss. 331; *Shattuck v. State*, 51 Miss. 50, 24 Am. Rep. 624; *State v. Copp*, 15 N. H. 212; *Cooper's Case*, 32 Vt. 253. Other courts, without wholly denying the power, insist that it is confined to contempts in the presence of the court: *Brooker v. Commonwealth*, 12 Serg. & R. 175; *Lining v. Bentham*, 2 Bay, 1; *State v. Johnson*, 2 Bay, 385; *State v. Galloway*, 5 Cold. 326, 98 Am. Dec. 404. In several states the authority has been held to have been conferred by statute (*Swafford v. Berrong*, 84 Ga. 65, 10 S. E. 593; *Clark v. Burke*, 163 Ill. 334, 45 N. E. 235), but its exercise is subject to revision by the higher courts: *In re Deaton*, 105 N. C. 59, 11 S. E. 244.

b. *Probate and Surrogate Courts.*—The authority of probate and surrogate courts and of other courts exercising similar jurisdiction is not the same in the different states. In some they are regarded as courts of general jurisdiction or of record, and where such is the case, we apprehend that their authority, like that of other courts of record, is inherent to the extent, at least, that it can be denied only when withheld by statute: *Watson v. Williams*, 36 Miss. 331. Though the power of these courts to punish for contempt is well-nigh, if not quite, universal, the majority of the decisions upon the subject indicate that it must be restricted to the cases and conditions prescribed by statute (*Welsh v. Lloyd*, 5 Ark. 367; *Greene County v. Rose*, 38 Mo. 390; *Doran v. Dempsey*, 1 Bradf. Sur. 499; *Seaman v. Duryea*, 11 N. Y. 324, 10 Barb. 523; *Saltus v. Saltus*, 2 Lana. 9; *In*

re Watson, 3 Lans. 408; Watson v. Nelson, 69 N. Y. 536), and even if not subject to any specific restriction, does not extend to the enforcement of its decrees and judgments for the payment of money by attachment for contempt in cases where this remedy would not be available under the practice in chancery courts: In re Bingham, 32 Vt. 329; In re Leach, 51 Vt. 630.

c. **Justices of the Peace and Other Magistrates of Similar Rank.**—The decisions respecting these officers and courts are very naturally controlled by the views of the courts making them respecting the inherent powers of inferior courts. In the courts believing that the power to punish is not inherent, it is denied unless delegated in express terms: In re Farnham, 8 Mich. 89; In re Kerrigan, 83 N. J. L. 344; Rhinehart v. Lance, 43 N. J. L. 311, 39 Am. Rep. 592; Rutherford v. Holmes, 5 Hun, 317; Albright v. Lapp, 26 Pa. 99, 67 Am. Dec. 402; while in the courts maintaining that it is an essential part of judicial authority, the power is upheld, unless expressly denied: Murphy v. Wilson, 46 Ind. 537; In re Cooper, 32 Vt. 253. The power is, in several of the states, admitted to be within the statutory grant of authority to these officers: Coleman v. Roberts, 113 Ala. 323, 59 Am. St. Rep. 111, 20 South. 449, 36 L. R. A. 84; Ex parte Latimer, 47 Cal. 131; Church v. Pearne, 75 Conn. 350, 53 Atl. 955; Swafford v. Berrong, 84 Ga. 65, 10 S. E. 593; Clark v. People, 1 Ill. 340, 12 Am. Dec. 177; Hill v. Crandall, 52 Ill. 70; State v. Newton, 62 Ind. 517; Burnham v. Stevens, 33 N. H. 247; People v. Hicks, 15 Barb. 153; People v. Williams, 51 App. Div. 102, 64 N. Y. Supp. 457; Ex parte Robertson, 27 Tex. App. 628, 11 Am. St. Rep. 207, 11 S. W. 669; and its exercise, whether the authority is expressly conferred by statute or is deemed an integral part of the grant of judicial authority, is often limited to contempts committed in the presence of the court, and therefore claimed to embarrass or suspend its proceedings: Clarke v. May, 2 Gray, 410, 61 Am. Dec. 470; Onderdonk v. Ranlett, 3 Hill, 323; State v. Applegate, 2 McCord, 110; State v. Johnson, 1 Brev. 155.

d. **Municipal Courts.**—Usually, but not universally, the municipal courts are treated as inferior and not as courts of record or of general jurisdiction. If by statute or other competent authority they are made courts of record or invested with the general powers of courts of record, they may unquestionably punish for contempt to the same extent as other courts of like dignity and jurisdiction. This view was applied in favor of the municipal court of Grand Rapids, Michigan, because it was by statute given exclusive jurisdiction of all criminal proceedings within the corporate limits of the city, and the power to issue all lawful writs and process, and to do all lawful acts which might be necessary and proper to carry into complete effect the powers and jurisdiction given by the act, and especially to issue all process and to do all acts which the circuit courts of the state within their respective jurisdiction might in

like cases issue and do: *Nichols v. Judge of Superior Court*, 130 Mich. 187, 89 N. W. 691. So, the power to punish for contempt may be given to a municipal court by the express terms of a statute: *Faircloth v. City of Macon*, 122 Ga. 795, 50 S. E. 915. Where they are neither made courts of general jurisdiction nor given the power here under consideration in express terms, they fall within the rules applicable to other inferior courts of the same state. Hence, the inherent power of the police courts to commit for contempt was affirmed in *Re Monroe*, 46 Fed. 52, but denied in *Re Palmeto*, 58 Kan. 809, 51 Pac. 288, and the power of the mayor of a city acting as an inferior court was maintained in *Re Deaton*, 105 N. C. 59, 11 S. E. 244, *State v. Aiken*, 113 N. C. 651, 18 S. E. 690, and denied in *Roberts v. Hackney*, 22 Ky. Law Rep. 975, 58 S. W. 810, 59 S. W. 328. If the common council of a city is given by statute full power and authority to punish all offenders against the laws, rules and regulations of the town by fine or imprisonment, or both, it is thereby made either an inferior court or a body composed of persons specially invested with powers of a judicial nature. In either contingency, if it acts in a state wherein the statute declares that every court has power to preserve and enforce order in its immediate presence and as near thereto as is necessary to prevent interruption, disturbance, or hindrance to its proceedings, it may punish contempt: *Swafford v. Berrong*, 84 Ga. 65, 10 S. E. 593. Where, however, such a council does not act judicially, it is said to be beyond the power of the legislature to confer authority upon it to punish for contempt: *Whitecomb's Case*, 120 Mass. 118, 21 Am. Rep. 502.

III. Judges of Courts.

Respecting the power of judges of court to punish for contempt, the decisions are both conflicting and difficult to understand. The question may be presented (1) when a person has been guilty of a contempt of court and is brought before a judge thereof in vacation to be punished therefor, and (2) when the contempt consists in the disobedience to some order of the judge or of some process issued by him or by his authority. In the cases of the first class the power is denied in *Taylor v. Moffatt*, 2 Blackf. 305; *People v. Brennan*, 45 Barb. 344; *State v. McKinnon*, 9 Or. 487; *Ex parte Ellis*, 37 Tex. Cr. App. 539, 66 Am. St. Rep. 831, 40 S. W. 275, and sustained in *State v. Myers*, 44 Iowa, 580; *Lathrop v. Clapp*, 40 N. Y. 328, 100 Am. Dec. 493. Concerning cases of the second class, there is less conflict of decision. The general rule asserted by the weight of authority is, that where a judge has power to make some order, pronounce some judgment, or issue or direct the issuing of some writ, his functions in doing so are judicial, and therefore include the power of compelling respect to the order, judgment or writ, by attachment and punishment for contempt (*Cobb v. Black*, 34 Ga. 162; *Ormond v. Ball*, 120 Ga. 916, 48 S. E. 383; *In re Wolf*, 52 Kan. 366,

34 Pac. 1048; *Bradley v. Veazie*, 47 Me. 85; *Moore v. Judge of Probate*, 1 Miss. 310; *Ex parte Adams*, 25 Miss. 883, 59 Am. Dec. 234; *State v. Loud*, 24 Mont. 428, 62 Pac. 497; *Nebraska C. H. Soc. v. State*, 57 Neb. 765, 78 N. W. 267; *Seastream v. New Jersey Exhibition Co. (N. J.)*, 61 Atl. 1041; *Briggs v. Mackellar*, 2 Abb. Pr. 30; *Shepherd v. Dean*, 18 How. Pr. 173, 3 Abb. Pr. 424; *In re Abbott*, 7 Okla. 78, 54 Pac. 319; *Smith v. Speed*, 11 Okla. 95, 66 Pac. 511, 55 L. R. A. 402; *Harman v. Wagener*, 83 S. C. 487, 12 S. E. 98), and the power extends to special judges in matters respecting which they have been given the same powers as a judge: *Mowrer v. State*, 107 Ind. 539, 8 N. E. 561. In Kansas however, by statutes enacted in 1897, the power of judges either to try or to commit persons for contempt was taken away from them and vested solely in the courts: *In re Barnhouse*, 60 Kan. 649, 58 Pac. 480.

IV. Various Agencies of Courts.

a. *Commissioners and Referees.*—Courts often appoint persons, or avail themselves of persons already appointed or designated by law, for the purpose of taking evidence and sometimes of reporting their conclusions thereon, and to this extent assisting in the discharge of judicial functions. Witnesses summoned to appear may refuse to do so, or, after appearing, may refuse to testify at all, or, though testifying to some extent, may refuse to answer some proper question put to them, and persons other than those summoned as witnesses may refuse to obey some lawful order made by a commissioner or referee. There are decisions maintaining that these officers may enforce obedience to their process or orders by attachment and punishment for contempt: *People v. Miller*, 9 Misc. Rep. 1, 29 N. Y. Supp. 305; *People v. Learned*, 5 Hun, 626; *Commonwealth v. Newton*, 1 Grant Cas. 453. The better view, however, is that, even when the acts in question amount to contempt, they are not contempts of the referee or commissioner, who acts merely as an agent of the court or of the law for the benefit of the law, but are contempts of court, and, therefore, not punishable by the commissioner or referee: *Peabody v. Harmon*, 3 Gray, 113; *Coburn v. Tucker*, 21 Mo. 219; *Bonesteel v. Lynde*, 8 How. Pr. 226; *In re Foodman*, 1 Ohio Dec. 360; *In re Remington*, 7 Wis. 643; *Haight v. Lucia*, 36 Wis. 355; *Stuart v. Allen*, 45 Wis. 158. Where they are such, the court may punish for contempt and award the proper punishment if the person attached is found guilty: *In re Haldron*, 10 Mont. 222, 25 Pac. 101; *In re Seeley*, 6 Abb. Pr. 217; *La Fontaine v. Southern Underwriters Assn.*, 83 N. C. 132; *Bradley F. Co. v. Taylor*, 112 N. C. 141, 17 S. E. 69. With respect to commissioners of the United States courts, their want of power to punish for contempt is too well settled to be the subject of controversy: *Ex parte Doll*, Fed. Cas. No. 8968; *In re Mason*, 43 Fed. 510; *Elting v. United States*, 27 Ct. of Cl. 158; *United States v. Beavers*, 125 Fed. 778; *In re Perkins*, 100 Fed. 950.

b. Notaries Public.—The functions of notaries public are sometimes analogous to those of commissioners and referees considered in the preceding paragraph, and a like conflict of decision has arisen respecting their power to punish for contempt. This power was upheld in *Coleman v. Roberts*, 113 Ala. 323, 59 Am. St. Rep. 111, 21 South. 449, 36 L. R. A. 84; In *re Abeles*, 12 Kan. 451; In *re Huron*, 58 Kan. 152, 62 Am. St. Rep. 614, 48 Pac. 574, 36 L. R. A. 822; *Ex parte McKee*, 18 Mo. 599; *Dogge v. State*, 21 Neb. 272, 31 N. W. 929; *De Camp v. Archibald*, 50 Ohio St. 618, 40 Am. St. Rep. 692, 35 N. E. 1056, and denied in *Burt v. Pyle*, 89 Ind. 398; *Ex parte Krieger*, 7 Mo. App. 367; In *re Nitsche*, 14 Mo. App. 213; *Courtney v. Knox*, 31 Neb. 652, 48 N. W. 763. Statutes have been enacted purporting to expressly confer this authority. Where, however, the judicial power of a state has been by its constitution vested in specified courts and tribunals, among which notaries are not included, the constitutionality of such statutes may well be denied, on the ground that their effect is to repose judicial power in other bodies when, by the constitution, it is exclusively vested in the courts: *Langenburg v. Decker*, 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 108; In *re Huron*, 58 Kan. 152, 62 Am. St. Rep. 614, 48 Pac. 574, 36 L. R. A. 822. *Contra*, *De Camp v. Archibald*, 50 Ohio St. 618, 40 Am. St. Rep. 692, 35 N. E. 1056.

c. Grand Juries.—These bodies are appendages to, if not a part of, the courts. They have power to summon and examine witnesses and to determine from the evidence before them whether indictments should be found or ignored, and the courts may by attachment and punishment for contempt of them compel the attendance of witnesses and the answering by them of all proper questions (In *re Gannon*, 69 Cal. 541, 11 Pac. 240), but, so far as we can ascertain, the power of the jury itself to punish for contempt has rarely, if ever, been claimed, and whenever claimed has been denied: *Wyatt v. People*, 17 Colo. 252, 28 Pac. 861.

V. Restriction of the Power of Courts to Contempts of Their Own Authority.

The power to punish for contempt, whether expressly conferred by some positive enactment or regarded as an incident to jurisdiction conferred upon the court, exists merely for the purpose of enabling it to compel due decorum and respect in its presence and due obedience to its judgments, order and process. Hence it is in no case authorized to inquire respecting or to punish contempts of any other court or tribunal, unless the latter is an agency or a part of the punishing court, and the contempt must, therefore, be regarded as a contempt of it and the power to punish as an incident for maintaining its authority: *Callan v. McDaniel*, 73 Ala. 96; *People v. Placer County Judge*, 27 Cal. 151; *Lockwood v. State*, 1 Ind. 161; *Kissel v. Lewis*, 27 Ind. App. 302, 61 N. E. 209; *Androscoggin &*

K. R. R. Co. v. Androscoggin R. Co., 49 Me. 492; Fitzsimmons v. Board of Canvassers, 119 Mich. 147, 77 N. W. 632; Nebraska C. H. Soc. v. State, 57 Neb. 765, 78 N. W. 267; Johnson v. Bouton, 35 Neb. 898, 53 N. W. 995; Phillips v. Welch, 12 Nev. 158; Wicker v. Dresser, 14 How. Pr. 465; In re Rhodes, 65 N. C. 518; In re Williamson, 26 Pa. 9, 67 Am. Dec. 374; Penn's Lessee v. Messinger, 1 Yeates, 2; James v. Smith, 2 S. C. 183; In re Tillinghast, 4 Pet. 108, 7 L. ed. 798; Ex parte Bradley, 7 Wall. 364, 19 L. ed. 214; In re Litchfield, 13 Fed. 863; United States v. Berry, 24 Fed. 780; Kirk v. Milwaukee D. C. M. Co., 26 Fed. 501.

VI. Jurisdiction is not Devested by Implication nor the Granting of Concurrent Authority or Remedy, nor the Making of an Act Criminal.

The power to punish a contempt may be vested in two or more tribunals. Hence, if it is given to a referee or commissioner, this is not a restriction upon or a diminution of the power previously possessed by the court, and the court is not prevented from punishing by the existence of a like power in its referee or commissioner (Wicker v. Dresser, 13 How. Pr. 331, 4 Abb. Pr. 93; Milton v. Richardson, 21 Misc. Rep. 380, 47 N. Y. Supp. 735; In re Hay F. & L. Works, 22 App. Div. 87, 47 N. Y. Supp. 802; Bradley F. Co. v. Taylor, 112 N. C. 141, 17 S. E. 69; Nieuwankamp v. Ulman, 47 Wis. 168, 2 N. W. 131); nor does the existence of a concurrent remedy prevent resort to that by attachment and punishment for contempt: Rowley v. Feldman, 84 App. Div. 400, 82 N. Y. Supp. 679. When a judgment is for money, and hence enforceable by execution, courts will rarely undertake to enforce it by attachment for contempt: Barrow v. Gilbert, 58 Ga. 70; Goodwillie v. Milliman, 56 Ill. 523; Carnahan v. Carnahan, 143 Mich. 390, 114 Am. St. Rep. 660, 107 N. W. 73; Perkins v. Taylor, 19 Abb. Pr. 146; O'Gara v. Kearney, 77 N. Y. 423, 57 How. Pr. 439; Myers v. Becker, 95 N. Y. 486.

The fact that an act constituting a contempt is also criminal, and is punishable by indictment or other method of criminal prosecution, does not take away the power of the court of whose authority it was a contempt to punish it as such: Bradley v. State, 111 Ga. 168, 78 Am. St. Rep. 157, 36 S. E. 630, 50 L. R. A. 691; O'Neil v. People, 113 Ill. App. 195; State v. Faulds, 17 Mont. 140, 42 Pac. 285; Fisher v. McDaniel, 9 Wyo. 457, 87 Am. St. Rep. 971, 64 Pac. 1056; Ex parte Savin, 131 U. S. 267, 9 Sup. Ct. Rep. 699, 33 L. ed. 150. Contra, State v. Blackwell, 10 S. C. 35.

VII. Legislative Control of.

Statutes enacted upon the subject of contempt are generally construed as merely declaratory of pre-existing law (State v. Morrill, 16 Ark. 384; Middlebrook v. State, 43 Conn. 257, 21 Am. Rep. 650; People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528; In re Chadwick, 109

Mich. 588, 67 N. W. 1071; *People v. Dwyer*, 1 Civ. Pro. Rep. 484; *State v. Johnson*, 1 Brev. 155; *State v. Williams*, 2 Speer, 26), and hence are rarely never held to authorize the punishment as contempt of acts not so punishable by the common law: *State v. Galloway*, 5 Cold. 326, 98 Am. Dec. 404. When so construed, no question can arise involving their constitutionality. They may, however, undertake (1) to vest the authority to punish for contempt in courts or tribunals not previously empowered to so punish, or in officers or other persons whose functions are not judicial; or (2) to take away from or diminish the authority of other courts previously possessing it uncontrolled. In either event a grave constitutional question is presented. If a court previously existing had no power to punish for contempt, there can be no doubt, if its functions are judicial, that this power may be given to it, but an attempt may be made by statute to confer the authority on notaries public or other officers whose functions are not judicial, or upon municipal councils whose functions are purely legislative. If the constitution of the state purports to vest all the judicial power in certain enumerated or described courts or other legal tribunals, this operates as a restriction and precludes the grant of such power to other courts or tribunals. The power to punish for contempt is undoubtedly a judicial power, and therefore, statutes undertaking to vest it in tribunals which are not judicial must be unconstitutional: *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502; *Haughney v. Ryan*, 182 Mo. 349, 81 S. W. 435; subdivision IV, b, ante.

Statutes of the second class may regulate the exercise of the power, but cannot destroy it, nor substantially impair the authority of the court both to compel due decorum to be observed in its presence and proceedings and due obedience to be accorded to its orders, judgments and decrees. The legislatures of many of the states have assumed, or presumed, to declare what acts constitute a contempt of court and what shall be the maximum penalty therefor when committed. Undoubtedly the legislature may prescribe a procedure in prosecutions for contempt not committed in the presence of the court, or so near thereto as to obstruct its proceedings, at least when such procedure is not so sluggish or obstructive as to substantially hamper judicial action and authority; and, as to the courts which the legislature has created and has given such powers as they possess, they may be denied all authority to punish for contempt, or such restriction may be placed thereon as the legislature deems best. With respect, however, to what shall constitute a contempt of the courts created by the constitution and therein given designated powers, and what shall be the maximum punishment therefor, the legislature has precisely the same authority to speak as we have, and no more. What it says may be accepted as a statement or compilation of the pre-existing law by those courts which do not desire to investigate or to speak for themselves. Yet, as a matter of fact,

state legislatures have often presumed to speak on both these subjects by codes or other statutes. Thus by section 1209 of the Code of Civil Procedure of California, the acts or omissions which constitute contempts are attempted to be enumerated, and by section 1218 of the same code the penalty for any of these acts not committed in the immediate view or presence of the court, or judge at chambers, is limited to a fine not exceeding five hundred dollars or an imprisonment not exceeding five days. Whether an injunction or other order of court shall be obeyed is thereby attempted to be made a question of price. This cannot be tolerated. There is no doubt that the legislature cannot deprive an act which is clearly contemptuous of its true character, nor can it limit the power of the court of which the contempt is committed to punish such act by such fine and imprisonment as it may deem adequate: *Ford v. State*, 69 Ark. 550, 64 S. W. 879; *In re Shortridge*, 99 Cal. 526, 37 Am. St. Rep. 78, 34 Pac. 227, 21 L. R. A. 755; *Cooper v. People*, 13 Colo. 337, 373, 22 Pac. 790, 6 L. R. A. 430; *People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787; *Bradley v. State*, 111 Ga. 168, 78 Am. St. Rep. 157, 36 S. E. 630, 50 L. R. A. 691; *Little v. State*, 90 Ind. 338, 46 Am. Rep. 224; *In re Robinson*, 117 N. C. 533, 53 Am. St. Rep. 596, 23 S. E. 453; *Hale v. State*, 55 Ohio St. 210, 60 Am. St. Rep. 691, 45 N. E. 199, 36 L. R. A. 254; *Smith v. Speed*, 11 Okla. 95, 66 Pac. 511, 55 L. R. A. 402; *Carter v. Commonwealth*, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310. Nor does the power of the court seem to be diminished by a constitutional provision providing in general terms that the legislature may regulate by law the punishment of contempts not committed in disobedience to process (*Ford v. State*, 69 Ark. 550, 64 S. W. 879), or may limit the power to punish for contempts. The limitations thus authorized relate to the amount of punishment which may be inflicted, and do not authorize the legislature to limit the inherent power of the court to decide what are contempts: *Bradley v. State*, 111 Ga. 168, 78 Am. St. Rep. 157, 36 S. E. 630, 50 L. R. A. 691. The only decisions which we have discovered which can possibly be regarded as at all at variance with the views hereinbefore expressed are *O'Neil v. People*, 113 Ill. App. 195, *Drady v. District Court*, 126 Iowa, 345, 102 N. W. 115, *In re Robinson*, 117 N. C. 533, 53 Am. St. Rep. 596, 23 S. E. 453, none of which, in our judgment, can fairly be regarded as subjecting the courts to legislative authority to such an extent as to disable them from compelling respect to themselves and obedience to their process, orders, and judgments.

The power of the courts is paramount to any legislative control. They cannot by the legislature be forced to delegate or to share that control, nor can they be required to submit to a jury the question of the guilt of the person accused of the contempt or the degree or character of his punishment, if found guilty. "It is a rule founded on the reason of the law that all contempts to the process of the

court, to its judges, juries, officers and ministers, when acting in the due discharge of their respective duties, whether such contempts be by direct obstruction or consequently—that is to say, whether they be by act or writing—are punishable by the court itself, and may be abated instante as nuisances to public justice”: *Carter v. Commonwealth*, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310.

GOODALE v. WALLACE.

[19 S. Dak. 405, 103 N. W. 651.]

USURY Resulting from Mistake.—An honest mistake in the drafting of notes which results in the reservation of interest in excess of that permitted by law does not make them usurious. (p. 967.)

USURY—Question for the Jury.—The question whether a sum in excess of legal interest was taken through an honest mistake or a corrupt agreement is for the jury or for the court sitting as such in the trial of a cause. (pp. 967, 968.)

INTEREST, Compound, What is not.—The provision in a note allowing interest upon interest after maturity is not a provision for compound interest, nor does it make the note usurious. (p. 967.)

USURY—Penalty—Making the Whole Debt Become Due upon Default in the Payment of Interest.—Where several promissory notes are given, which in the aggregate represent the principal and interest of a loan, each note to bear interest after maturity but not before, and all are secured by a mortgage containing a stipulation that if the mortgagors fail to pay any portion of such notes, either principal or interest, promptly at the times they become due, the whole sum of both principal and interest shall at once become due and collectible, the transaction is not thereby rendered usurious, for the reason that the stipulation is in the nature of a penalty from which the mortgagors may relieve themselves by prompt payment of the notes when due. (p. 968.)

USURY.—The Fact that Notes are Made Payable Monthly Instead of Annually cannot make them usurious. (p. 969.)

Charles W. Brown, for the appellants.

Frex H. Whitfield, for the respondent.

⁴⁰⁸ **CORSON, P. J.** This is an action to foreclose a real estate mortgage on certain lots in Rapid City. Findings and judgment being in favor of the plaintiff, the defendants have appealed. The mortgage was given to secure the payment of fifty-nine ⁴⁰⁹ promissory notes for \$40 each, and one note for \$43.20. Thirty-nine of these notes were paid,

and the fortieth was partially paid, and foreclosure proceedings were instituted to foreclose the mortgage for the balance due on the last twenty notes. The defendants interposed the defense that the notes were usurious, and that the amount paid by the defendants was more than sufficient to pay the original amount loaned, and hence that the findings and judgment should have been for the defendants. The first note of the series is as follows:

"No. 1. \$40.00

"Rapid City, S. Dak., September 28, 1892.

"October 28, 1892, after date, we or either of us promise to pay to the order of Anna S. Goodale forty 00-100 at First National Bank of Rapid City, So. Dak., with interest at 12 per cent. per annum from maturity until paid, for value received.

"MINNIE E. WALLACE.

"ARTHUR E. WALLACE.

"Post Office, Rapid City.

"Received payment.

"HULST & PRICE."

The others were all drawn bearing the same date, and similar in form, except as to the date of payment, each of which was made payable on the twenty-eighth day of the month for a period of five years. The court finds that the last of said notes was due and payable September 28, 1897; that no part of said notes have been paid, except the first thirty-nine thereof, and \$22 paid on account of the fortieth note and indorsed thereon on January 29, 1892; and that there is now due and owing to the plaintiff from said defendants on account of said notes and accrued interest thereon \$843.20, with interest at twelve per cent per annum on each of the notes from its maturity to the time of trial, amounting in all (principal and interest) to \$1,378.50; and the court finds generally in favor of the plaintiff and against the defendants upon all issues. The court concludes that the plaintiff is entitled to a decree that ⁴¹⁰ the mortgaged premises be sold for the amount so found due, and for a deficiency judgment against defendants Minnie E. and Arthur E. Wallace. Judgment was entered accordingly, and the property sold in the manner prescribed by law, and a deficiency judgment of \$150 entered against the two defendants last named.

The first question presented arises upon a motion to dismiss the appeal on the ground that the property was sold and the deficiency judgment paid under the stipulation between the parties, and that therefore an appeal would not lie from the judgment so compromised and settled to this court. This motion was argued at the last term of this court and taken under advisement, but, in view of the fact that the counsel differ as to the stipulation entered into under which the deficiency judgment was compromised and settled, we are inclined to take the view the appeal should not be dismissed, and hence the motion to dismiss is denied.

This brings us to the merits of the case, and the principal question presented is as to whether or not the notes were usurious. The amount actually loaned by the plaintiff to the defendants was \$1,800, but, as will be noticed, sixty notes, aggregating \$2,403.20, were executed by the defendants, and it is specified in the notes that they are to draw interest after due at the rate of twelve per cent per annum. The court, as we have seen, finds against the defendants upon this issue, and denied the motion of the appellants for a new trial based upon the ground that the evidence was insufficient to justify the findings.

It is contended by the appellants that by the terms of the notes there has been reserved about \$74.51 in excess of the sum of \$1,800 loaned, with twelve per cent interest thereon from ⁴¹¹ the date until the trial of the action, and that under the provisions of the code of this state the interest upon the amount was therefore forfeited, and the only sum that could be collected was the original amount of \$1,800 loaned, and that, that sum having been paid, the respondent was not entitled to any judgment in her favor in this action. The respondent, on the other hand, insists (1) that, by a correct computation of the amount to be paid on said notes, the amount did not exceed the amount of the original loan, with interest thereon at the rate of twelve per cent; (2) that if there was an excess of interest over and above twelve per cent provided for by the notes, it was caused by a mistake in the computation made by the appellant Arthur E. Wallace, by whom the notes were drawn and delivered to the agent of the plaintiff; and that it was not the intention of either party that the interest reserved should exceed the twelve per cent. per annum allowed by the code.

As will be noticed, the contract is somewhat peculiar. The original amount loaned was, as before stated, \$1,800, but the notes, as we have seen aggregated \$2,403.20; no interest being payable on the notes until due. In other words there was a computation apparently of an amount that would be required to pay the \$1,800, with twelve per cent interest, and the amount so found that would become due was included in these sixty promissory notes. Computing the interest in the manner in which it was apparently computed, there does not appear to have been any excess of interest reserved over and above the twelve per cent per annum. When the first note was paid, on October 28, 1892, there was \$18 for one month's interest on \$1,800, and \$22 paid upon the principal; thus leaving for the second month, as due upon the principal, \$1,778. This process ⁴¹² of paying the interest and applying the balance of the amount of the note over and above the interest to the payment of the principal would have paid at the end of five years the sum of \$2,403.20, the amount for which the notes were given. The appellants suggest, however, that the computation should have been to ascertain the interest upon the \$40 for the one month, and applied the balance upon the principal, and by this method of computation he claims that the amount provided for in excess of twelve per cent interest was about \$74.51. We are inclined to take the view that the computation as made by the respondent and evidently adopted by the court is the correct computation, and does not violate our statute of usury. But if we are not correct in this view, we think the excess of interest, if any, was taken under a mistake. The evidence as to the manner in which the notes were prepared, and by whom drawn, is as follows: "V. T. Price, sworn as a witness on behalf of the plaintiff, testified as follows: My name is V. T. Price. I reside at Rapid City, South Dakota. I acted for the plaintiff, Mrs. Goodale, in the matter of negotiating a loan to Mr. and Mrs. Wallace, the defendants. . . . I acted for Mrs. Goodale in this transaction. The papers were drawn up by Mr. Wallace, and the notes are in his handwriting, except the other signature, which is that of Mrs. Wallace. Mrs. Goodale advanced \$1,800 in money to Mrs. Wallace. Mr. Wallace had been in that building and loan association, and his proposition was to pay in this manner, thinking that he could pay it off much more easily by paying so much each month; and he drew them up in this way, and interest on the money to be com-

puted in the notes, and to draw interest from maturity; and I made him the notes at twelve per cent. He drew the notes and made the ⁴¹³ computation. Q. They were divided in this particular form at whose request? A. At the request of Mr. Wallace. Q. Was the purpose of dividing it into forty notes made known to you? A. Yes; he wanted to do that, and thought he could pay it in \$40 payments, and have his home clear. The agreement as to the rate of interest to be charged was twelve per cent per annum, and no more." On cross-examination the witness further testified: "I left the matter of the computation to Mr. Wallace; I figured in round numbers that the interest would amount to about \$600, at twelve per cent; and I had great confidence in him; and our agreement was that he was to pay twelve per cent interest, and no more; and he made out the papers. These papers represent our agreement, if they are made like that; and, if not, they do not. Our agreement was twelve per cent interest at maturity. These notes here are supposed to represent the amount loaned, with twelve per cent per annum added to them. I talked with Mr. Wallace. I did not have any talk with Mrs. Wallace. The total amount of payments on the notes prior to January, 1896, was \$1,582.90 on the notes, and \$234.98 on the interest after maturity. . . . This item of interest after maturity was computed, as stated in the notes, at twelve per cent. The amount of interest in the first note for \$40, dated September 28, 1892, was one month's interest at twelve per cent on net \$1,800. . . . The amount of interest in the first note is one month's interest on \$1800, or \$18, and there would be \$22 of principal." It is certainly clear from the evidence of Mr. Price, who was acting for the respondent, that it was not his intention to contract for any interest in excess of twelve per cent per annum; and we can hardly presume that it was the intention of the defendant Wallace, as his agreement was to pay twelve per cent per ⁴¹⁴ annum upon the loan, to include interest in excess of that sum. His evidence was not taken in the case, and hence the testimony of Mr. Price, as before stated, stands uncontradicted; and there is no evidence that the plaintiff was there present, or had any knowledge as to the form of the notes, or the manner in which the interest was computed. If there was a mistake, therefore, in the drawing of the notes by Mr. Wallace, merely, and there was no intention on the part of either to include in the notes any illegal interest, but

the excess of interest, if there was any, was the result of a mistake of both parties, this court would not be inclined to hold the contract usurious.

The author of the article on "Usury" in 29 American and English Encyclopedia of Law, on page 463, says: "There is no usury where, through inadvertence or mistake of fact, more than the legal rate of interest is taken or reserved, as where the excessive interest taken or reserved is by mistake in the computation, or where a clerical mistake is made in drawing the obligation evidencing the loan. It is usually a question for the jury whether a sum in excess of the lawful interest was taken through mistake or corruptly." And in support of these propositions the author cites a very large number of cases from the various states of the Union in which this doctrine seems to be maintained. The law as here announced meets with our approval. It would certainly be unjust and inequitable to punish a person who has loaned money, by forfeiting all of his or her interest where there has been no corrupt or intentional agreement to evade the statute. Assuming, therefore, for the purpose of this decision, that there may have been embraced in these notes the illegal interest contended for by the appellant, it is clear that it was not intended by the plaintiff, and we cannot ⁴¹⁵ presume that it was intended by the appellants to violate the statute upon the subject of interest. As stated in the law as quoted above, the question as to whether or not a sum in excess of lawful interest was taken through honest mistake or a corrupt agreement is a question for the jury or for the court sitting in the trial of the case; and, as the court in the case at bar has found in favor of the plaintiff upon this issue, its findings will not be disturbed in the absence of a preponderance of evidence against them.

It is further contended by the appellant that the provision allowing interest on the note after maturity was in effect allowing interest to be compounded. This contention is untenable. The provision in contracts for the payment of a simple interest upon accrued interest on notes and obligations does not in this state constitute usury. This question was decided by the late territorial supreme court in Hovey v. Edmison, 3 Dak. 449, 22 N. W. 594. In that case it was held by the court that a promissory note providing for the payment of interest annually, and stipulating that each annual installment of interest not paid when due should bear interest at a

specified rate from the time it fell due until paid, was valid and legal. This has since been the law in this territory and state, and we see no reason for overruling that decision, and hence it may be regarded as the settled law of this state. We fully recognize the law contended for by the counsel for appellants—that, when a scheme is intentionally devised by the lender of money to extort from the borrower a larger amount of interest than the law permits to be reserved or taken, it is the duty of the court to declare the interest forfeited; but where, as in this case, there was clearly no such intention, and the illegal ⁴¹⁶ interest, if any, was reserved by mistake, simply, and not with any intention of evading the statute, it would be manifestly unjust and inequitable, and this court would be very reluctant, to declare the interest forfeited in such a case. It clearly appears from the testimony of the defendant Mrs. Wallace that her husband, Mr. Wallace, acted as her agent in the transaction. In her testimony she says: "I had no talk with Mr. Price except when the notes became due and he came in to collect them. That was after they had been executed. I never talked to Mrs. Goodale at all, in any shape, until a year ago this winter. Mr. Price acted for her." She further says in regard to her husband: "He acted for me in arranging with Mr. Price for the loan, and he delivered the notes after they were signed by me to Mr. Price."

It is further contended by the appellants that as there was a stipulation in the mortgage that if the mortgagors should fail to pay any portion of the above-mentioned sum, either principal or interest, promptly at the times they should become due, the whole sum—both principal or interest—should at once become due and collectible, therefore the contract was clearly usurious, as the whole amount of the principal of the notes would become due and payable upon default in the payment of the first note; but this contention is untenable, for the reason that such stipulation is in the nature of a penalty from which the mortgagors could relieve themselves by a prompt payment of the notes when due: Webb on Usury, sec. 120; 2 Am. & Eng. Ency of Law, 486. The author, in speaking of this class of cases, says: "So, if the provision for the payment of excessive interest is dependent on contingency which the borrower may avoid by ⁴¹⁷ paying the debt, with legal interest, the loan will not be deemed usurious": State v. Elliott, 61 Kan. 518, 59 Pac. 1047; Tholen v. Duffy, 7 Kan. 405. A similar clause is fre-

quently inserted in mortgages, but the stipulation has never been held as constituting a contract for the payment of usurious interest, so far as our researches extend.

It is further contended by the appellant that there is compound interest in these notes, and therefore the case comes within the principle of the case of *Drury v. Wolfe*, 134 Ill. 294, 25 N. E. 626, but in our view the case at bar is not analogous to that case. There it is clear, as stated by the court, that the effect of the computation was to charge compound interest and that the amount of those several notes could only be reached by compounding the interest. In the case at bar, however, no compound interest seems to be included in the notes; but the effect of the transaction would seem to be simply providing for the payment of the interest monthly as it should become due, and providing for the payment of such interest monthly would not be an evasion of the usury law, as it is perfectly competent to provide for the payment of interest annually, quarterly, or monthly: See 29 Am. & Eng. Ency. of Law, 492; also *Meyer v. City of Muscatine*, 1 Wall. 384, 17 L. ed. 564; *Hatch v. Douglas*, 48 Conn. 116, 40 Am. Rep. 167; *Briggs v. Iowa Sav. & Loan Assn.*, 114 Iowa, 232, 86 N. W. 320; *Hawley v. Howell*, 60 Iowa, 79, 14 N. W. 199; *Ragan v. Day*, 46 Iowa, 239.

We have not deemed it necessary to cite authorities, as the law governing this class of cases seems to be well settled that, where there is an intention on the part of the contracting parties to reserve or receive interest in excess of the sum allowed by statute, the interest, under our law, is forfeited, but where ⁴¹⁸ the excessive interest is reserved or taken under an honest mistake, with no intention on the part of the parties to violate the statute, no such forfeiture will result.

The judgment of the court below and order denying a new trial are affirmed.

Usury is a Matter of Intention, and to avoid a contract it must appear that the lender knew the facts and acted with a view of evading the law. A contract for interest at higher than the legal rate, both before and after judgment, without a corrupt intent on the part of the lender to exact an unlawful rate of interest, is not usurious: *Anderson v. Creamery Package Mfg. Co.*, 8 Idaho, 200, 101 Am. St. Rep. 188. The question as to what contracts are usurious is discussed in the note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 178. That the compounding of interest after it becomes due at the end of a year does not amount to usury, see *Blake v. Yount*, 42 Wash. 101, 114 Am. St. Rep. 106.

STATE v. HUSTON.

[19 S. Dak. 644, 104 N. W. 451.]

LIBEL, Jurisdiction of Criminal Prosecution, for, Where It is Printed in One County and Circulated in Another.—If the editor and proprietor of a newspaper prints a libel therein, he is subject to a criminal prosecution in a county of the state other than that in which his printing office is located, but in which he has circulated copies of such paper by mailing it to subscribers residing therein. (pp. 970, 971.)

E. P. Wanzer, for the appellant.

W. T. Scott and Aikens & Judge, for the respondent.

644 FULLER, J. All the facts set forth in the sheriff's return to a writ of habeas corpus being admitted by a demurrer thereto, the only question presented by this appeal from an order of the circuit court denying the petitioner's application for a discharge from custody is whether the editor and proprietor of a newspaper, who prints a libel therein, with the willful and malicious intent to injure another by the publication of such defamatory article, is subject to a criminal prosecution in a county of this state other than that in which his printing office is located, but into which he has circulated copies of such paper by mailing the same to subscribers residing therein. At common law, where a bullet discharged from a rifle aimed by an assassin in one county takes murderous effect in another county, jurisdiction is concurrent; and our statute expressly **645** provides that where a public offense is committed partly in one county and partly in another, or within five hundred yards of the boundary line of two or more counties, the jurisdiction of the offense is in either of such counties. Reasoning by analogy therefrom, it seems conclusive that an editor of this state, who writes and mails a libelous newspaper article in one county to be published in another, consummates the offense in the latter county, and may be indicted therein and placed upon his trial: Rev. Code. Crim. Proc., secs. 72, 73. Such is the rule at common law, so far as traceable, and in *Commonwealth v. Blanding*, 3 Pick. 304, 15 Am. Dec. 214, it was held that the transmission of a newspaper published in another state to one of the counties of Massachusetts for circulation rendered the publisher of a libel contained therein amenable to prose-

cution in such county. So in *Belo v. Wren*, 63 Tex. 686, the court say: "The fact that the crime of libel may have been completed by a publication of the paper in Galveston county does not make it any less of a crime to circulate the number containing the alleged libelous article in other places. By the common law the sale of each copy is a distinct offense, and the prosecutor may at least choose for which of the distinct offenses he will call the guilty party to account. A copy of the paper may first be sold to A, then one to B, and another to C, but, because the publication is completed by selling to A, the government is not bound to select that particular fact as the one upon which it will rely to prove the completion of the offense. It may indict for either of the sales, and it makes no difference which was first in point of time. So, for the same reason, it is unimportant in what place the publication first took place." In conformity with the principles upon which the law of libel is based, Chancellor McClain makes the following observation: "The crime is committed where the publication is made; but if the publication is in a ⁶⁴⁶ newspaper intended for circulation, it may be deemed made in each county into which it is sent, even though printed in another state": McClain on Criminal Law, sec. 1058. The following cases are to the effect that a prosecution for libel is sustainable in any county where a periodical containing it circulates or to which it is mailed for publication: *Baker v. State*, 97 Ga. 452, 25 S. E. 341; *Commonwealth v. Macloon*, 101 Mass. 1, 100 Am. Dec. 89; *Haskell v. Bailey*, 63 Fed. 873, 11 C. C. A. 476; *Bailey v. Chapman*, 15 Tex. Civ. App. 240, 38 S. W. 544; *Mills v. State*, 18 Neb. 575, 26 N. W. 354. The act of publication with malicious intent being the gravamen of criminal libel, our conclusion is that the editor of a newspaper who thereby starts in motion unlawful means to injure the good name of another may be prosecuted, in the absence of legislative restriction, in any county where his libelous publication is circulated.

The order appealed from is therefore affirmed.

If a Libel is, at the request of the accused, inserted in a newspaper published in an adjoining state, which usually circulates, and which in fact was circulated, in this state, he is guilty of a publication in this state: *Commonwealth v. Blanding*, 3 Pick. 304, 15 Am. Dec. 214. The place where a crime is deemed committed is discussed generally in the note to *Simpson v. State*, 44 Am. St. Rep. 79.

CITY OF FORT PIERRE v. HALL.

[19 S. Dak. 663, 104 N. W. 470.]

JUDGMENT, Relief from in Equity, Denial of for Laches.—A judgment will not be relieved against in equity when its rendition might have been prevented by the production of evidence which for five years before the commencement of the action for relief had been a matter of public record, though the complainant seeking relief is a municipal corporation. The allegation in its complaint that it was a difficult matter to locate the papers and records relating to the cause of action sued upon furnishes no sufficient excuse for the delay and the failure to defend. (p. 973.)

LACHES in Defending an Action and in Seeking Relief from a Judgment.—Ample means of information is equivalent to knowledge, and courts of equity will not interfere on behalf of an aggrieved party who has slumbered on his rights for an unreasonable time in full view of a defense which might have been reasonably known and asserted by the exercise of ordinary diligence. (p. 974.)

JUDGMENTS, Relief from in Equity.—A court of equity will not relieve from a judgment unless the party seeking its interference can assail the judgment by facts or on grounds of which he could not avail himself at law, or was prevented from doing so by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part. When a party has once had an opportunity of being heard and neglects to do so, he must abide the consequences of his own neglect. (p. 975.)

John F. Hughes, for the appellant.

John A. Holmes, for the respondent.

664 FULLER, J. At the trial of this action to permanently restrain the enforcement of a judgment based on two city warrants, aggregating five hundred and twenty-three dollars and thirty cents, the sufficiency of the facts stated in the complaint **665** was challenged by a general demurrer, and this appeal is from an order sustaining the same.

Eliminating incongruous averments and some of the conclusions of law, it is alleged, in substance, that one of the warrants issued in legal form by the proper officials of the city of Fort Pierre on the fifth day of February, 1894, and upon that day duly registered, "Not paid for want of funds," was drawn by mistake on the general fund, instead of a fund derived from special assessments against property in front of which the payee named in the warrant had constructed a sidewalk, and that the defendant thereupon purchased the same at a very liberal discount, with full knowledge of such mistake; that afterward the defendant, Eliza Hall, instituted

an action, and filed her verified complaint, wherein it is falsely stated that the above-mentioned warrants are valid obligations of the city, and judgment by default on said warrants was rendered and entered on the sixth day of March, 1900. It is further alleged "that a portion of the said warrants were valid warrants of this plaintiff, but the same were not due, and no action had accrued on the same at the time of entering said judgment." Assuming that proof of the allegations of the complaint would have been sufficient to defeat the action of the warrants, we will determine from a consideration of all of the facts and circumstances whether plaintiff's failure to obtain justice is due to negligence in offering no defense to that action. Neglect to appear and answer therein, and this tardy application to a court of equity to permanently restrain the enforcement of the judgment by default, is sought to be justified in the complaint as follows: "That since the issuance of said warrant, and at the time of rendition of such judgment, and up until a few weeks since, the mayor, council, and other officers of this plaintiff had no knowledge or information in regard to the invalidity ^{ess} of said warrant, or of its not having been a legal claim and demand against this plaintiff, and had no knowledge of the facts relating to its issuance, as hereinbefore set forth. That at the time of rendition of said judgment this plaintiff or its officers or agents had no knowledge of its said defense to said action, nor could they have discovered the same by the exercise of proper and due diligence. That it was a difficult matter to find and locate the records and papers relating to the issuance of said warrant, and upon which the same was based, said records and papers being also indefinite, and making it a difficult matter to trace the history of said warrant; and at the time of rendition of said judgment, and at all times herein mentioned, there was nothing to call the attention of the officers and agents of this plaintiff to the fact of the invalidity of this warrant, and this plaintiff and its said officers had no knowledge of the same until within the last few weeks. That about thirty days since, when this warrant was presented for payment, owing to the fact that it had been lately discovered that other illegal judgments had been taken against this plaintiff, it occurred to some of the officers of this plaintiff that it might be advisable to investigate the records in relation to this and other warrants. This investigation resulted in discovery by said officers of the facts as hereinbe-

fore set forth in relation to the illegality of this warrant, and of all the matters in relation to it as hereinbefore set forth. That, owing to the sworn statements made by defendant in her complaint in said action, wherein she alleged that the said warrant was based upon a good and valid consideration and was duly and properly drawn, the court was misled and induced to sign the decree in said action; and said decree was based upon the warrants as hereinbefore set forth, and including this last-described warrant, and was entered for an amount of two hundred and sixty dollars and eighty-two cents in excess of the amount for which it ^{est} would have been rendered, had the facts in regard to this warrant not been misrepresented and so falsified in plaintiff's complaint. That the time within which this plaintiff could move the court to set aside or vacate said judgment has long since expired, and the time for appeal therefrom has long since expired, and this plaintiff has not now, nor has it had for more than two years past, any other plain or adequate remedy at law, or any other remedy whatever."

Consonant with public interest, and the reluctance of a court of equity to disturb judgments at law, we say in the case of *Howard v. City of Huron*, 6 S. Dak. 180, 60 N. W. 803, that: "The conclusiveness of a judgment upon the rights of the parties does not depend upon its form, or upon the fact that the court investigated or decided the legal principles involved. A judgment by default or confession is in its nature just as conclusive upon the rights of the parties before the court as a judgment upon demurrer or verdict." It would do violence to the well-established practice of courts of equity to relieve plaintiff from a judgment, the rendition of which might have been prevented by the production of evidence which had been for five years before this action was commenced a matter of public record, and the fatally indefinite allegation "that it was a difficult matter to locate the records and papers relating to the issuance of said warrant" furnishes no excuse for delay and failure to defend. Ample means for information is equivalent to knowledge, and courts of equity will not interfere in behalf of an aggrieved party who has slumbered on his rights for an unreasonable time in full view of a defense which might have been reasonably known and asserted by the exercise of ordinary diligence. That, by mistake of law, one of the warrants was drawn on the wrong fund for an amount indefinitely excessive, and

the other had not matured when judgment was entered, is the only basis for the unspecified ⁶⁶⁸ charge of fraud, and it is plainly apparent that such defense might have been discovered by reasonable inquiry long prior to the commencement of the original action. To the point that the remedy here invoked is confined to extraordinary cases, we quote from section 485 of Freeman on Judgments as follows: "The rule allowing parties to appeal to chancery against a judgment in any court is of great strictness and inflexibility, and it is necessary that it should be so, as otherwise the jurisdiction of that court would soon supplant all other tribunals. A court of equity, therefore, will not lend its aid unless the party claiming its assistance can impeach the judgment by facts, or on the grounds of which he could not have availed himself at law, or was prevented from doing it by fraud or accident or the act of the opposite party, unmixed with negligence or fault on his own part. When a party has once an opportunity of being heard, and neglects to do so, he must abide the consequences of his own neglect. A court of equity cannot relieve him, though the judgment is manifestly wrong." In *Melms v. Pabst Brewing Co.*, 93 Wis. 153, 57 Am. St. Rep. 899, 66 N. W. 518, the court say: "In an action to set aside conveyances for fraud committed many years before the commencement of the action, the plaintiff must allege and prove the time when the fraud was discovered, and what the discovery was, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been made before." Where either mistake, fraud or ignorance of the facts is relied upon, and delay is sought to be excused, the allegations of the complaint must be sufficient to show a court of equity that the plaintiff has not slumbered on his rights, and that the remedy is invoked within a reasonable time after a discovery was or ought to have been made: *Pipe v. Smith*, 5 Colo. 146; *Farnam v. Brooks*, 9 Pick. 212; *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa, 737, 98 N. W. 606; *Bank v. Campbell*, 12 Ind. 42; ⁶⁶⁹ *Casey v. Gregory*, 12 B. Mon. 505, 56 Am. Dec. 581. The headnote, fully sustained by the opinion, in the case of *Crim v. Handley*, 94 U. S. 652, 24 L. ed. 216, is as follows: "The court affirms the doctrine announced in *Hendrickson v. Hinckley*, 17 How. 443, 15 L. ed. 123, that a court of equity will not enjoin a judgment at law unless the proof clearly shows that the defendant had a just defense,

of which he could not avail himself at law, or to which, if available, he was prevented from resorting by fraud or unavoidable accident, unmixed with any fault or negligence in himself or his agent." When a person seeks to enjoin a judgment at law, the specific grounds upon which the complainant's equity rests must be distinctly set forth, and it is indispensable that the complaint show upon its face that the judgment assailed was not rendered by reason of his own negligence in not making the necessary defense: *Neal v. Henderson*, 72 Ga. 209; *Brenner v. Alexander*, 16 Or. 349, 8 Am. St. Rep. 301, 19 Pac. 9; *Kelleher v. Boden*, 55 Mich. 295, 21 N. W. 346; *Mastick v. Thorp*, 29 Cal. 444.

If, as alleged in the complaint and admitted by the demurrer, one of the warrants was valid, and the payee named in the other constructed a sidewalk, for which he was entitled to a warrant on a fund created by special assessment against city property, the failure to tender the just amount, or the warrant to which the defendant was confessedly entitled, violates the maxim that he who seeks equity must do equity.

The order of the trial court sustaining the demurrer is affirmed.

Relief in Equity, other than by appellate proceedings, against judgments is the subject of an extended note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218. It is well understood that laches and neglect in applying to a court of equity will usually bar the right to the relief sought: See the notes to *Neppach v. Jones*, 23 Am. St. Rep. 149; *Smith v. Thompson*, 54 Am. Dec. 130. However, a person cannot be denied relief from a void judgment, because of laches, where there has been no attempt to enforce it, because, until then, the complainant had no occasion to act: *Cooley v. Barker*, 122 Iowa, 440, 101 Am. St. Rep. 276.

CASES

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

DAVIS v. ROLLER.

[106 Va. 46, 55 S. E. 4.]

EXECUTIONS—When Issued.—An execution is duly issued when it is made out and signed by the clerk ready to be levied and marked "to lie," although it has not been placed in the hands of an officer to be levied, and another execution may be issued within the statutory period from the return day of such execution. (p. 979.)

EXECUTIONS—Statute of Limitations.—If the collection of an execution is suspended by a decree in chancery, the period of suspension is to be excluded in the computation of the time within which another execution must be issued on the judgment to prevent the bar of the statute of limitations. (p. 980.)

JUDGMENTS—Assignment in Parts—Priorities.—If a commissioner is directed by the court to convey land sold at a judicial sale subject to the lien of a judgment, reserving a vendor's lien in the conveyance to secure sums due assignees of different parts of the judgment, such liens are of equal dignity, if there is no supervening equity growing out of the order of assignment which disturbs the equity of the rights between the assignees. (p. 981.)

JUDGMENTS—Liens—Priorities.—A surety in a judgment to whom part of it has been assigned cannot assert his lien to the prejudice of an assignee of another part of the judgment who has by execution acquired a lien on all the personal property of the judgment debtors. (p. 982.)

Conrad & Conrad and Sipe & Harris, for the appellants.

J. B. Stephenson, M. McCormick and C. Curry, for the appellee.

47 KEITH, P. The appellee, John E. Roller, suing on behalf of himself and all other lien creditors of Mary E. Pence, filed his bill in the circuit court of Rockingham county, alleging that B. G. Patterson, receiver, recovered a judgment. *Am. St. Rep., Vol. 117—63 (977)*

ment for \$1,200, with legal interest from the first day of May, 1880, until paid, subject to a credit of \$546 as of January 9, 1883, against Mary E. Pence and John P. Pence, her husband, Archart, Bowman, Will, Thompson, Homan and Andes; that in the chancery cause of *Basore v. Pence*, B. G. Patterson, special receiver, assigned to the complainant \$870.88, a part of this judgment, with interest on \$775.09 from November 29, 1884, and on \$95.79 from January 12, 1885; and that by deed dated February 7, 1885, Patterson, as special commissioner, acting under the decrees of the court, conveyed to Mary E. Pence the real estate involved therein, which need not be here specifically stated.

This deed was admitted to record in the clerk's office of Rockingham county on the twelfth day of February, 1885, and the judgment referred to was docketed in the clerk's office of that county on the seventh day of May, 1884.

The bill further alleges that Mary E. Pence subsequently became indebted to the complainant in various sums, for which she and her husband executed to him a negotiable note for \$300, ⁴⁸ due June 18, 1888; that by reason of certain transactions set forth in the bill it was agreed between the plaintiff, John E. Roller, and Mary E. Pence and John P. Pence, her husband, that a credit of \$950 should be given to them upon settlement of the matters outstanding between them, to be applied to the satisfaction of the \$300 negotiable note and to the lien of the judgment which had been assigned to him.

It further appears from the bill that a part of the judgment in the name of Patterson, receiver, above referred to, was assigned to one James Dove, and by him assigned to Andrew Andes, who was himself one of the defendants in the judgment; and a lien for both sums—that is to say, the \$300 assigned to Andes and \$870.88 assigned to Roller, together constituting the amount of the Patterson judgment—was reserved as a vendor's lien upon the property conveyed to Mary E. Pence by Patterson, special commissioner, by the deed of February 7, 1885, before mentioned.

The prayer of the bill is that all the parties against whom the judgment was obtained be made defendants to the bill; that the vendor's lien and judgment lien may be enforced against the property of the principal defendant; and that, if there be any deficiency after appropriating the proceeds of said property, the living sureties and the representatives

of those deceased may be called upon to pay their respective proportions; and for general relief.

Several of the defendants answered the bill, and, the cause coming on to be heard, an account was ordered to be taken as to the fee simple and annual value of the real estate owned by Mary E. Pence, and of the liens against the same, and the order of their priorities. The commissioner reported, and to his report sundry exceptions were filed, with the result that the matter was again referred to a commissioner; and upon the exceptions to this second report arise the issues which we are now called upon to consider.

The statute of limitations was pleaded to the judgment in the ⁴⁹ name of Patterson, receiver, against Pence and others, which was in part assigned to the appellee, John E. Roller. The commissioner was of opinion that this judgment was barred by the statute, and an exception to this ruling was sustained by the court. This is one of the alleged grounds of error insisted upon by appellants.

This judgment was obtained at the April term, 1884, of the circuit court of Rockingham county, and it was docketed on May 7th of that year. The first execution upon it bears date April 30, 1884, is regular in all respects, and is duly attested by the clerk. Upon the back of it is the following indorsement: "The within execution is subject to a credit of \$546.60, as of the ninth day of January, 1883"; and then follows the words "to lie."

The defendants in the judgment insist that this execution does not comply with our statute—section 3577 of the Code—which provides that "on a judgment execution may be issued within a year, and a scire facias or an action may be brought within ten years after the date of the judgment; and where execution issues within the year, other executions may be issued, or a scire facias or an action may be brought within ten years from the return day of an execution on which there is no return by an officer, or within twenty years from the return day of an execution on which there is such return"—the precise contention of defendants being that no execution can be said to have issued upon a judgment unless it be not only made out by the clerk but placed in the hands of an officer to be levied; and counsel cites authorities from other jurisdictions which seem to support this position. In this state, however, the law seems to be otherwise.

In 4 Minor's Institutes, part 1, page 799, it is said: "Executions are expected properly to be sued out within a year from the date of the judgment; yet they may, notwithstanding, in many cases, be obtained afterward, sometimes by means of a writ of scire facias, or an action on the judgment, and sometimes ⁵⁰ without any process thereon, as a matter of course. If within the year an execution issues (by which is understood its being made out and signed by the clerk, ready for the sheriff), other executions on the same judgment may be issued without scire facias; or a scire facias or action on the judgment may be brought within ten years from the return day of an execution on which there is no return by an officer, or within twenty years from the return day of an execution on which there is such return."

We need not enlarge upon the authority of Minor's Institutes in this state.

But there is a yet more persuasive argument in support of the position, and that is that what was done in this case was in pursuance of and in accordance with a practice which we believe to be coeval with the statute under construction, and which has been uniform and unquestioned throughout the limits of the state.

We are of opinion, therefore, that the execution dated April 30, 1884, was duly issued within a year from the date of the judgment.

This execution of April 30, 1884, was made returnable on the first Monday in the ensuing July, and the next question which was issued, and the one which appellee relies upon, is dated the eleventh day of October, 1894; so that after the return day of the first execution, and before the issuance of the second execution, a period of ten years three months and some days had elapsed. The bar of the statute would, therefore, still attach unless there was some interruption of its operation, which will reduce the time to the statutory period of ten years.

By decree entered in the cause of Basore and others v. Pence and others, at the October term, 1884, it was directed, among other things, that Special Receiver B. G. Patterson, in whose name the judgment was rendered upon which the execution was issued was "not to collect any more of said judgment than the sum above named until the further order of the court, which ⁵¹ will be made hereafter, if found to be necessary to pay any unpaid costs." The sum "above

named" referred to in this decree was \$814.23, which it was thought would be sufficient to pay off all the liens remaining unpaid against John P. Pence and the unpaid costs, which sum was considerably less than that for which the execution of April 30, 1884, was issued, viz.: \$1,200, with interest from the first day of May, 1880, subject to a credit of \$546.60 as of the 9th of January, 1883. That decree remained in force until the third day of February, 1885; so that the period from the twenty-second day of October, 1884, to the third day of February, 1885, is to be excluded from the computation of time in determining whether or not the bar of the statute of limitations applies to the judgment in question, the result being that the execution of October 11, 1894, was issued within less than ten years from the return day of the execution, which was returnable on the first Monday in July, 1884.

We are of opinion that there was no error in holding that the vendor's lien in favor of James Dove, which was assigned by him to Andrew Andes, is of equal dignity with that of John E. Roller. It is true, as was said by the commissioner, that the decree in *Basore v. Pence*, of May 31, 1881, authorizing the assignment by B. G. Patterson, special receiver, of a portion of the debt due from Mary E. Pence on account of her purchase money, provided that "the said assignment was to be without recourse, and the lien of said bond to be postponed until the other bonds are paid off in full," thus subordinating the lien in favor of Dove to that securing to the receiver the payment of the residue of the purchase price; but by a subsequent decree of the January term, 1885, directing the conveyance of the land purchased by Mary E. Pence, it was directed that a lien should be retained "to secure the sum due James Dove and John E. Roller, respectively, under decrees in this cause"; and the deed making this conveyance reserved liens in favor of "James Dove and John E. Roller, respectively, as liens of equal dignity." Andes, on the other hand, claims that the lien in his favor for \$300 should be preferred to that of John E. Roller, and bases his contention upon the language of the deed of February 7, 1885, by which "a lien is expressly retained on the properties herein conveyed to secure the payment, first, to James Dove the said sum of \$300, with interest on the same from the first day of June, 1881, and to secure to John E. Roller the payment of \$870.88, with interest," etc.

There was no reason why a preference should have been given to the one over the other. Both represented parts of the purchase money, and there was no supervening equity growing out of the order of assignment which should have disturbed the equity of the rights between the assignees.

A fourth exception filed to the report of the commissioner was that the commissioner erred in not holding that Andrew Andes, being the surety in the debt due to John E. Roller, is estopped from asserting the vendor's lien in his (Andes') favor until the debt due John E. Roller is paid in full.

This claim was denied by the commissioner because he was of opinion that Roller's judgment was barred by the statute of limitations. He states in his report that if the lien of that judgment had not been barred Andes would have been estopped by his suretyship from enforcing his lien to Roller's prejudice.

We have reached the conclusion that the judgment was not barred, but is still in force and vigor as a security for whatever sum may be due upon it; it seems to be clear that Andes, one of the sureties in that judgment, should not be permitted to withdraw money claimed by him under his vendor's lien to the prejudice of the judgment creditor, upon whose judgment an execution had issued, which is a lien upon all the personal property of the judgment debtors, whether capable of being levied on or not.

We are further of opinion that the record fails to show that appellee, Roller, so dealt with the liens and securities existing for the protection of his debt as to impair his right to enforce said liens for whatever amount may appear to be due to him on ⁵³ account of them, and we shall, therefore, not further prolong this opinion than to declare the principles upon which the amount thus due to him may be ascertained.

There is in the supplemental record a statement setting forth the items constituting the consideration for the negotiable note dated June 11, 1888, for \$300. That note is carried into a statement showing the balance due from Mary E. Pence to John E. Roller, and which also embraces the judgment for \$870.88, which is the principal subject of this litigation. These two sums constitute the principal of the debt claimed by him, making a total of \$1,170.88, upon which interest is calculated, and after allowing certain credits, among them the amount agreed upon for the Pope bonds, which were

assigned to him, of \$950, a balance is ascertained in his favor of \$550.56 as of May 1, 1894.

However this settlement may be as between Roller and Mrs. Pence, it is certainly incorrect as to the sureties in that judgment. In order that the exact balance for which the sureties are justly liable may be determined, there must be a reference to a commissioner. There may be items entering into the \$300 negotiable note which ought to be taken into the computation in ascertaining the balance due. Such items should be allowed, if any there be, but the residue of the \$300 negotiable note should be excluded, as to the sureties, from the amount due to John E. Roller, as shown by the commissioner's report of March, 1901.

Numerous questions were presented in argument which we think it unnecessary to discuss.

The decree of the circuit court is reversed, and the cause remanded for further proceedings to be had in accordance with the views herein expressed.

The Statutory Time Within Which Execution must issue to preserve the lien of a judgment does not run during the time when the owner of the judgment is restrained by injunction or appeal from obtaining execution: Rock Island Nat. Bank v. Thompson, 173 Ill. 593, 64 Am. St. Rep. 137.

COMMONWEALTH v. ATLANTIC COAST LINE RAILWAY COMPANY.

[106 Va. 61, 55 S. E. 572.]

STATE CORPORATION COMMISSION—Power of.—The state corporation commission of Virginia, created by constitutional authority, is the instrumentality through which the state exercises its governmental powers for the regulation and control of public service corporations, and for these purposes it is clothed with legislative, judicial and executive powers, and may declare a statute imposing a fine or forfeiture on a corporation for refusing to do a certain act unconstitutional and void. (p. 986.)

CONSTITUTIONAL LAW—Regulation of Railroad Rates—
Mileage Tickets.—A state may prescribe a maximum scale of rates for the transportation of passengers, but it cannot compel a railroad company to contract with any individual or class for carriage at a charge less than the established or regular scale of fares. It cannot arbitrarily fix a maximum passenger rate on mileage-books and

require the carrier always to keep them on sale to all who apply for them, and to redeem them at a later period than he has theretofore redeemed mileage-books. A statute to such effect is class legislation, a discrimination in favor of the wholesale buyer, invades the right of the carrier to manage his own affairs, denies to him the equal protection of the law and of his property without due process of law, and hence is unconstitutional. (pp. 988, 989.)

The statute involved in the principal case contains the following provisions:

"1. Be it enacted by the General Assembly of Virginia, That from and after this act shall take effect the power is conferred in the State Corporation Commission, and it is required, to fix and prescribe a schedule of rates for the transportation of passengers by all transportation companies or corporations, and until such rates are prescribed by the State Corporation Commission all transportation companies or corporations, operated by steam, shall at all times keep on sale at each and every station, mileage books of five hundred miles and over, which books may contain such reasonable conditions and restrictions as may from time to time be approved by the State Corporation Commission.

"2. And until said rates are fixed and prescribed it shall be unlawful for any transportation company or corporation, operated by steam, to charge or collect a greater sum than two cents per mile on such mileage books, and such mileage books shall be good and valid for the use of any dependent household member of the family of the party to whom issued, dwelling under the same roof, within one year from the date of same: provided, however, the name of any person so entitled to use such book or books shall be furnished in writing by the purchaser at the time of purchase, and shall be inserted in such book or books."

"5. That the transportation company or corporation issuing such book or books shall redeem within eighteen months after the expiration of the time limit named in said book any unused portion of such book or books, deducting the regular rate for the portion used; and such redemption shall be made within fifteen days after presentation of such mileage book or books to any authorized agent of the issuing road or corporation."

W. A. Anderson, attorney general, for the state.

W. B. McIlwane, for the appellee.

⁶² CARDWELL, J. This is an appeal from a judgment of the state corporation ⁶³ commission denying the prayer of a petition filed on behalf of the commonwealth by the attorney general against the Atlantic Coast Line Railroad Company, the object of which was to compel the defendant railroad company to comply with the act of the General Assembly, approved March 15, 1906, requiring all railroads operating in this state to keep on sale at all times mileage-books of five hundred miles and over at a charge of not more than two cents a mile.

The state corporation commission has, in a written opinion made a part of the record, after stating how the case arose, set forth in a very satisfactory manner the reasons why the relief asked on behalf of the commonwealth could not be granted, and we therefore adopt its opinion as a part of the opinion of this court.

"The petition states that the regular maximum rate of the defendant company is three cents per mile. The company was summoned by the commission to show cause why it should not be required to comply with the said statute, and have penalties imposed upon it for its failure to perform its public duty in this respect. In its defense the company alleges that the act in question is unconstitutional. Several grounds are assigned by the defendant upon which its assertion of the unconstitutionality of the law is based. The two main contentions are:

"1. That the statute in question is in contravention of the provisions of the fourteenth amendment to the constitution of the United States, in that it deprives the defendant of its property without due process of law, and without just compensation, and also denies to the defendant the equal protection of the laws.

"2. That the General Assembly of the state, under the provisions of the organic law of the state, has no authority by legislation to prescribe or fix rates for transportation, but that authority to exercise the legislative functions of the state in that respect is conferred exclusively upon the state corporation commission.

"The learned attorney general, as the highest law officer of ⁶⁴ the commonwealth, urged upon the commission that in this proceeding it was invested with all the powers, and had imposed upon it all the responsibility, of a court of record. He earnestly contended that the commission not only had the

judicial authority to pass upon these constitutional questions, but that it was its manifest duty to do so, in so far as it was necessary to reach a final conclusion. This position of the attorney general was not combatted by the learned counsel for the defendant company, but was conceded to be correct. Indeed it is no longer open to question. 'In this commonwealth, the state corporation commission, created by constitutional authority, is the instrumentality through which the state exercises its governmental powers for the regulation and control of public service corporations. For these purposes, it has been clothed with legislative, judicial and executive powers,' was held by the court of appeals of this state in the case of *Norfolk & P. R. R. Co. v. Commonwealth*, 103 Va. 289, 49 S. E. 39, which went up to that court on appeal from the commission. The constitution of Virginia, in section 156c, provides, as to the commission, that 'In all matters pertaining to the public visitation, regulation or control of corporations, and within the jurisdiction of the commission, it shall have the powers and authority of a court of record, etc.' This section gives the commission, in the exercise of its judicial functions, authority to administer oaths, compel the attendance of witnesses, enter up and enforce its judgments, and confers upon it other ordinary attributes of a court of general jurisdiction. In all matters 'within the jurisdiction of the commission,' says the constitution, employing the word 'jurisdiction,' which is appropriately used with reference to a judicial tribunal as distinguished from legislative or administrative authority. The commission, by section 156b, has conferred upon it the legislative authority to fix and prescribe rates and classifications, and to make regulations for transportation and transmission companies to the full extent to which that power exists in the state government. But in the exercise of ^{as} this legislative power it cannot make its rates effective or put its regulations into force until it has summoned the company or companies to be affected before it. This is done by a notice, which affords due process of law to the company. The hearing or investigation upon that notice gives to the final action of the commission the force and effect of a judgment of a judicial tribunal.

"Passing upon the reasonableness of rates and classifications to be prescribed by it, and of regulations, orders and requirements to be promulgated by it—in the exercise of its

legislative authority—constitute the principal matters 'within the jurisdiction' of the commission (as a judicial tribunal) as outlined by the constitution. The general assembly has brought many additional matters within the jurisdiction of the commission.

"In this proceeding the attorney general invokes the jurisdiction of the commission under sections 16 and 19 of the act approved April 15, 1903, and carried into the code of 1904 as section 1313a. By that statute the commission is authorized to compel all corporations to perform any public duty or requirement, and to impose fines upon them for failing to do so. This brings within the judicial jurisdiction of the commission the enforcement of all statutes imposing duties upon public service corporations. The commission cannot impose a fine upon a corporation without summoning the company before it, hearing what it has to say in its defense, and passing judgment thereon judicially—in other words, giving the company a fair trial as in any other court. To proceed otherwise under this statute would be repugnant to fundamental principles, and would make the statute itself in violation of the constitution, both of the state and the United States. The jurisdiction of the commission is further enlarged by clause 19 of section 1294b of the Code, being section 19, chapter 2, of the act concerning public service corporations. The commission is there given jurisdiction to entertain a petition filed before it complaining of violation of any of the provisions of that act. ⁶⁶ 'If the grievance complained of be established,' says the legislature in this act, 'the state corporation commission, sitting as a court of record, shall have jurisdiction,' etc. The commission awarded an injunction under this statute against the Virginia Passenger and Power Company, restraining it from increasing its rates by discontinuing transfers: See Report of State Corporation Commission of 1904, pt. 1, p. 94.

"The commission having summoned the defendant company before it to show cause why a penalty should not be imposed upon it, the commission must hear fairly and pass judicially upon any issues properly raised. It matters not that one of the issues is the unconstitutionality of the act which the commission seeks to enforce. If the act is void, it is a just reason why the company cannot be compelled to comply with it, or be fined for violating it.

"In support of its argument that the act in question here contravenes the fourteenth amendment of the constitution of the United States, the company relies chiefly upon the authority of the case of *Lake Shore & M. Ry. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. Rep. 565, 43 L. ed. 858. The supreme court of the United States, in that case, held unconstitutional a statute of Michigan requiring railroad companies to keep on sale one thousand mile books or tickets. The opinion, delivered by Mr. Justice Peckham, declares that legislation of this character violates the constitutional rights of the railroad companies to due process of law and the equal protection of the laws. The statute provided that the tickets might be required to be issued in the name of the purchaser and his wife and children, the ticket to be valid for two years, and the unused portion then to be redeemed. The court says: 'We cannot regard this exceptional legislation as the exercise of a lesser right which is included in the greater one to fix by statute maximum rates for railroad companies. The latter is a power to make a general rule applicable in all cases and without discrimination in favor of or against any individual. It is the power to declare a general law upon the subject of rates beyond which the company cannot go, but within which it is at liberty to conduct its work in such a manner as may seem to it best suited for its prosperity and success. This is a very different power from that exercised in the passage of this statute. The act is not a general law upon the subject of rates, establishing maximum rates which the company can in no case violate. The legislature having established such maximum as a general law now assumes to interfere with the management of the company while conducting its affairs pursuant to and obeying the statute regulating rates and charges, and notwithstanding such rates, it assumes to provide for a discrimination, an exception in favor of those who may desire and are able to purchase tickets at what might be called wholesale rates—a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule. And it assumes to regulate the time in which the ticket purchased shall be valid, and to lengthen it to double the period the railroad company has ever before provided. It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the

statute, and to that extent it would seem that the statute takes the property of the company without due process of law.'

"The learned judge reasons at length along the same lines. The opinion establishes that the state may prescribe a maximum scale of rates, but it cannot compel a railroad company to contract with any individual or class for carriage at a charge less than the established or regular scale of fares. The reasoning of the learned judge is not entirely and clearly convincing, nor is the conclusion reached by him very satisfactory, and three of the judges dissented. But we are bound by this decision, as it emanates from the highest tribunal in the country. The case has been referred to in several subsequent cases in the supreme court of the United States, without criticism or doubt cast upon it. It has also been followed in New York. In that ⁶⁸ state a statute somewhat similar to the Michigan and Virginia statutes was assailed as unconstitutional in the case of *Beardsley v. New York etc. Co.*, 162 N. Y. 230, 56 N. E. 488. The court of appeals of New York refers to the opinion of Justice Peckham on the Michigan statute, and is not disposed to agree with all of its reasoning. But the court, in a brief opinion, concludes that it is bound by this opinion of the supreme court of the United States on a question arising under the federal constitution, and held the New York statute to be unconstitutional.

"In referring to the case of *Lake Shore & M. Ry. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. Rep. 565, 43 L. ed. 858, the attorney general says in his written brief: 'I frankly concede that unless this case can be distinguished from the Michigan case, or unless it can be shown that this case is overruled by some other decision or decisions of the United States supreme court, the decision of the United States supreme court in the Michigan case must be considered as conclusive of this case, and the Churchman act must, in that event, be held to be unconstitutional.' It is sought to distinguish the Virginia statute from the Michigan statute by pointing out that in the latter law the right to purchase the mileage tickets seemed to be confined to married men and that the law itself was a portion of a general statute by which the legislature had fixed a maximum scale of passenger rates. These differences are incidental, and we do not think that they affect the reasoning by which the conclusion is reached by the supreme court of the United States.

"The court says: 'The legislature has the power to secure to the public services of the corporation for reasonable compensation, so that the public shall be exempted from unreasonable exactions, and it has also the authority to pass such laws as shall tend to secure the safety, convenience, comfort and health of its patrons and of the public with regard to the railroad. But in all this we find it neither necessary nor appropriate, in order that the legislature may exercise its full right over these corporations, to make such a regulation as this, which discriminates ⁶⁰ against it and in favor of certain individuals, without any reasonable basis therefor, and which is not the fixing of maximum rates or the exercise of any such power.'

"We conclude that the statute before us is in conflict with the constitution of the United States, and is therefore void, and we have no authority to punish the defendant company for failure to comply with its terms. We are greatly strengthened in this conclusion by a convincing opinion delivered several days ago upon this question by the learned judge of the corporation court of Staunton, in which he reaches a similar result.

"As the conclusion already reached forces us to take no further proceedings in this matter, and so disposes of the whole case, it is unnecessary for us to pass upon the other question raised by the defendant company. The entire law-making power of the people of Virginia is vested in their representatives constituting our General Assembly, subject only to such limitation as may be placed upon it by the constitution of the state. Whether the provisions of the constitution relative to the powers and authority of this commission, and vesting in the commission the legislative power to make rates, are so worded as to exclude the General Assembly from exercising its legislative power in that respect, is a question which it is needless for the commission to pass upon, unless it is so presented as to render its adjudication absolutely essential to the decision of the case."

It will be observed that the commission considered that the controlling question in the case is, whether or not the act of the General Assembly under review, and which we will for convenience refer to as the "Virginia mileage act," is violative of the provisions of the fourteenth amendment of the constitution of the United States, by depriving the appellee company of its property or liberty without due process of

law, or by depriving it of the protection of the laws. The learned attorney general concedes that the case of *Lake Shore & M. Ry. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. Rep. 565, 43 L. ed. 858 (which we shall speak of for convenience as the "Michigan ⁷⁰ case"), must be considered as conclusive of this case, unless they can be distinguished, or it can be shown that the Michigan case is overruled by some other decision or decisions of the United States supreme court. Therefore, there is but little for us to add to what has been said in the opinion of the state corporation commission, *supra*.

The leading case relied on for the commonwealth is *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, which announced the broad doctrine that a state government has the inherent right to regulate and control railroad companies and other public service corporations, and to prescribe the rates and charges that they should be allowed to make. In that case the power of the legislature of Illinois to fix by law the maximum of charges for storage of grain in warehouses in Chicago and other places in the state was the question at issue, and upon the ground that when private property is devoted to public regulation it was held that under the limitations upon the legislative power of the states, imposed by the constitution of the United States, the legislature of Illinois could fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the state. A lengthy dissenting opinion was filed by Mr. Justice Field, concurred in by Mr. Justice Strong, taking the ground that the ruling of the majority was subversive of the rights of private property theretofore believed to be protected by constitutional guarantees against legislative interference, and in conflict with the authorities cited in its support; and that the decision of the court gave unrestrained license to legislative will.

By subsequent decisions of the same court the doctrine laid down in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, has been frequently and materially modified: *Railroad Commission Cases*, 116 U. S. 307, 6 Sup. Ct. Rep. 334, 338, 29 L. ed. 636; *Chicago etc. R. Co. v. Minn.* 134 U. S. 418, 10 Sup. Ct. Rep. 702, 33 L. ed. 970; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418, 42 L. ed. 819; ⁷¹ *San Diego L. Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. Rep. 804, 43 L. ed. 1154.

With the modifications ingrafted upon the rule referred to the rule itself has been approved in a number of cases down

to and including Minneapolis etc. Ry. Co. v. Minn. etc., 186 U. S. 257, 22 Sup. Ct. Rep. 900, 46 L. ed. 1151, and in those cases decided after the Michigan case we are unable to find anything that can be construed as overruling that case or discrediting it in any degree, the fact being that the case was referred to because the circumstances in those cases, on the one hand, and the Michigan case, on the other, were different, and therefore the language of the decisions different. In the cases modifying the doctrine of *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, the trend of judicial thought, it may be safely said, is more in harmony with the views expressed in the dissenting opinion of Mr. Justice Field than with the view of the case taken by the majority of the court.

The most important and pertinent modification to be considered in connection with the case under review appears in the Railroad Commission Cases, 116 U. S. 307, 6 Sup. Ct. Rep. 334, 338, 29 L. ed. 636, where the opinion by Chief Justice Waite (who also wrote the opinion in *Munn v. Illinois*), after reviewing the ruling in *Munn v. Illinois*, says: "From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

In *Chicago etc. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. Rep. 702, 33 L. ed. 970, the rule in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, appears to have been approved by a majority of the court, and another very important modification of the rule ingrafted thereon, to the effect that where a state created a commission and clothed that commission with authority ⁷² to prescribe rates and charges to be made by railroad companies, the power thus delegated to the commission should not be exercised arbitrarily without giving the railroad companies affected a day in court and opportunity to be heard, and to appear and show the effect of the schedule of rates and charges prescribed by the commission upon them, and that to do this was depriving them of their property without due process of law and depriving them of the equal protection of the laws.

The other important modifications of the rule are not relevant to the issue in this case, and were announced in a number of cases in which the rule was variously formulated, many of which are exhaustively reviewed by Mr. Justice Harlan in *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418, 42 L. ed. 819, where that learned judge states the doctrine, as established by the adjudications of the court, as follows:

"1. A railroad corporation is a person within the meaning of the fourteenth amendment, declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; 2. A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroads that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the fourteenth amendment of the constitution of the United States; 3. While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state, or by regulations ⁷³ adopted under its authority, that the matter may not become the subject of judicial inquiry."

We are wholly unable to perceive the antagonism claimed on behalf of the commonwealth to exist between the cases we have mentioned and a number of others not necessary to be adverted to, recognizing the rule in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, with its modifications, and the principle announced in the *Michigan* case (173 U. S. 684, 19 Sup. Ct. Rep. 565, 43 L. ed. 858). The fact is that the last-named case refers to *Munn v. Illinois* and the cases modifying the rule announced therein, and recognizes the existence of the rule as modified; but, while recognizing the power of the legislature to prescribe maximum charges which may be made by public service corporations, held that the *Michigan* mileage statute did not belong to that class of legislation enacted

in the exercise of this admitted power, but was a taking of the property of the company without due process of law—legislation which is prohibited by the fourteenth amendment, and therefore violated the constitutional rights of railroad companies to due process of law, and the equal protection of the laws. It was contended in that case, as in the case here, that as the legislature would have the power to reduce the maximum charges to the same rate at which the Michigan statute provided for the purchase of thousand mile tickets, the railroad company could not be harmed nor its property taken without due process of law when the legislature only reduced the rate in favor of a few citizens instead of all; but the opinion denied the right of the legislature to make such an alteration, upon the ground that to do so might involve a reduction of rates to an amount insufficient to give remuneration to which the railroad company was legally entitled under the decisions of the court.

It will be observed that while the Michigan statute required thousand mile tickets to be sold by railroad companies for less than the ordinary rates of fare, for use by the purchaser and his wife and children, if named on the ticket, and made them valid for two years after the date of purchase, the Virginia ⁷⁴ mileage act requires the companies at all times, day and night—at all stations, regular and flag—to keep on sale books of five hundred miles and over, and that “it shall be unlawful for any transportation company or corporation operated by steam to charge or collect a greater sum than two cents per mile on such mileage-books, and such mileage-books shall be good and valid for the use of any dependent household member of the family of the party to whom issued, dwelling under the same roof, within one year from the date of same.” As it appears to us, the provisions of the two statutes are practically the same, and fall within the purview of the Michigan case, as the reasoning for holding the one violative of the provisions of the fourteenth amendment of the constitution of the United States applies as well to the other. As stated in the opinion of the state corporation commission, above, the incident that the Michigan statute had fixed a maximum scale of passenger rates is mentioned in the Michigan case, but the conclusion reached was in no way rested upon that incident. On the contrary, the opinion says: “The power of the legislature to enact general laws regarding a company and its affairs does not include the

power to compel it to make an exception in favor of some particular class in a community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not a reasonable regulation." And again: "Regulations for maximum rates for present transportation of persons, or property, bear no resemblance to those which assume to provide for the purchase of tickets in quantities at a lower than the general rate, and to provide that they shall be good for years to come. This is not fixing the maximum rate, nor is it proper legislation. It is an illegal and unjustifiable interference with the right of the company." Clearly the dominant idea running through the whole opinion is that this is class legislation, and is not for the equal benefit of the whole people; therefore, the conclusion is irresistible that the ⁷⁵ same judgment would have been rendered by the court had the legislature of Michigan not fixed a maximum scale of passenger rates.

It is true that the Michigan case was decided by a divided court, as was the case of *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, and nearly all of the cases sanctioning the doctrine of that case, but instead of the Michigan case being discredited by any subsequent decision of the court, in *Wisconsin etc., R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. Rep. 115, 45 L. ed. 194, in referring to the power of a state to regulate, etc. railroad companies, the Michigan case is cited as authority for the proposition of law that "while this power of regulation exists, it is also to be remembered that the legislature cannot, under the guise of regulation, interfere with the proper protection of the business of railroad corporations in matters which do not fairly belong to the domain of reasonable regulation." And the court adds: "The distinction between this case and that of *Lake Shore etc. R. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. Rep. 565, 43 L. ed. 585, . . . is very plain. There we held that the statute in question was not a reasonable regulation of the business of the company; that it was the exercise of a pure, bald and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road, permitting them to do so at less expense than others, provided they could buy a certain number of tickets at one time. It was not legislation for the safety, health or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who,

in the legislative judgment, should be carried at a less expense than the other members of the community; and there was no reasonable ground upon which the legislation could be rested, unless the simple decision of the legislature should be held to constitute such reason."

We have, then, in *Wisconsin etc. R. Co. v. Jacobson*, the court's own construction of its decision in *Railway Co. v. Smith* (the Michigan case), 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858.

⁷⁶ In *Bardsley v. New York etc. R. Co.*, 162 N. Y. 230, 56 N. E. 488, holding a New York statute, similar to the Michigan and the Virginia mileage statutes, in conflict with the fourteenth amendment of the constitution of the United States, the opinion, while indicating that the court was not disposed to agree with all of its reasoning, says: "The supreme court of the United States, in *Lake Shore Ry. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. Rep. 565, 43 L. ed. 858, has practically foreclosed all discussion on the question of the constitutionality of statutes of the character of the one before us."

We fully recognize, as did the court in *Beardsley v. New York etc. Co.*, 162 N. Y. 230, 56 N. E. 488, that the decision in the Michigan case is conclusive upon us on the question of the constitutionality of the statute under consideration; and, therefore, the judgment of the state corporation commission complained of must be affirmed.

In the Case of *Winchester etc. R. R. Co. v. Commonwealth*, 106 Va. 264, 55 S. E. 692, the supreme court again decided that although the state corporation commission created by the state constitution is invested with certain legislative, executive and judicial powers, that fact does not render it an invalid tribunal, and such grant of powers is not in conflict with the Bill of Rights expressly providing that "except as hereinafter provided the legislative, executive and judicial departments shall be separate and distinct." Also that the constitution of the state and the laws passed in pursuance thereof subjecting common carriers, in the matter of their public duties and charges, to the control of such state corporation commission, are not in conflict with that provision of the national constitution forbidding any state to deny to any person the equal protection of the laws, nor do they constitute class legislation, as they apply to all carriers alike, nor do they deprive the carrier of his property without due process of law, as they provide for a full and fair trial before any decision or action adverse to the carrier's

interest can be rendered, and give the right of appeal in every case without limit as to the amount involved.

The state has the inherent power of regulating and controlling public service corporations operating within her borders, and of prescribing the facilities and conveniences which shall be furnished by them, and may confer this power upon a commission, such as a state corporation commission, and vest it with legislative, executive and judicial powers.

In exercising its legislative powers in making rules and regulations, the state corporation commission is not bound to give notice to the carriers affected thereby, but if it exercises its judicial powers by seeking to enforce such rules and regulations, and to adjudge the penalties for their violation, then such carriers are entitled to notice and an opportunity to be heard, without which there is not due process of law, and this right is not satisfied by a notice given to the carriers before such rules and regulations were adopted.

The Constitutionality of Statutes regulating the sale of railway tickets is discussed in the note to *Jannin v. State*, 96 Am. St. Rep. 828.

HERRING v. WILTON.

[106 Va. 171, 55 S. E. 546.]

NUISANCE—Noise of Dogs—Injunction.—The annoyance and inconvenience arising from the barking and howling of dogs and the whining of puppies to such an extent as to greatly annoy and break the rest and sleep of an adjoining family, and seriously disturb them in the reasonable use and enjoyment of their home, constitutes a nuisance which may be enjoined, although a town ordinance may afford an easy and expeditious remedy at law for the inconvenience suffered by such family. (p. 1000.)

EQUITY JURISDICTION—Retention of Jurisdiction.—If courts of equity have once acquired jurisdiction, a subsequent statute which gives to or enlarges the jurisdiction of the common-law courts over the same subject does not deprive the equity courts of their jurisdiction, although the statute may furnish a complete and adequate remedy at law unless such statute uses prohibitory or restrictive words. (p. 1000.)

EQUITY JURISDICTION.—If courts of equity have once acquired jurisdiction, they do not lose it merely because courts of law have been subsequently authorized to administer the same or similar relief. (p. 1001.)

J. B. Stephenson and H. W. Bertram, for the appellant.

Sipe & Harris, for the appellee.

¹⁷¹ KEITH, P. Wilton, the appellee in this court, filed a bill in the circuit court of Rockingham county, in which he states that he is a ¹⁷² resident of the town of Harrisonburg, and that contiguous to him is the property occupied by George Herring; that for three years past Herring has maintained on the lot on which he resides a kennel, about one hundred or one hundred and twenty-five feet distant from Wilton's residence, in which he is breeding dogs for sale, having at times as many as seven or eight, and rarely so few as two or three; that the dogs keep up an incessant barking, especially during the night, by which the complainant and his family are so annoyed and disturbed as to be prevented from obtaining such sleep and rest as health requires; that by reason of the repetition of this nuisance he has become extremely nervous, at times about unfit to attend to business; that the health of his family is being seriously and permanently impaired, and they are being deprived of the use and enjoyment of their home; that he has complained to Herring, but is unable to obtain from him any permanent relief; and that complainant, impelled by the desire to avoid litigation between himself and a neighbor, has borne with the situation until he can no longer endure it without serious and permanent injury to the health of himself and his family. He further avers that Herring is without visible means to respond in damages to an action at law, and charges that any judgment against him commensurate with the damage sustained will be wholly unavailing. He prays that Herring, his agents, etc., may be enjoined from keeping upon his premises dogs causing the injurious noises and disturbances complained of; that the nuisance of the kennel may be discontinued and abated, and for general relief.

A temporary injunction was granted in accordance with the prayer of the bill, and at a subsequent day the defendant answered the bill, admitting that for a number of years he has been keeping a few dogs for his own pleasure and for the profits derived from their sale, but denying that they have been creating a nuisance to the plaintiff and his family, or that the dogs kept by him could have been a nuisance to anyone in a normal condition of health and nerves. He denies that he has kept the ¹⁷³ number of dogs with which he is charged in the bill, and states in detail the number kept by him at various times. He denies that he is unable to respond in damages for any nuisance he may have occasioned; and

finally claims that the plaintiff's annoyance is due to his nervous temperament, and asserts that neither the plaintiff nor any member of his family has ever been made ill or prevented from attending to business.

Upon these issues evidence was taken, and the case coming on to be heard, the circuit court perpetuated the temporary injunction, and Herring obtained an appeal from one of the judges of this court.

We think the weight of evidence establishes that plaintiff and his family were subjected to great and continuous annoyance and discomfort by the howling and barking of the dogs and the whining of puppies upon the premises of appellant; that their rest has been broken, their sleep interrupted, and that they have been seriously disturbed in the reasonable use and enjoyment of their home.

In *Dittman v. Repp*, 50 Md. 516, 33 Am. Rep. 325, Judge Alvey, delivering the opinion of the court, says: "In all such cases the question is whether the nuisance complained of will or does produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits, and as, in view of the circumstances of the case, is reasonable and in derogation of the rights of the complainant."

In *Spelling on Injunctions*, section 431, it is said that: "Noises which tend to disturb rest and quiet in the neighborhood may be restrained. . . . To warrant an injunction against a noise as a nuisance it must be shown that the noise is such as to produce actual physical discomfort to a person of ordinary sensibilities, and is unreasonably and unnecessarily made."

In *Brill v. Flagler*, 23 Wend. (N. Y.), at page 357, a case in which Flagler sued Brill for killing his dog, and the defendant ¹⁷⁴ pleaded that the dog was accustomed to come upon the premises of the defendant in the night-time as well in the daytime, and by his barking and howling annoy and disturb the defendant and his family, speaking of this plea the court said: "I am of opinion that the facts which the plea sets up constitute a bar to the action. The demurrer admits that the dog was in the constant habit of coming on the premises and about the dwelling of the defendant, day and night, barking and howling, to the great annoyance and disturbance of

the peace and quiet of the family; that the plaintiff was fully advised of this mischievous propensity of the animal, and willfully neglected to confine him, and that defendant unable to remove the nuisance in any other way killed him. No other authority than the experience and observation of every man is necessary to enable him to determine that the matters set forth in this plea constitute a private nuisance to the inmates of a family, and upon general principles justify all reasonable means to remove it. It would be mockery to refer a party to his remedy by action. It is far too dilatory and impotent for the exigency of the case. Whatsoever unlawfully annoys, or does damage to another, is a nuisance, and may be abated by the party aggrieved, so as he commits no riot in the doing of it."

That case, it is true, was an action at law, but it states clearly and forcibly the annoyance and inconvenience arising from the barking and howling of dogs, that they constitute a nuisance, and in that case excused what would otherwise have been a trespass. It declares that the remedy by action at law would be a mockery and far too dilatory and impotent for the exigency of the case, thus presenting a case for the interposition of a court of equity. It is true, also, that in that case the dog came upon the premises of the man who shot him; it was, therefore, somewhat in the nature of a trespass, while a nuisance generally results from the commission of an act beyond the limits of the property affected: High on Injunctions, 2d ed., sec. 739. Especially is this true of noises, and many other illustrations ¹⁷⁵ might be added. Dogs in a neighbor's yard may effectually murder sleep and destroy the reasonable enjoyment of a home.

It is urged on the part of plaintiff in error that an ordinance of the town of Harrisonburg afforded an easy and expeditious remedy for whatever inconvenience appellee may have suffered.

In *Kelly v. Lehigh M. & M. Co.*, 98 Va. 405, 81 Am. St. Rep. 736, 36 S. E. 511, this court said: "Where courts of equity have once acquired jurisdiction, a subsequent statute which gives to or enlarges the jurisdiction of the common-law courts over the same subject does not deprive the equity courts of their jurisdiction, although the statute may furnish a complete and adequate remedy at law unless the statute conferring such jurisdiction uses prohibitory or restrictive words."

And this was reiterated in *Steinman v. Vicars*, 99 Va. 595, 39. S. E. 227, where it was said: "Where courts of equity have once acquired jurisdiction, they do not lose such jurisdiction merely because courts of law have been subsequently authorized to administer the same or similar relief": *Spelling on Injunctions*, secs. 398, 399.

We are of opinion that a court of equity has jurisdiction in such matters, and that in this case it has been properly exercised.

The decree of the circuit court is affirmed.

The Right to Kill Dogs which have become a nuisance by their propensity to fight and howl or to kill sheep has been recognized by the courts in some cases: *Hubbard v. Preston*, 90 Mich. 221, 30 Am. St. Rep. 426; *Thorne v. Mead*, 122 Mich. 273, 80 Am. St. Rep. 568; note to *Hamby v. Sampson*, 67 Am. St. Rep. 295. But compare *Chapman v. Decrow*, 93 Me. 378, 74 Am. St. Rep. 357; *Hodges v. Cousey*, 77 Miss. 353, 78 Am. St. Rep. 525; *Ten Hopen v. Walker*, 96 Mich. 236, 35 Am. St. Rep. 598.

HENRICO COUNTY v. CITY OF RICHMOND.

[106 Va. 282, 55 S. E. 683.]

CONSTITUTIONAL LAW.—A statute will not be declared unconstitutional unless there is a clear violation of some explicit provision of the constitution. (p. 1006.)

CONSTITUTIONAL LAW—Conferring Legislative Power on Courts.—A statute providing for the extension of the corporate limits of cities and towns, designating the circuit judges of the state in which the premises lie as the governmental agency for carrying out the provisions of the statute, and conferring upon them the power to determine the boundaries, and the necessity for and expediency of extending such limits, is not unconstitutional as conferring legislative power on such courts. (p. 1006.)

The ordinance involved in this case reads as follows:

"AN ORDINANCE.

“(Approved August 12, 1905.)

“To extend the corporate limits of the city of Richmond in pursuance of the provisions of the act of the General Assembly of Virginia, approved March 10, 1904, entitled ‘An act to provide for the extension of the corporate limits of cities and towns.’

"Be it ordained by the Council of the city of Richmond:

"1. That the city of Richmond hereby declare that it is desirable to annex, in pursuance of the act of the General Assembly of Virginia, approved March 10, 1904 (Acts 1904, page 144), certain territory of the county of Henrico, Virginia, adjacent to the present corporate limits of the city of Richmond, in which is included the town of Fairmount, and to that end the city of Richmond doth hereby accurately describe the metes and bounds of such territory as follows: [Here follows a full description by metes and bounds.]

"2. The city of Richmond doth hereby set forth the necessity for and the expediency of the proposed annexation—that is to say:

"(1) That the crowded and congested conditions at present prevailing in almost every section of the city may be relieved by adding sufficient territory to the corporate limits of the city not built upon, but adapted to city improvements, so as to afford cheap and desirable locations for the erection of commodious, healthful and beautiful residences.

"(2) That the present and prospective system of public improvement of the city, such as the establishment of grades of streets and alleys, the plans of construction of sewers, culverts, drains, and water and gas mains, may be designed, adjusted and made, so as to avoid unnecessary annoyance and damage necessarily occurring where property is built upon and developed before such systems are designed, acquired and made.

"(3) The fact that a part of the territory proposed to be annexed is already built upon, though without any sufficient system of sewers or other improvements, makes it not only expedient, but necessary that some complete system of sewerage be promptly provided for the proper sanitation and improvement of such territory.

"(4) That within the territory proposed to be annexed there are several locations where the houses and population are more or less dense, which necessitate better police and fire protection than the county of Henrico is enabled, with the means at its command, to afford to such communities, and, as a result, it endangers the safety of life and property not only without but also within the corporate limits.

"3. The city of Richmond hereby sets forth the terms and conditions upon which it desires to make the proposed annexation, and proposes for the future management of the annexed territory the following:

“(1) That the city of Richmond shall assume and provide for the reimbursement of the county of Henrico of a just proportion of any existing debt of said county, if any there be, and shall also make compensation to the county of Henrico for any schoolhouse or other public building of said county located within the annexed territory.

“(2) That the tax rate upon the land within the annexed territory shall not be increased beyond the rate assessed by the county of Henrico for its purposes at the time of the annexation under this ordinance for a period of five years after such annexation, except upon the petition of a majority of the freeholders of such territory presented to the council of the city of Richmond.

“(3) That all revenues derived by the city of Richmond from taxation in said territory during the first period of five years, either on property or from other sources, including licenses, shall be wholly expended by the city of Richmond upon streets, sewers, light, water and other public improvements in said territory; provided, however, that at any time within the said five years the council of the city of Richmond may, by ordinance, set apart a sum equal to twelve per centum of the assessed value, at the time of annexation, of the lands annexed, or of such part thereof as may be determined upon by said council, which sum so set apart shall be wholly expended in public improvements in and for the benefit of the annexed territory, or part thereof, as may be determined as aforesaid; and when said sum shall have been so set apart and said public improvements shall have been begun, the land annexed or part thereof, as aforesaid, shall be subject to city tax rate and the proceeds thereof shall be paid into the city treasury along with all other taxes and licenses in such territory for general purposes, although said five years shall not have elapsed, provided that said sum to be set apart and expended shall be reduced by the sum already expended on said improvements under any other plan of annexation; and provided said sum also shall be reduced by the amount of any debt of the town of Fairmount, should the said town be annexed to the said city of Richmond as a part of said territory; which, however, shall apply solely to the scheme of taxation within the territory of said town of Fairmount; and provided further, that out of the proceeds of sale of the next issue of bonds by the city of Richmond after such annexation the said sum equal to the said twelve per centum of the as-

essed value at the time of annexation of the land annexed, reduced by the sums hereinbefore mentioned, shall be set apart and expended in said territory as hereinbefore directed, unless said sum has been already so expended.

“(4) That all county levies imposed on persons and property within such territory for the current fiscal year in which said annexation is made shall be paid to the county of Henrico.

“(5) That the taxes assessed, collected and expended during the said period of five years shall be so assessed, collected and kept that the same may be expended as hereinbefore provided in the territory of the particular ward from which it was so collected until and unless a sum be set apart equal to twelve per centum of the assessed value at the time of annexation of the lands annexed, and when said sum shall have been so set apart, and the public improvements shall have been begun, the land annexed shall be subject to the city tax rate.

“(6) That the city of Richmond will, as soon as annexation is accomplished, afford police and fire protection and public school facilities to the citizens residing in the annexed territory; and will, with all reasonable dispatch, afford and furnish other public facilities and improvements to said citizens, as provided by law.

“(7) That in the annexed territory no new streets or alleys shall be opened or projected except with the consent and approval of the council of the city of Richmond.

“4. That the city attorney be, and he is hereby, instructed to institute and prosecute, with as little delay as possible, the necessary legal proceedings in order to annex to the city of Richmond, by proper decree or judgment of the Circuit Court of the county of Henrico, the territory hereinbefore accurately described, upon the terms and conditions hereinbefore set forth.”

Braxton & Williams and L. O. Wendenbury, for the plaintiff in error.

H. R. Pollard, Meredith & Cocke, T. W. Gardner and J. H. Drake, Jr., for the defendants in error.

290 HARRISON, J. The subject matter of this controversy is the extension of the corporate limits of the city of Richmond. The evidence before the circuit court is not in

the record before us, the appellant having appealed solely upon the legal questions involved. Under these circumstances it must be assumed that the evidence was legal, and sufficient to justify the conclusion reached by the circuit court upon all questions of fact.

Prior to the adoption of the constitution of Virginia, which took effect on the tenth day of July, 1902, the legislature exercised the power of passing special statutes for the enlargement of the limits of cities and towns, each act authorizing the enlargement of some particular city or town. That the legislature had this power was determined in *Wade v. City of Richmond*, 18 Gratt. 583. The recent constitutional convention deemed it unwise for the legislature to exercise this power. It therefore declared that "the General Assembly shall provide by general laws for the extension and the contraction, from time to time, of the corporate limits of cities and towns; and no special act for such purpose shall be valid": Va. Const. 1902, art. 8, sec. 126.

²⁰¹ Under this constitutional provision it was impossible for the legislature to specify by general law what amount of territory should be annexed, or how much the limits of a city or town should be annexed, as the necessities of each would vary according to its size, crowded condition and financial ability. It was equally impracticable for the legislature by general law to determine the terms and conditions upon which such extensions should be made. It therefore became a necessity that the legislature should select and designate some agency to exercise a judgment on the facts of each case. The constitutional provision to which we have adverted does not limit the legislature in selecting this agency, but it is left free to select any instrumentality not prohibited by the constitution.

In obedience to this constitutional provision, the General Assembly, by an act approved March 10, 1904, provided by general law for the extension of the corporate limits of cities and towns, selecting and designating the circuit judges of the state as the governmental agency for carrying out the provisions of the law: Acts 1904, pp. 144, 148; Va. Code 1904, sec. 1014a. The first section of this act provides, among other things, "that whenever it is deemed desirable by any city or town to annex any territory to such city or town, its council shall declare by ordinance, which shall be passed by a recorded vote of a majority of all the members elected to the council, or

to each branch thereof, when there are two, that it desires to annex certain territory, and shall accurately describe therein the metes and bounds of the territory proposed to be acquired and set forth the necessity for or expedience of annexation, and the terms and conditions upon which it desires to annex such territory, as well as the provisions which are made for its future management and improvement."

The petition for appeal rests its contention that the judgment of the circuit court should be reversed upon two grounds: First, that the annexation statute of March 10, 1904, is unconstitutional and void, because in contravention of the Bill of ²⁹² Rights, which provides "that the legislative, executive and judicial departments of the state should be separate and distinct"; and is also in violation of article 3 of the constitution, which provides that "except as hereinafter provided, the legislative, executive and judicial departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others, nor any person exercise the power of more than one of them at the same time." Second, that the ordinance of the city of Richmond, which was passed in pursuance of the act, is invalid because it does not comply with the law. The constitutionality of the act is manifestly the main question relied on. The entire petition for appeal is devoted to a discussion of that question, the invalidity of the ordinance being merely suggested without argument.

It is not to be denied that this court may declare an act of the General Assembly unconstitutional. It is, however, a delicate matter to hold that the legislative department of the government has transcended its powers, and it will not be done except in a case where there is a clear violation of some explicit provision of the constitution or Bill of Rights. To doubt must be to affirm.

The contention is that this annexation statute devolves upon the court the charge of purely legislative functions; that its vice, so far as it offends against article 3 of the constitution, is twofold: 1. "That it authorizes the court not only to reject the boundaries and the terms fixed by the annexation ordinance, but it attempts to authorize the court to substitute new boundaries and new terms for those rejected"; and 2. That "it not only authorizes the court to ascertain whether the conditions and methods prescribed by the statute have been pursued in the attempted annexation, but it attempts to authorize the court to review the proceedings upon the question of the

policy or expediency of the annexation, and to affirm or set aside the annexation according to the court's view of the expediency therefor, regardless of whether the conditions and ²⁹³ methods prescribed by the statute have been pursued by the subordinate legislative body attempting to effect the annexation or not, thus requiring a judicial tribunal to pass upon a purely political question involving only considerations of policy and statescraft."

This is the second case that we have been called upon to consider at this term involving a construction of the constitutional provision here relied on. The first was *Winchester & Strasburg R. Co. v. Commonwealth*, 106 Va. 264, 55 S. E. 692, on appeal from the state corporation commission. In that case it was contended that the corporation commission was an invalid and illegal tribunal, because the constitutional and legislative enactments which created it had concentrated in the commission legislative, executive and judicial powers in violation of the Bill of Rights and article 3 of the constitution. In disposing of this contention adversely to those making it, this court said that the administration of the government would be wholly impracticable if the general maxim relied on were strictly, literally and unyieldingly applied in every situation; that the federal government as well as the several state governments abounded with illustrations of the intermingling of such powers in one person or body; that experience has shown that no government could be maintained where an unqualified adherence to that maxim was enforced; that the universal construction of the maxim in practice had been that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, but that either department may exercise the powers of the other to a limited extent; and that this practical construction of the maxim had been repeatedly recognized with approval by the supreme court. For a fuller discussion of the subject and the authorities cited, see the opinion in the case of *Winchester & Strasburg R. Co. v. Commonwealth*, 106 Va. 264, 55 S. E. 692, decided at this term.

In that case, it is true, the corporation commission was ²⁹⁴ created by the organic law, but the authorities there cited applied to cases where the commingling of two or more of these powers was accomplished by legislative enactment only. These cases show that the construction put by the appellant, in the case at bar, upon the constitutional separation of the de-

partments of government is too narrow, and has been very generally rejected.

Duties are devolved upon the court by this statute which if segregated and taken by themselves would be technically legislative in their character, but, when the whole statute is read together and its purpose considered, it does not impose upon the court purely legislative functions, such as would make it obnoxious to the constitutional provision invoked. It seems to be admitted by the learned counsel for the appellant that the annexation of territory to a municipality, under general laws, involves both legislative and judicial questions; and yet it contended that the legislature should have designated some subordinate legislative body to carry out the provisions of the act, in which case we would have had a legislative body discharging judicial functions.

The initiative in the proceeding provided for by this statute is taken either by the municipality to enlarge its limits, or by those representing the outlying territory, to have the corporate limits extended to them. Like the move to open a new road, it nearly always inaugurates controversy, and often a bitter contest. To determine such a controversy there could be no safer or more competent tribunal to ascertain the facts and give judgment in the premises than the courts, although in doing so there would necessarily be determined some questions which were legislative in their character.

Nearly, if not all, of the questions to be determined under the provisions of this act are questions of fact. The power so much inveighed against in the court to determine the necessity for or expediency of annexation is controlled by the existence of facts and circumstances justifying action. The necessity for or expediency of enlargement is determined by the health of the community, its size, its crowded condition, its past growth, and the ²⁰⁵ need in the reasonably near future for development and expansion. These are matters of fact, and when they so exist as to satisfy the judicial mind of the necessity for or expediency of annexation, then, in accordance with the provisions of the act, the same must be declared. It is manifest that the legislature, carrying out the provisions of the constitution, intended, as doubtless did the enactors of the organic law, to require that every annexation should depend upon evidence showing the necessity for or expediency of annexation, that the terms proposed are reasonable and fair, and the provisions for future management of the territory just.

The legislature of this state has never given to the constitutional provision, here invoked, the restrictive meaning contended for by the appellant. On the contrary, it has always conferred upon the courts of the commonwealth a jurisdiction involving a mingling of powers, some of which are quite as legislative in their character as those conferred by the act under consideration. Many statutes might be referred to showing such instances, but a few only need be mentioned as illustrative of others.

For years in this state the power to levy taxes was conferred upon the old county courts. Until the establishment of the corporation commission the Virginia courts had the power to grant or refuse charters of private corporations, fixing their terms, or amending or modifying the same, possessing the fullest power of creation as well as limitation. For years in this state it has been to the judicial department that the legislature has delegated the power to determine the opening or closing of the highways in the counties; and until the constitution of 1849-50 the legislature exercised the power of granting divorces and other acts of a judicial character. This legislative construction of the constitution is entitled to no inconsiderable weight, and cannot be lightly set aside: *Cooley's Constitutional Limitations*, 4th ed., pp. 81, 83; *Murray v. Hoboken L. & I. Co.*, 18 How. 272, 15 L. ed. 372; *United States v. Hill*, 120 ²⁹⁶ U. S. 169, 7 Sup. Ct. Rep. 510, 30 L. ed. 627; *Day v. Roberts*, 101 Va. 248, 43 S. E. 362.

This court has recognized with approval this legislative construction of the constitution. If there is any sovereign power universally recognized as legislative in its character it is the power to levy taxes; and yet this court has held that the General Assembly had power to confer upon the county courts authority to levy taxes for local purposes: *In re County Levy*, 5 Call, 139; *Harrison County Justices v. Holland*, 3 Gratt. 247; *Gilkeson v. Frederick Justices*, 13 Gratt. 577.

In the case of *Bull v. Read*, 13 Gratt. 78, an act of the legislature which authorized any district of the county of Accomac to determine by a majority vote whether it would accept the terms of the statute for the establishment of free schools was attacked as unconstitutional and void because the General Assembly, instead of exercising the legislative power exclusively vested in it by the constitution, and enacting the law, had referred it to a vote of the people and made its existence as a

law depend upon the vote of the people. The statute was upheld, the court saying that "there was a plain distinction between the act to be done by the voters and the legislative function": Citing among other cases, *Commonwealth v. Judge of Quarter Sessions*, 8 Pa. 391. In this Pennsylvania case the question involved was similar to that in the case at bar. The supreme court of that state, on page 395, says: "But the erection of a township or the creation of a new district for merely municipal purposes or convenience in the transaction of public business is in no degree similar to the exercise of the law-making power. The one is the exercise of sovereignty, the other, in its very nature, a subordinate function. The latter, like the laying out of a public road or highway, or the erection of a bridge, may require the exercise of judgment and skill, but there is nothing either in the positive provisions of our constitution, or the genius of our institutions, which prohibits the action of other than legislative bodies. . . . So, too, the courts, acting through commissioners, are vested with the right to erect new townships ²⁹⁷ and divide old ones. No one has ever doubted the constitutional right of the legislature to authorize the exercise of both these jurisdictions by the courts, because it has never been imagined that it bore any resemblance to the power of enacting laws."

In *Ex parte Bassitt*, 90 Va. 679, 19 S. E. 453, section 97 of the Code, which authorized the county court to appoint additional justices to the number specified in the constitution, whenever the court should be of the opinion that the public service required a greater number of justices, was assailed as an unwarranted delegation of power to the county courts and in violation of the second article of the constitution, which declares that "the legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others." The constitution provided that there should be elected for each district of a county one supervisor, three justices of the peace, one constable, and one overseer of the poor, who should hold their respective offices for the term of two years; the fourth section providing that nothing in the article should be construed as prohibiting the General Assembly from providing by law for any additional officers in any county. Judge Lewis, delivering the opinion of the court, says: "The constitution, it will be observed, does not prescribe the manner in which additional officers shall be provided for, but leaves that

to the discretion of the legislature." And further says: "There is here no delegation of legislative power, but the county courts are merely empowered to declare the event, so to speak, upon which the act is to take effect within their respective counties." After citing Cooley's Constitutional Limitations, 119, as to the power of the legislature to delegate to the voters questions involving the expediency of changing municipal limits, the learned judge says: "The same principal applies to the present case; for if it be competent for the legislature to submit a matter of local concern to the decision of the voters of the municipality it is equally competent for it to submit a similar question to the decision or approval of the county courts."

²⁹⁸ There has been no case before this court where the constitutional question under consideration arose in a case involving the annexation of additional territory to a city. Many such cases have arisen, however, in our sister states, where statutes similar to ours have been upheld.

In *Wahoo v. Dickenson*, 23 Neb. 416, 36 N. W. 813, the statute involved provided for filing with the court a petition setting forth the benefits to be derived and a plat of the territory desired; it provided for a trial, and declared that if the court find the allegations of the petition to be true, and that such territory or any part thereof would receive material benefit by its annexation to such corporation, or that justice and equity require such annexation of the territory or any part thereof, a decree shall be entered accordingly. In holding this act valid the supreme court said, on page 730: "We do not understand the statute, however, as clothing the courts with power to legislate in the premises—that is, to determine in the first instance what territory should be annexed. This power is bestowed upon the city council. The evident purpose is to protect the owners of property from being forcibly brought within the corporation, unless one or two facts are made to appear: 1. That the territory, or a part of it, will receive material benefit from its annexation to such corporation—that is, after all the territory sought to be annexed will receive material benefits, then a decree will be entered accordingly; if but part receives material benefit, then a decree will be entered only for such part. 2. Where justice and equity require such annexation of said territory, or a part thereof, then a decree will be entered according to the facts found. The determination of these questions is a judicial act, and the

courts are duly empowered and the question is proper for the courts to consider." The act involved in this case was a general law, the constitution of Nebraska prohibiting special legislation as applied to any particular municipal corporation.

It would unnecessarily prolong this opinion to quote at length ²⁹⁹ from many other cases which are quite as pertinent as the Nebraska case: See *Forsythe v. City of Hammond*, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576, 68 Fed. 774; *Paul v. Town of Walkerton*, 150 Ind. 565, 50 N. E. 725; *Kelly v. Meeks*, 87 Mo. 396; *City of Burlington v. Leebrick*, 43 Iowa, 252; *Callen v. Junction City*, 43 Kan. 627, 23 Pac. 652, 7 L. R. A. 736; *City of Jackson v. Whiting*, 84 Miss. 163, 36 South. 611; *Foreman v. Town of Marianna*, 43 Ark. 324; *People v. Fleming*, 10 Colo. 553, 16 Pac. 298; *Morton v. Woodford*, 99 Ky. 367, 35 S. W. 1112.

Many authorities are cited by the learned counsel for the appellant in support of the contention that the act in question is invalid. In most, if not all, of these cases, there was no constitutional provision requiring a general law providing for the extension of corporate limits, and most of them refer to the original incorporation of cities and towns. There is undoubtedly some conflict in the authorities. This conflict seems, however, to arise out of the differences in the terms and conditions of the several statutes, the scope and purpose of each, and the judicial view as to the character of the questions relegated to the courts in each case.

In the case at bar the manifest purpose of the act was to make the matter of enlarging the corporate limits of a city or town a case to be tried in court. It is in the highest sense litigation. Those in favor of the extension and those opposed to it each have rights that should be considered and respected. The act prescribed a method of procedure by which all the parties concerned are brought before a court of competent jurisdiction, which it declares "shall hear the case upon evidence introduced in the manner in which evidence is introduced in common-law cases." The policy of annexation as a public necessity was determined by the legislature when it enacted this statute providing for its accomplishment when certain conditions were shown to exist. The court is called upon by the statute to express no opinion as to its wisdom as a matter of public policy. It has ³⁰⁰ only to determine, upon the evidence adduced, the rights of the opposing parties in the particular case before it; whether, upon the facts and

circumstances established by the evidence, the city is entitled to any extension at all, and if any, how much, and the terms and conditions upon which such extension shall be granted. The power that is devolved upon the court by this statute is not an authority to make laws, and is no greater power than that which, in the evolution of law, society has found it necessary to relegate to the courts in many other instances; and there is as little danger of such power being abused in this instance as in any other.

These considerations lead us to the conclusion that the act here called in question, so far as its validity is involved in this appeal, is not invalid because in conflict with the constitutional provision relating to the separation of the powers of government.

We are further of opinion that the objection to the ordinance is untenable. The ordinance of the city of Richmond, which is the foundation of this proceeding, substantially complies with the statute, and sets forth the case of the city with as much fullness and detail as was practicable under the circumstances.

The order appealed from provides that the annexation therein determined upon shall take effect the day of its entry, February 17, 1906. The suspension of that order during the pendency of this appeal makes it necessary, in order to avoid confusion, to change the time at which the annexation shall take effect. It will therefore be provided by this court that the annexation shall take effect from the date of its final order. Subject to this modification, the judgment of the circuit court must be affirmed.

Mr. Justice Buchanan Dissented on the ground that the statute involved "confers upon the courts the power to ascertain and determine the necessity for, or expediency of, extending the corporate limits of cities and towns. That power, it was held by this court, in *Wade v. City of Richmond*, 18 Gratt. 583, was a purely legislative power or function, and that decision is in accord with the great weight of authority."

Powers not in Themselves Judicial, and not to be exercised in the discharge of the functions of the judicial department, cannot be conferred upon courts or judges designated by the constitution as part of the judicial department of the state: *State v. Barker*, 116 Iowa, 96, 93 Am. St. Rep. 222. As to what is not a delegation of non-judicial functions to the courts, see *State v. George*, 22 Or. 142, 29 Am. St. Rep. 586; *Board of Supervisors v. Todd*, 97 Md. 247, 99 Am. St. Rep. 438; *Carter v. State*, 42 La. Ann. 927, 21 Am. St. Rep. 404.

FIRST NATIONAL BANK v. RICHMOND ELECTRIC COMPANY.

[106 Va. 347, 56 S. E. 152.]

BANKS AND BANKING—Duty of Depositors as to Return of Passbook and Vouchers.—A bank depositor is under obligation to the bank to examine within a reasonable time, or have examined by some competent person, in good faith and with ordinary care, the account rendered in his passbook and the vouchers returned, and to report any errors discovered. Failing in this, he is negligent, and may be held liable for the payment of a forged check. (pp. 1016, 1017.)

BANKS AND BANKING—Payment of Forged Checks.—If the officers of a bank, before paying a forged or altered check, could, by the exercise of proper care and skill, have detected the forgery, it is not entitled to a credit for the amount of the check, even if the depositor omitted all examination of his account returned to him by the bank. (p. 1018.)

BANKS AND BANKING—Forged Checks—Principal and Agent.—In the commission of a forgery an employé is not the agent of his principal, and his knowledge cannot be imputed to the principal; but after forged checks have been paid and returned to the depositor as vouchers with the bank account written up and balanced according to the usual business methods, if the depositor assigns the duty of examining such vouchers and account to his clerk, who has had an opportunity of committing and has committed a forgery, such employé in the discharge of this duty is the agent of the depositor, who is chargeable with his agent's knowledge of the fraud. (p. 1019.)

Leake & Carter and W. B. Tennant, for the defendant in error.

G. Bryan and A. W. Patterson, for the plaintiff in error.

³⁴⁸ **HARRISON, J.** The electric company, plaintiff, kept an active account with the defendant bank, and this action is to recover a balance of deposit alleged to be due it from the bank. This alleged balance was brought about by the bank having paid a number of checks, the amount of which had been raised after being signed by the plaintiff.

It appears that the plaintiff had in its employ a clerk named Woodall. Once a week the electric company issued its check for a sum sufficient to cover its weekly payroll payable "to the order of payroll." Its clerk and cashier, Woodall, presented these checks to the bank for payment. In July, 1903, the plaintiff discovered that Woodall had since December, 1901, a period of about eighteen months, been defrauding it by raising twenty-six of these payroll checks by the sum of one hundred dollars each. Upon this discovery Woodall be-

came a fugitive from justice and has not since been apprehended. The bank resisted a demand upon it for the amount of these fraudulent alterations, upon the ground that the account of the electric company with it had been settled monthly during the eighteen months, its passbook written up and the fraudulently altered checks returned with the book, and no report of the fraud had ever been made to the bank. Inquiry developed the fact that, after being returned, Woodall had destroyed all of the altered checks ³⁴⁹ except two, which had not been returned by the bank at the time of his flight. It further appears that Woodall, in order to conceal his fraud, would make false additions of the checks given, on the stubs of the plaintiff's check-book, thereby making the aggregate there shown correspond with the passbook. Such examination of its passbook as was made by the plaintiff consisted of the president of the company, together with Woodall, comparing at times the passbook with the stubs of the check-book. In doing this Woodall would sometimes hold the passbook and sometimes the check-book, while the president would hold the other, thus enabling Woodall to call out in either case from the book held by him the figures so as to make the amount correspond with the book held by the president. In this way every time the examination took place the passbook as balanced and the check-book were made to agree. It further appears that the fraud could have been instantly discovered by verifying the additions made by Woodall on the stubs of the check-book, or by the president looking at both the passbook and the check-book on any one of the occasions when the examination was made by Woodall and himself together.

That banks, in their relations with depositors, are held to a rigid responsibility is a proposition established by practically an unbroken current of authority: *National Bank v. Nolting*, 94 Va. 263, 26 S. E. 826. Some of the earlier cases seemed to go to the extent of holding that a depositor was under no duty to the bank to examine periodical statements of his account, with the vouchers, and give notice to the bank within a reasonable time of errors discovered therein. Modern adjudications, however, of the highest authority, do not sanction this broad proposition: *Leather M. Nat. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. Rep. 657, 29 L. ed. 811; *First Nat. Bank of Birmingham v. Allen*, 100 Ala. 476, 46 Am. St. Rep. 80, 14 South. 335, 27 L. R. A. 426; *Dana v. National Bank*, 132 Mass. 156; *Myers v. Southwestern Nat. Bank*, 193 Pa.

1, 44 Atl. 280, 74 Am. St. Rep. 672; Scanlon-Gipson L. Co. v. Germania Bank, 90 Minn. 478, 97 N. W. 380.

³⁵⁰ The facts in most of the cases cited are very similar to those in the case at bar, in some of them almost identical.

Mr. Justice Harlan, delivering the opinion of the supreme court in *Leather M. Nat. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. Rep. 657, 29 L. ed. 811, says: "The court below, as shown by its opinion, proceeded upon the ground that Cooper was under no duty whatever to the bank to examine his passbook and the vouchers returned with it, in order to ascertain whether his account was correctly kept. For this reason, it is contended, the bank, even if without fault itself, has no legal cause of complaint, although it may have been misled to its prejudice by the failure of the depositor to give timely notice of the fact, which, by ordinary diligence, he might have discovered on the occasion of the several balancings of the account that the checks in question had been fraudulently altered. This view of his obligations does not seem to the court to be consistent with the relations of the parties, or with principles of justice." This learned jurist further says: "While it is true that the relation of a bank and its depositor is one simply of debtor and creditor, and that the depositor is not chargeable with any payments except such as are made in conformity with his orders, it is within common knowledge that the object of a passbook is to inform the depositor from time to time of the condition of his account as it appears upon the books of the bank. It not only enables him to discover errors to his prejudice, but supplies evidence in his favor in the event of litigation or dispute with the bank. In this way it operates to protect him against the carelessness or fraud of the bank. The sending of his passbook to be written up and returned with the vouchers is, therefore, in effect, a demand to know what the bank claims to be the state of his account. And the return of the book, with the vouchers, is the answer to that demand, and, in effect, imports a request by the bank that the depositor will, in proper time, examine the account so rendered, and either sanction or repudiate it. . . . The depositor cannot, therefore, without injustice to the bank, omit all examination of ³⁵¹ his account when thus rendered at his request. His failure to make it or to have it made, within a reasonable time after opportunity given for that purpose, is inconsistent with the object for which he obtains and uses a passbook."

In *Dana v. National Bank*, 132 Mass. 156, the supreme court of Massachusetts says: "The plaintiffs owed to the defendant the duty of exercising due diligence to give it information that the payment was unauthorized; and this included not only due diligence in giving notice after knowledge of the forgery, but also due diligence in discovering it. If the plaintiffs knew of the mistake, or if they had that notice of it which consists in the knowledge of facts which, by the exercise of due care and diligence will disclose it, they failed in their duty; and adoption of the check and ratification of the payment will be implied. They cannot now require the defendant to correct a mistake to its injury, from which it might have protected itself but for their negligence."

The other cases cited are equally conclusive upon the proposition that the depositor is under obligations to the bank to examine within a reasonable time and with ordinary care the account rendered in the passbook and the vouchers returned by the bank to the depositor, and to report any errors discovered without unreasonable delay. Upon this point the conclusion reached by those cases is, in our judgment, both reasonable and just, and the principle announced should be applied in determining the rights of the parties in the present controversy.

"In their relations with depositors, banks are held, as they ought to be, to rigid responsibility. But the principles governing those relations ought not to be so extended as to invite or encourage such negligence by depositors in their examination of their bank accounts as is inconsistent with the relations of the parties or with those established rules and usages sanctioned by business men of ordinary prudence and sagacity, which are or ought to be known to depositors. We must not be understood as holding that the examination by the depositor of his account ³⁵³ must be so close and thorough as to exclude the possibility of any error whatever being overlooked by him. Nor do we mean to hold that the depositor is wanting in proper care when he imposes upon some competent person the duty of making that examination and of giving timely notice to the bank of objections to the account. If the examination is made by such an agent or clerk in good faith and with ordinary diligence, and due notice given of any error in the account, the depositor discharges his duty to the bank. But when, as in this case, the agent commits the forgeries which misled the bank and injured the depositor,

and, therefore, has an interest in concealing the facts, the principal occupies no better position than he would have done had no one been designated by him to make the required examination, without, at least, showing that he exercised reasonable diligence in supervising the conduct of the agent while the latter was discharging the trust committed to him. In the absence of such supervision the mere designation of an agent to discharge a duty resting primarily upon the principal cannot be deemed the equivalent of performance by the latter. While no rule can be laid down that will cover every transaction between a bank and its depositors, it is sufficient to say that the latter's duty is discharged when he exercises such diligence as is required by the circumstances of the particular case, including the relations of the parties, and the established or known usages of banking business": *Leather M. Nat. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. Rep. 657, 29 L. ed. 811.

"Of course if the defendant's officers, before paying the altered checks, could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of those checks, even if the depositor omitted all examination of his account": *Leather M. Nat. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. Rep. 657, 29 L. ed. 811.

In the case at bar there was evidence tending to show that the plaintiff did not examine its passbook and the vouchers returned therewith with reasonable care and diligence; and did not exercise reasonable care and diligence in supervising the ³⁵³ conduct of its agent while the latter was examining such passbook and vouchers. Whether he did so exercise reasonable care and diligence was, under proper instructions, a question to be determined by the jury.

We are of opinion that the circuit court erred in refusing the following instruction asked for by the defendant: "No. 3. The jury are instructed that the plaintiff is charged with such knowledge as Woodall had in making the examination of its bank-book and the inspection of returned checks, and comparison of the same with the stubs of plaintiff's check-book."

As already seen, such examination of its passbook as was made by the plaintiff was together with Woodall as its agent. Woodall had, at the time these examinations were made, full knowledge of the forgeries, as he had himself been guilty of the wrongdoing.

In the commission of a forgery the employé is not the agent of his principal, and his knowledge cannot be imputed to the principal. But after the forged checks have been paid and returned to the depositor as vouchers, with the bank account written up and balanced according to the usual business methods, if the depositor assigns the duty of examining such vouchers and account to this same clerk, who has had an opportunity of committing a fraud and has done so, then such employé in the discharge of this duty is the agent of the depositor, and such depositor is chargeable with his agent's knowledge of the fraud: *Dana v. National Bank*, 132 Mass. 156; *First Nat. Bank of Birmingham v. Allen*, 100 Ala. 476, 46 Am. St. Rep. 80, 14 South. 335, 27 L. R. A. 426; *Myers v. Southwestern Nat. Bank*, 193 Pa. 1, 74 Am. St. Rep. 672, 44 Atl. 280; *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529; *Leather M. Nat. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. Rep. 657, 29 L. ed. 811.

In *First Nat. Bank of Birmingham v. Allen*, 100 Ala. 476, 46 Am. St. Rep. 80, 14 South. 335, 27 L. R. A. 426, it is said: "The evidence shows that on each occasion after the return of the passbook and checks, the plaintiff, with the assistance of his clerk, Tomlin, the forger, examined the account as rendered and the checks or vouchers. We may conclude the evidence shows that the plaintiff himself personally was without fault in ³⁵⁴ this respect, and but for the fact that his clerk, Tomlin, was the forger, the false checks would have been discovered by the examinations which were in fact made. The evidence shows that in these examinations Tomlin either called from the passbook and the plaintiff the checks, or vice versa, and Tomlin, knowing when a forged entry or check was reached, answered in such a way as to deceive the plaintiff. Tomlin, the clerk and forger, had knowledge of the forged checks; was such knowledge of the agent chargeable to his principal? The case in 132 Mass. 156, holds that the principal is chargeable with notice under such circumstances, and we are of opinion the conclusion is supported by reason and sound principles of law."

In *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529, it is said: "Of course the knowledge of the forgeries that Davis possessed, from the fact that he was the forger, was in no respect to be attributed to the plaintiffs. But we see no reason why they were not chargeable with such information as a comparison of the checks with the check-book would have imparted to an innocent party pre-

vously unaware of the forgeries. The plaintiffs' position may be no worse because they intrusted the examination to Davis instead of to a third person; but they can be no better off on that account. If they would have been chargeable with the negligence or failure of another clerk in the verification of the accounts, they must be equally so for the default of Davis, so far as the examination itself would have disclosed the facts."

In the case of *Myers v. Southwestern Nat. Bank*, 193 Pa. 1, 74 Am. St. Rep. 672, 44 Atl. 280, it is said: "While the plaintiff was not chargeable with the knowledge of his clerk that the latter had committed the forgery, he was clearly responsible for the acts and omissions of his clerk in the course of the duties with which he was intrusted—viz., to receive the checks from the bank, take them to his employer's office, compare the amounts thereof with the amounts in the bank-book, check-book, etc."

In the case at bar the instruction under consideration was ³⁵⁵ supported by the evidence, and the authorities cited show that it correctly stated the law.

We are inclined to think there was no error in the action of the circuit court with respect to other instructions, but as its judgment must be reversed for the error pointed out in refusing instruction No. 3, asked for by the defendant, we will not comment upon the other instructions objected to, but will leave the court, upon the evidence adduced at another trial, to give such instructions as to it may seem proper in the light of the principles herein announced.

The judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for further proceedings not in conflict with the views herein expressed.

The Rights and Remedies of the several parties when a forged check has been paid are discussed in the note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 889; and the liability of one receiving payment of a check on a forged indorsement is discussed in the note to *First Nat. Bank v. Bank of Rutherford*, 94 Am. St. Rep. 641. For subsequent decisions on these questions, see *Wellington Nat. Bank v. Robbins*, 71 Kan. 748, 114 Am. St. Rep. 523, and cases cited in the cross-reference note thereto. If, in an action by a depositor to recover of a bank money alleged to have been paid on forged checks, it appears that the forgeries were made by a confidential clerk of the depositor, who intrusted him with the balancing of his bank and account-books, and that the bank was not negligent in honoring the checks, the depositor cannot recover of the bank. He alone is responsible for his failure to examine the checks after payment and reject them within a reasonable time: *Myers v. Southwestern Nat. Bank*, 193 Pa. 1, 74 Am. St. Rep. 672, and see the cases cited in the cross-reference note thereto.

LEE v. LAPRADE.

[106 Va. 594, 56 S. E. 719.]

CONVEYANCES—Rescission of for Mistake Notwithstanding Covenant for Title.—Although a vendee has a right to proceed at law upon his covenants for title, he also has a right, when the grantor has made a mistake in the description of the property conveyed, which he is unable to correct and which is material in its character and affects the very substance of the transaction, to go into a court of equity upon the ground of mistake, and have the deed canceled and the purchase money refunded. (p. 1024.)

DEEDS—Cancellation for Mistake—Interest on Purchase Money.—If a deed is canceled on the ground of mutual mistake in the description of the land conveyed, and a decree is rendered for the repayment of the purchase money, the latter should bear interest from the time when the mistake was discovered and demand made. (p. 1027.)

D. P. Halsey, J. E. Edmunds, Anderson & Lee and S. A. Anderson, for the appellant.

Dillard & Lee and C. A. McHugh, for the appellee.

⁵⁹⁴ **CARDWELL, J.** The Hyde Park Land Company, in the year 1888, acquired ⁵⁹⁵ title to a lot of land in the suburbs of the city of Roanoke, had a plat made of its property, laid it off into lots and streets, dedicating the streets to the city, and placed the lots in the hands of real estate agents to be sold. Some of these streets were only designated by a plowed furrow on either side, but there does not seem to have been anything to indicate the boundaries of the lots. On the map they were indicated by sections and numbers. In 1890 the land company sold one of these lots to one Aunspaugh, trustee, and on January 31, 1890, executed to him a deed purporting to convey the lot, in which deed the boundaries were described as follows: "Beginning at a point on the south side of Loudoun avenue four hundred feet west of Thirteenth street; thence with Loudoun avenue north 68 degrees 45 minutes west, fifty-two and seven-tenths feet to a point; thence south 25 degrees west, one hundred and thirty and three-tenths feet to an alley; thence with the said alley south 68 degrees 45 minutes east, sixty-two feet to a point; thence north 21 degrees and 15 minutes east, one hundred and thirty feet to the place of beginning."

Aunspaugh, by deed bearing date June 25, 1890, conveyed the said lot to George W. Laprade, the description being the

same as that in Aunspaugh's deed from the land company. Laprade placed the lot in the hands of one J. F. Wingfield, a real estate agent (who was also a stockholder in the land company), who sold it to C. A. Lee for the sum of seven hundred dollars, and Laprade and his wife conveyed the lot to Lee by deed bearing date October 17, 1890, in which deed it was described identically as in the two aforementioned deeds, with the further recital that it was the same lot conveyed in those deeds. Laprade is a resident of Franklin county and Lee is a resident of Lynchburg, Virginia.

After purchasing this lot Lee instructed certain real estate agents in Roanoke to sell it for him, but no sale was effected. It was in the summer of 1899, by correspondence, placed in the hands of one J. W. Boswell, a real estate agent, and after a further correspondence, continuing over a period of three years, Lee was informed that the lot described in his deed was squarely ⁵⁹⁶ in Fourteenth street. Lee then made repeated efforts to get an amicable settlement of the matter with Laprade; but failing in this he instituted this suit for the purpose of rescinding the contract of purchase of the lot, and annulling the deed conveying the same to him, and for the recovery from Laprade of the purchase money he had paid for the lot, with interest thereon, etc.

The defendant, Laprade, demurred to the bill on the grounds that the plaintiff had a complete and adequate remedy at law, and that the city of Roanoke was not made a party defendant. The demurrer was sustained, but the plaintiff was allowed to file an amended bill, which he did, making the city of Roanoke, and Laprade's wife also, parties defendant, and setting out and alleging more definitely the circumstances constituting the mutual mistake under which Laprade and the plaintiff were laboring when the contract for the purchase of the lot was made. Laprade also demurred to this amended bill, which demurrer was overruled, and he thereupon filed an answer.

With his answer Laprade files and tenders to the plaintiff a deed bearing date June 4, 1904, purporting to convey from the land company and the defendants, Laprade and wife, the lot which Laprade claims that he in fact sold and intended to convey to the plaintiff, which deed, so tendered, conveys an entirely different lot from that conveyed to the plaintiff by the deed of October 17, 1890, to wit, a lot with a different number and in a different section of the Rogers & Fairfax

addition to the city of Roanoke, and far from answering the description in the deed of October 17, 1890.

The answer of Laprade does not specifically deny the allegation of the amended bill that plaintiff believed that he was buying the lot described in his deed, and that Laprade believed he was selling plaintiff another lot than the one described, thereby causing a mistake in the transaction concerning the purchase and sale of the lot, but claims that he, Laprade, through his agent, Wingfield, sold plaintiff another lot than the one described in ⁵⁹⁷ his deed, to wit, a lot fifty feet west of Thirteenth street; and this is the lot which the deed tendered with the answer conveys, and to which deed Aunspaugh, trustee, was not a party.

Depositions were taken both for the plaintiff and the defendant, Laprade, certain letters and other writings being filed with the depositions as evidence, and upon the hearing of the cause the circuit court refused to rescind the contract as prayed for in the original and amended bills, and dismissed the bills with costs to Laprade, but authorizing the plaintiff to withdraw from the papers in the cause the corrected deed, tendered with the answer of Laprade, for the lot, which the court decided that the plaintiff had purchased. It is from this decree that the case is brought here on an appeal.

The city of Roanoke filed no answer, as its rights were admitted in the bills and also practically admitted by appellee Laprade's counsel, viz., that the land embraced in Fourteenth street had been dedicated to and was the property of the city of Roanoke.

It is contended on behalf of appellee that the circuit court was without jurisdiction to grant the equitable relief asked in the bills filed in the cause.

This court is of opinion that this contention is without merit.

In 4 Minor's Institutes, fourth edition, 697, it is said: "In cases of plain mistake or misapprehension, though not the effect of fraud or contrivance, equity will rescind the conveyance, if the error goes essentially to the substance of the contract, so that the purchaser does not get what he bargained for, or the vendor sells that which he did not design to sell." On page 700 the same author says: "Thus, if A buys land of B, to which B is supposed to have a good title, and it turns out, in consequence of facts unknown alike to both parties, he has no title at all, equity will cancel the trans-

action and cause the purchase money to be restored to A, putting both parties in statu quo." To the same effect is Story's Equity Jurisprudence, p. 160 et seq.

In *Home B. & C. Co. v. London*, 98 Va. 152, 35 S. E. 362, ⁵⁸⁸ it was held that: "Where a grantor has made a mistake in the description of the property conveyed, which he is unable to correct, and which is material in its character, and affects the very substance of the transaction, the grantee is entitled to have the deed canceled and the purchase money paid refunded."

The relief sought in that case was very similar to the relief asked in this.

In *Rogers v. Pattie*, 96 Va. 498, 31 S. E. 897, it was held that: "A vendee of real estate may go into a court of equity on the ground of mutual mistake and recover for land lost, notwithstanding he has the right to proceed at law on his covenants for title." In that case there was only a misdescription of the property conveyed, but the court refused to rescind the contract because the mistake made did not affect the very substance of the thing contracted for. There was included in the deed in that instance a part of the public highway, which the vendor had no right to sell or convey, but the portion of the land sold by him embraced in the public highway formed only a small part of the land actually sold, and did not materially affect the value of the land which the vendee actually acquired by the deed; therefore this court remanded the cause, with direction to the lower court to ascertain and allow the vendee just compensation for the land lost by superior title, the opinion saying: "It now being settled in this state that notwithstanding the vendee's right to proceed at law upon his covenants for title, he has the right to go into a court of equity upon the ground of mistake, and recover compensation: *Blessing's Admrs. v. Beatty*, 1 Rob. 287; *Boschen's Exr. v. Jurgen's Exr.*, 92 Va. 756, 24 S. E. 390; *Hull v. Watts*, 95 Va. 10, 27 S. E. 829."

The remaining question is, whether upon the facts proved, the appellant is entitled to the relief asked in his bill and amended bill.

If Wingfield, the agent of appellee Laprade, did, as a matter of fact, show appellant the lot in Fourteenth street and sell it to him, as appellant claims, then he (Wingfield) admittedly did ⁵⁸⁹ so through mistake, and the contract should be rescinded and the purchase money restored to appellant, thus

placing the parties in statu quo, especially in view of the fact that it appears that even if appellee Laprade's claim that he in fact sold appellant a different lot be true he does not tender to appellant with his answer a deed conveying a good title to that lot, inasmuch as the title to it came from Aunspaugh, trustee, to appellee Laprade, and Aunspaugh, trustee, is not made a party to the deed tendered. The deed (and only deed, so far as this record discloses) made by Aunspaugh, trustee, to appellee Laprade, conveys the lot in Fourteenth street, and conveys no interest whatever in lot No. 1, section 61, in the Rogers and Fairfax addition to the city of Roanoke, which is the description of the lot conveyed by the deed tendered with Laprade's answer. The lot in Fourteenth street is unmistakably the lot described and conveyed in the deed from Laprade to appellant, and there is no denial of this fact; nor is there any denial of the fact that the land conveyed was prior to the conveyance dedicated to the city of Roanoke as a street. So that the land lost from the lot conveyed affected the very substance of the thing contracted for by appellant, and not merely an immaterial part of such substance. In this we have prima facie proof that appellant's contention was correct, and the burden was on appellee to show as a matter of fact that Wingfield sold appellant a different lot from the one described in the deed.

This he has failed to do. Wingfield, testifying in behalf of appellee Laprade, gives as one of his reasons for believing that he showed appellant lot No. 1 in section 61 of the Rogers and Fairfax addition, that it was a larger lot than the other lots, and he was anxious to sell appellant a bargain. Upon reference to the plot in the record, which is admitted to be an exact copy of the survey made by Wingate, city engineer of Roanoke, it is seen that his lot is not only no larger than the other lots, but that it is actually smaller—in fact it is shown to be the smallest lot on the plat. The witness (Wingfield), testifying fourteen ⁶⁰⁰ years after the transactions had with appellant, does not speak in positive terms, but uses such expressions as "I think so," "If I recollect correctly," "I am still under the impression," etc. That his recollection is poor and his statements unreliable is shown from the fact that he is in error about the very things he states most positively, and upon which he principally relies to bear out

his statement that he sold appellant lot No. 1 in section 61 of Rogers and Fairfax's additions. For instance, he says Fourteenth street had been laid off and graded, and had been scraped, and that he could not have made any such mistake unless doing it intentionally; whereas he is contradicted in this by every witness who testified on the point. The uncontradicted proof is that Fourteenth street was never marked off, except by a plowed furrow on either side, and that shortly thereafter grass had grown up to such an extent that a casual observer would not take any notice of these furrows. Boswell, a witness for appellee Laprade, and a real estate agent whom appellant had requested to sell his lot, had a survey made of it, as described in appellant's deed, in September, 1899, and neither he nor the city engineer who made the survey discovered at that time that it was a street; and in answer to the question, "At this time, then, no street had been run through this lot, and, so far as you know, no street has been run through it now; is that correct?" said "That is correct." Hawkins, another witness for appellee Laprade, expressly says that it had not been graded, but was merely indicated by a plowed furrow. Walker, who at the time of the sale to appellant was working for Wingfield, says: "At that time it [Fourteenth street] was in grass, and the lots adjoining it were in grass"; and in answer to the question "Was there any street opened across it at that time?" said, "No, sir."

We do not deem it necessary to pursue this evidence further. In our view of it the conclusion therefrom is irresistible that appellant believed at the time that he was purchasing the lot which was conveyed to him by the deed of October 17, 1890, ⁶⁰¹ which lot is included almost entirely within the limits of Fourteenth street, and that appellee Laprade believed at the time that he was selling to appellant an entirely different lot, which appellant had not seen and would not have bought had it been shown to him; and that the deed of October 17, 1890, by mistake, conveyed to appellant a lot which appellee Laprade had no right to convey, the greater portion thereof having been theretofore dedicated to the city of Roanoke as a street. Under these circumstances, clearly, that deed should be set aside and annulled, and appellant should recover from appellee Laprade the purchase money paid therefor.

It appears that the purchase money was paid partly in cash and partly by the assumption of certain debts secured on the

lot supposed by appellee Laprade to have been conveyed, and the residue was secured by a deed of trust; and that the deferred payments thus secured, as well as the debts assumed by appellant, were thereafter paid by him, but when these payments were made does not appear from the record.

Upon the question as to the time from which appellant would be entitled to interest on the money which he should recover from appellee Laprade, the authorities cited on his behalf in support of the contention that he should recover interest from the date the purchase money was paid do not apply. They are cases which hold that upon breaches of the warranty of title the vendee is entitled to the amount of the purchase money paid by him with interest from eviction and costs. The principle governing here is that where money has been paid and received under a mutual mistake of fact, and no fraud or misconduct can be imputed to the party from whom the money is sought to be recovered, interest will not be allowed except from the time when the mistake was discovered and demand made: *Craufurd's Admr. v. Smith's Exr.*, 93 Va. 623, 23 S. E. 235, 25 S. E. 657. See, also, 22 Am. & Eng. Ency. of Law, 2d ed., 627, and authorities cited in note.

Among the authorities there cited is *Talbot v. National Bank*, 129 ⁸⁰² Mass. 67, 37 Am. Rep. 302, in which the opinion says: "Interest on the amount paid by the plaintiffs is recoverable only as damages for the wrongful detention of the money by the defendant. Nothing in the facts agreed shows that the plaintiffs made any demand for the money before bringing suit. Under these circumstances interest should be computed from the date of the writ only."

In this case the bill alleges, and the allegation is not denied, that the demand was made on the — day of —, 1903; so that it would not be possible for this court to do more than determine that appellant is entitled to recover of the appellee, Laprade, the consideration named in the deed of October 17, 1890, namely, seven hundred dollars, and remand the cause to the circuit court with direction to ascertain the exact date upon which the demand was made by appellant upon appellee Laprade for the return of the said seven hundred dollars; and, upon this being ascertained, to make its decree canceling and annulling the deed of October 17, 1890, and authorizing appellant to recover of appellee Laprade the sum of seven hundred dollars, with interest thereon from the

date upon which appellant made demand upon appellee La-prade therefor.

It follows that the decree appealed from must be reversed and the cause remanded to be further proceeded with in accordance with this opinion.

Mistakes for Which Written Instruments may be Canceled are discussed in the recent note to Steinmeyer v. Schroepel, ante, p. 227.

Avoidance of Contracts on the Ground of Mistake is discussed in the notes to Miles v. Stevens, 45 Am. Dec. 631; Alabama etc. Ry. Co. v. Jones, 55 Am. St. Rep. 494.

UNITED STATES MINERAL COMPANY v. CAMDEN & DRISCOLL.

[106 Va. 663, 56 S. E. 561.]

CORPORATIONS—Right to Purchase Their Own Stock.—Corporations may purchase, hold and sell shares of their own stock, provided they act in good faith and without intent to injure their creditors. (p. 1029.)

APPELLATE PRACTICE—Review of Evidence.—The only way in which the evidence can be subjected to review on appeal as to the action of the trial judge in granting and refusing instructions, or in overruling a motion for a new trial, is by proper bill of exceptions. (p. 1080.)

S. A. Hall and S. S. P. Patteson, for the plaintiff in error.

J. R. Moss, Hubbard & Gayles and F. C. Moon, for the defendants in error.

684 HARRISON, J. This action was instituted by the plaintiffs, Camden & Driscoll, against the United States Mineral Company, to enforce the payment of a balance of \$2,500, alleged to be due them from the defendant company. The declaration avers that the plaintiffs sold to the defendant company a tract of twenty acres of land for the agreed price of \$5,000; that of this sum the defendant paid \$2,500 in cash, and for the residue delivered to the plaintiffs certificates for twenty-five shares of its capital stock of the par value of \$100 per share, upon the promise and agreement on the part of the defendant company that within four months from the date of such agreement, to wit, the twelfth day of March, 1903, it would redeem and purchase the stock so issued to the

plaintiffs at its face value, and thereby pay the \$2,500 balance of purchase money due for the land sold. The plaintiffs further aver that relying upon this promise and agreement, which was made as an inducement thereto, they parted with their title to the twenty acres of land by delivering to the defendant a deed therefor; "yet the defendant, not regarding its undertaking and promise, but contriving and intending to deceive and defraud the plaintiffs, hath not performed its promise to pay the plaintiffs the balance of \$2,500 of purchase money, or any part thereof."

There was a demurrer to the declaration, and the grounds of demurrer being called for by the plaintiff, they were specified in writing to be "that a corporation has no authority to purchase its own stock; that the contract set out in the first, second and fourth counts of the declaration is an unlawful contract and a fraud upon the other stockholders; and for divers other causes." Only the grounds of demurrer pointed out in this written specification can be considered here, it being the function of this ^{case} court to pass upon the very case which was before the lower court.

As to the last ground mentioned it is sufficient to say that there is nothing on the face of the declaration to suggest that the contract set out is unlawful or in any particular a fraud upon the stockholders of the defendant company.

The broad proposition contained in the first ground of demurrer, that a corporation has no power to purchase its own stock, is wholly untenable. In the absence of charter or statutory prohibition, it is well settled, indeed the prevailing doctrine in the United States, that corporations may purchase, hold and sell shares of their own stock, provided they act in good faith and without intent to injure their creditors: *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 19, 46 Am. Dec. 183; *Shoemaker v. Washburn L. Co.*, 97 Wis. 585, 73 N. W. 333; *Republic L. Ins. Co. v. Swigert*, 185 Ill. 150, 25 N. E. 680, 12 L. R. A. 328; *Rollins v. Shaver Wagon Co.*, 80 Iowa, 680, 20 Am. St. Rep. 427, 45 N. W. 1037; *Dock v. Schlichter Jute Co.*, 167 Pa. 370, 31 Atl. 656; *Blalock v. Kernersville M. Mfg. Co.*, 110 N. C. 99, 14 S. E. 501.

In the light of these authorities there can be no question that the defendant had the power to purchase its own stock under the circumstances of the case stated in the declaration, and therefore the demurrer was properly overruled.

The other assignments of error, which are to the action of the circuit court in giving certain instructions, and in refusing to set the verdict, in favor of the plaintiffs, aside as contrary to the law and the evidence, cannot be considered by this court, for the reason that the evidence, which must be looked to in connection with each of such assignments, has not been made a part of the record by a bill of exception. There is printed with the record, beginning on page 31 and ending on page 163, a statement purporting to be the evidence offered by the plaintiffs and defendant, at the end of which is the following certificate by the judge presiding at the trial: "I hereby certify ~~see~~ that the foregoing is all the evidence in this case." How or when this statement got among the papers of the case nowhere appears. It is not made the subject of a bill of exception. It is not referred to or mentioned in any of the bills of exception taken in the case; nor is it identified in any way by being attached to a bill of exceptions, or otherwise.

The only way in which the evidence or the facts proved before a jury can be made a part of the record is by a bill of exception. This subject has been so often adverted to in the opinions of this court that it ought to be well understood; and yet the frequency with which the question is raised in this court that the evidence has not been made part of the record by a proper bill of exception shows a lack of care in the preparation of records for an appeal that is greatly to be regretted. The object of the institution of bills of exception was to enable a party to spread upon the record the matters that occurred at the trial. Unless this is done, the case shows nothing but the process, the pleadings, the verdict and the judgment: *Bowyer v. Chestnut*, 4 Leigh, 1, 5; 4 *Minor's Institutes*, 728, 729, 742, 743.

In the recent case of *West v. Richmond Ry. etc. Co.*, 102 Va. 339, 46 S. E. 330, this court said: "All presumptions are in favor of the correctness of the judgment of the court below and against the exceptor, and unless a proper bill of exception is taken, setting forth specifically and definitely the allegation of error relied on, and so much of the evidence as is necessary to enable the appellate court to pass intelligently upon the question raised, the judgment of the trial court must be sustained. The plaintiff in error having failed to observe that requirement by having the evidence at the trial incorporated in the record, this court has nothing before it upon which to base an opinion with respect to the rulings of the court in the

particulars complained of": Citing numerous decisions of this court to the same effect. In that case it is also said, with respect to the suggested hardship of disposing of the case in the absence ⁶⁹⁷ of the evidence, that this court is not responsible for the omission, and is powerless to supply the deficiency. In the practical administration of justice courts must be satisfied to enforce the law as they find it. They cannot undertake to prevent hardship in particular cases by a departure from established principles.

For these reasons the judgment of the circuit court must be affirmed.

A Corporation may, under ordinary circumstances, purchase its own stock: See the note to *Commercial Nat. Bank v. Burch*, 33 Am. St. Rep. 339; *Wisconsin Lumber Co. v. Greene etc. Tel. Co.*, 127 Iowa, 350, 109 Am. St. Rep. 387. Compare *Adams etc. Co. v. Deyette*, 8 S. Dak. 119, 59 Am. St. Rep. 751. The general rule on this question is this: A private corporation may purchase its own stock if the transaction is fair and in good faith free from actual or constructive fraud, provided the corporation is not insolvent or in process of dissolution, and the rights of its creditors are in no way affected by the purchase: *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 101 Am. St. Rep. 569; *Hall v. Henderson*, 126 Ala. 449, 85 Am. St. Rep. 53.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

BUCKEYE BUGGY COMPANY v. MONTANA STABLES.

[43 Wash. 49, 85 Pac. 1077.]

CONTRACTS—Severability—Parol Evidence to Vary.—If a contract for the sale of two articles for one sum is entire, the acceptance of one amounts to the acceptance of both, and parol evidence is not admissible to explain the consideration. (p. 1035.)

CONTRACTS—Severability.—If several articles are sold for a single and entire consideration, the contract of sale is entire and cannot be severed, except by agreement of the parties, but, on the other hand, if several articles are sold, and a separate price is agreed upon for each, although a single instrument of transfer may be executed reciting a single consideration for the whole, then for sufficient cause shown, the contract may be rescinded as to a part and enforced as to the remainder. (p. 1035.)

CONTRACTS—Severability—Parol Evidence.—If two articles are sold at the same time and the contract recites a single consideration for both, parol evidence is admissible to show that a separate price was agreed upon for each. (p. 1036.)

CONTRACTS—Evidence of Parol Contemporaneous Agreement.—A written contract entered into with an agent for the purchase of two articles, reciting that no agreement should be recognized unless written therein, and that no verbal agreement should be recognized, cannot be varied by evidence of a contemporaneous oral agreement. (p. 1036.)

G. M. Emory and J. F. Murphy, for the appellant.

Emmons & Emmons and H. T. Granger, for the respondent.

⁴⁹ **RUDKIN, J.** On the fifth day of December, 1902, the defendant executed and delivered to the plaintiff the following written order:

(1032)

BUCKEYE BUGGY CO., Columbus, Ohio

Seattle, Wash., Dec. 5, 1908

Please ship March 15, 1909, or as soon thereafter as possible, the following work, in accordance with description, etc. in your catalogue, boxed and aboard cars at Columbus, Ohio:

ALL ORDERS TAKEN SUBJECT TO APPROVAL OF HOME. No agreement or consideration will be recognized unless WRITTEN upon this blank. Our responsibility ceases upon delivery to R. K.

ROUTING										TERMS: \$300 Cash Balance, \$100 a mo. till paid	
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How Many	Style	Top	Track	Pole or Shafts	Wheels		Axle	Trimming	Mounting	Price of each	Painting	Remarks
					Size	Band or Patent						
1	265	Top	Reg.	Pole	Reg.	B	Reg.	Gr. Lash				
1	278	Open	"	"	"	"	"	"				16 in. Extension Kelly tire. Wains regular white tire Dont waste till car broke 1600.00 N.Y. Red Body to correspond Ice Chest Horn - Lead Bars

Name Montana Stables
Phone Main 750

ORDER NO. _____

Everything must be written on this order, as no verbal agreements or promises will be recognized.

THIS ORDER NOT SUBJECT TO COUNTERMANT.

GEORGE BARR (signed) MONTANA STABLES, INC.

SALISBURY VAN BASS

By J. W. Coleman, Manager

⁵¹ This action was brought to recover the contract price of the two vehicles therein described and of certain extras ordered at the same time. The claim for extras was abandoned at the trial and will not be further considered. The complaint alleged the execution and delivery of the order; that in the month of April, 1903, the two vehicles were shipped and delivered to the defendant; and that no part of the purchase price of \$1,600 had been paid, except the sum of \$181.25. The amended answer put in issue the allegations of the complaint, except the existence of the corporation, the ordering of sundry articles, and the payment of \$181.25. The answer, also, contained an affirmative defense in which it was alleged that the contract between the plaintiff and the defendant was partly in writing and partly oral; that the written part of the contract was as set forth in the above order, and that at the time of the execution of the order and as a part thereof, it was orally agreed as follows: That the style No. 265 in the written order was to be a brougham for use in the livery business in the city of Seattle, which should accommodate four persons with comfort, and was not to be a three-quarter sized brougham, such as is commonly used by physicians and private families; that the brake should not be a stiff bar brake and should not be placed upon the front wheels of the vehicle; that the fifteen inch extension should be measured from the edge of the front seat in the middle thereof to the nearest part of the cushion back of the front seat. It was further alleged that it was understood and agreed that the figures "1600" appearing in the order were the totals of the separate sums agreed upon as the purchase price of the two vehicles, and that \$900 was the agreed price of the brougham, and \$700 the agreed price of the coach.

It was further alleged that, on or about April 10, 1903, the defendant was informed that the brougham being manufactured by the plaintiff was not according to contract, and the defendant thereupon wired the plaintiff countermanding the order as to the brougham and refusing to accept the same, ⁵² because it was of three-fourths size and because the fifteen inch extension was not being constructed according to contract. It was further alleged that, notwithstanding the countermand of the order, the plaintiff shipped the brougham and coach in May, 1903, consigned to the order of the defendant at Seattle; that the defendant thereupon examined the vehicles and finding the coach according to order accepted

the same, but the brougham did not conform to the contract in the following particulars: It was three-fourths size and not full size, and would not accommodate four persons with comfort; it did not have the fifteen inch extension, and the wheels did not have the regulation track, and it was equipped with the stiff bar brake. For these reasons the defendant refused to accept the brougham and actually rejected the same, storing it in the city of Seattle subject to the order of the plaintiff, and immediately notified the plaintiff of such rejection. The reply denied the affirmative portions of the answer. The court granted a judgment in favor of the plaintiff on the pleadings for the full amount, and from this judgment the defendant appeals.

Two questions are naturally presented by the appeal: 1. Was the order in question so far an entire contract as to preclude the appellant from alleging and proving that a separate consideration was agreed upon for each of the vehicles? And 2. In the absence of fraud or mistake, should the appellant be permitted to vary the terms of the written order by parol testimony tending to show a contemporaneous oral agreement? If the contract in suit was entire, and parol testimony was incompetent to explain the consideration, the judgment must be affirmed, as an acceptance of one vehicle would in law be equivalent to the acceptance of both. If, on the other hand, it was competent for the appellant to show that the contract was in fact severable, the judgment must be reversed, as a sufficient deviation from the written contract was alleged to warrant the appellant in refusing to accept the brougham.

⁵³ We believe it to be a rule that if several articles are sold for a single and entire consideration, without any apportionment of the purchase price as between the several articles, the contract of sale is entire and cannot be severed, except by agreement of the parties. On the other hand, if several articles are sold, and a separate price is agreed upon for each, although a single instrument of conveyance may be executed reciting a single consideration for the whole, yet, for sufficient cause shown, the contract may be rescinded as to a part and enforced as to the remainder. This is well illustrated by the case of *Miner v. Bradley*, 22 Pick. 457. In that case the plaintiff bid off a cow and four hundred pounds of hay at public auction for the sum of seventeen dollars without any apportionment of the purchase price. The court held

the contract entire, but distinguished the contract from such a contract as we have suggested in the following language: "Where a number of articles are bought at the same time, and a separate price agreed upon for each, although they are all included in one instrument of conveyance, yet the contract, for sufficient cause, may be rescinded as to part, and the price paid recovered back, and may be enforced as to the residue. But this cannot properly be said to be an exception to the rule; because in effect there is a separate contract for each separate article." Again, "Had the plaintiff bid off the cow at one price and the hay at another, although he had taken one bill of sale for both, it would have come within the principles of the above case. [Referring to *Johnson v. Johnson*, 3 Bos. & P. 162.] But such was not the fact."

In *Aultman & Taylor Co. v. Lawson*, 100 Iowa, 569, 69 N. W. 865, the court held that, although a threshing outfit was sold for "one lump sum," yet it was competent to show that a separate price was agreed upon for each of the several parts, saying: "True, the consideration is stated in 'one lump sum,' but the evidence shows that the sum was the aggregate of prices agreed upon as to the different parts. The contract does not ⁶⁴ show the prices on the different parts, but, being silent on that subject, it was competent to prove what the agreement was in that respect, such proof not being in contradiction of the contract." To the same effect see *Field v. Austin*, 131 Cal. 379, 63 Pac. 692.

On the second question we are clearly of opinion that the order or contract cannot be modified or varied by parol testimony as to a contemporaneous oral agreement. The rights of the parties must therefore be determined by the written contract, except in so far as the appellant should be permitted to prove that a separate consideration was agreed upon for each vehicle, and that the brougham was not accepted by it and did not conform to the written order.

The judgment is therefore reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Mount, C. J., Hadley, Crow, Dunbar and Root, JJ., concur.

The Admissibility of Parol Evidence to add to or vary a written instrument is discussed in the note to *Harris v. Murphy*, 56 Am. St. Rep. 659. As a rule, parol evidence is not admissible to show what was the consideration of a contract and the understanding of the parties thereto, if the object of such evidence is to contradict a

written obligation and give to it an effect inconsistent with its terms: *Sandage v. Studebaker Bros. Mfg. Co.*, 142 Ind. 148, 51 Am. St. Rep. 165.

As to What Contracts are Entire and what severable, see the notes to Hayett & Smith Co. v. Chicago Edison Co., 59 Am. St. Rep. 277; *Gill v. Benjamin*, 54 Am. Rep. 624.

FOX v. CITY OF SEATTLE.

[43 Wash. 74, 36 Pac. 379.]

ELECTION FOR BONDS—Three-fifths of Voters.—A constitution providing for the assent of three-fifths of the voters therein, voting at a municipal election to be held for that purpose, authorizing a bond issue, and a city charter providing for the assent of three-fifths of the voters voting on such question at such election, require only three-fifths of the voters actually voting on such question, although the vote may have been taken at a general election, at which many persons voting for public officers cast no vote on the bond question. (p. 1042.)

J. H. Powell, for the appellant.

S. Calhoun and F. B. Conway, for the respondent.

75 DUNBAR, J. This action was brought by the plaintiff to enjoin the defendant from issuing one million one hundred thousand dollars of municipal bonds, six hundred thousand dollars to provide funds for extensions to the municipal lighting plant of the city, and five hundred thousand dollars to provide funds for the purchase of property for park purposes. The defendant city claims to be authorized to issue said bonds by virtue of an authority conferred upon it by the electors of the city at the last general election, in the month of March last, at which election the proposition of the issuance of these bonds for the above purposes was submitted to a vote of the people. It is conceded that the city has a right to issue the bonds in question, provided the proposition received the requisite vote at that election; so that the sufficiency of the vote cast in favor of the bonds is the only question for discussion here. The lower court sustained a demurrer to both causes of action, and the plaintiff elected to stand upon his complaint. The court thereupon rendered final judgment for the defendant. From such judgment this appeal is taken.

⁷⁶ It is alleged in the complaint, and is conceded, that each of the propositions submitted received the assent of three-fifths of the voters voting upon that proposition, and that neither of the propositions received the assent of three-fifths of all the voters voting at the general election. So that the question presented is, in order to legalize the issuance of the bonds, Was it necessary that three-fifths of all the votes cast at said election should be cast in favor of said issuance, or was three-fifths of the votes of the voters voting upon the particular proposition submitted sufficient? This question depends upon certain provisions of the constitution and of the charter of the city of Seattle. Article 8, section 6, of the state constitution provides, among other things, as follows: "No county, city, town, school district or other municipal corporation, shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of three-fifths of the voters therein voting at an election to be held for that purpose."

And section 30 of article 4 of the charter of the city of Seattle provides as follows: "When loans shall be created exceeding one and a half per centum of the taxable property in the city, and bonds therefor issued by the city under this charter, the city council, in authorizing and providing for the same shall direct the times and manner of payment and rates of interest, but no such bonds shall be issued except as provided by law, nor unless the proposition for creating such indebtedness shall have been previously submitted to the electors of the city at a regular, general or special election, of which thirty days' notice shall have been published in the city official newspaper, and such proposition shall have then received the assent of three-fifths of the voters voting at such election."

It will thus be seen that the constitution provides for the assent of three-fifths of the voters therein voting at an election to be held for that purpose, and that the charter provides for the assent of three-fifths of the voters voting at such election. ⁷⁷ It is the earnest contention of the appellant that the only construction that can be given to such charter provision is that the proposition must receive three-fifths of all the votes cast at such election, whether cast upon the bond proposition, or for the election of mayor, or any other propo-

sition which is submitted to the voters at such general election; and that, inasmuch as three-fifths of all the votes cast at the general election on all propositions were not cast in favor of the bond proposition, such proposition was lost; and many cases are cited in support of this contention. It is conceded, however, that under the constitutional provision which prohibits the incurring of the indebtedness in question without the assent of three-fifths of the voters therein voting at an election to be held for that purpose, the language of the constitution is satisfied if three-fifths of the voters voting at a special election assent to the issuance of the bonds, although a less number than three-fifths of the qualified electors of the city assent thereto. So that we will not further notice this proposition, but will determine whether or not the charter provision, which, if the appellant's contention is correct, places a still further limitation upon the right of the city than does the constitution, is satisfied by an affirmative vote of three-fifths of the voters voting upon such proposition at a general election.

Of course, if the vote were taken at a special election called only for the purpose of voting upon such bonds, this question could not arise, and a three-fifths vote would unquestionably be sufficient to warrant the issuance of the bonds. Courts are, and of right ought to be, reluctant to defeat the fair expression of the popular will manifested by the voters at an election, the express and only object of which is to ascertain the popular will, and such expression will be upheld and made effective unless the law which defeats it is so plain and unequivocal that it is susceptible of but one construction, in which case the court is powerless to do otherwise than give legal effect to its provisions. We do not think, however, that such a case is presented by the provisions of the city charter ⁷⁸ above set forth, especially when construed with reference to the constitutional provisions relating to the same subject. And courts will, if possible, consistently with the proper canons of construction, construe the provisions of the charter to be in harmony with the constitution, rather than in opposition to or in any way limiting its provisions. It seems to us that there is no real difficulty in reconciling the charter with the constitutional provision, when we take into consideration the probable object of the charter provision, and consider what the language employed therein had reference to.

It will be observed that the constitution requires propositions of this kind to be submitted to a vote at an election to be held for that purpose. This is, in effect, providing a special election for the submission of questions of this kind, and if all the requirements of a special election are met, as we understand they were met in this case, by giving proper notice, etc., the fact that for the sake of economy the election was held on the same day that a general city election was held, and that the same ballots were used, does not make it a general election, or take it out of the provision of the constitution above quoted, viz., that such proposition must be submitted at an election to be held for that purpose; but that the election on the special proposition being so held is merely an incident not affecting in any manner its distinct purpose or character. The constitution, it will be quoted, does not provide for either general or special elections so termed, but provides only for an election to be held for that purpose, and that purpose, of course, is a special purpose. The provision in the charter that such proposition shall have then received the assent of three-fifths of the voters voting at such election, construed with reference to the constitutional provision, evidently means three-fifths of the voters who are expressing an opinion on the question discussed in the ordinance; and the question discussed in the ordinance was the question of the loan and the issuance of the bonds. This was not an ordinance providing for a general election, and ⁷⁰ discussing propositions with relation to other phases of such election and other propositions upon which the citizens were called upon to vote, but the whole subject matter discussed was the subject of the loan and the issuance of the bonds. When the ordinance continuing says, "and in case such three-fifths of the voters are in favor of such loan, the city council may," etc., it evidently refers to the three-fifths of the voters voting upon the proposition under discussion; and while the language employed might under some certain circumstances be subject to another construction, it does not preclude the construction which we have placed upon it.

The result of the construction contended for by appellant, instead of making the test of the will of the people certain, would make it uncertain and dependent upon circumstances unconnected with the expression of the people on this subject. This thought is clearly expressed by the learned judge who tried this cause, in the following words: "A different

rule would lead to some novel and certainly unexpected results. The council had power to submit such question at either a general or a special election. At a special election the question whether the proposition had been carried would necessarily be determined solely by counting the votes for and against it. At a general election it would inevitably be determined in part, at least, by the vote upon some other or possibly a dozen wholly different matters. So that the rule for ascertaining whether a given proposition had been adopted or not would not be the fixed rule prescribed by the constitution, nor even by a definite rule found in the charter, but by a variable measure dependent partly on the charter and partly on the action of the council. Such was certainly not the intention of the constitution, nor, as I conceive, could it have been contemplated by the makers of the city charter."

We have not overlooked the large list of authorities cited by the appellant, notably the cases from California, but from an examination of them it is ascertainable that most of them, at least, were decided under provisions of the constitution⁸⁰ and charter provisions different from the ones under discussion, and many of the cases cited in those cases with approval where the decisions were in harmony with this decision cannot be distinguished from the case at bar. Some few cases we think are in point, but it does not seem to us that the reasoning is logical or the conclusions reached necessary. But the many cases decided by this court, while possibly the exact question discussed here was not raised, all tend to sustain the legality of the election called in question; and especially the case of *Metcalf v. Seattle*, 1 Wash. 297, 29 Pac. 1010. There it was held that the majority of three-fifths of the voters necessary to carry an election for the increase of municipal indebtedness, above one and one-half per cent of the assessment-roll, is three-fifths of those persons who actually vote at the election, and not three-fifths of all those who may have the right to vote thereat. In discussing this question, cases were approvingly cited which were as strong as the case at bar, notably the case of *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. Rep. 539, 28 L. ed. 517, where the United States supreme court construed a constitutional provision of the state of Mississippi, to the effect that the legislature should authorize no county to aid any railroad company unless two-thirds of the qualified voters of such county at a special election or regular election to be held therein

shall assent thereto, to mean two-thirds of the qualified voters present and voting at the election in favor of the proposition as determined by the official return of the result, the court in that instance saying: "In that connection a voter is one who votes; not one who, although qualified to vote, does not vote." It seems to us that the language of the Mississippi constitution, "unless two-thirds of the qualified voters of such county," etc., is as conclusive that all the qualified voters of the county must be counted as is the language of the charter provision in this case that all the voters voting at such election shall be counted. We said, in commenting upon that case: ⁸¹ "This decision of the supreme court but followed its earlier decisions in similar cases, viz.: *St. Joseph Township v. Rodgers*, 16 Wall. 644, 21 L. ed. 328, and *County of Cass v. Johnston*, 95 U. S. 360, 24 L. ed. 416. In the last-named case the constitution of Missouri prohibited townships from aiding railroad companies 'unless two-thirds of the qualified voters of the . . . town at a regular or special election to be held therein, shall assent thereto,' which is identically the same language, slightly transposed, as that of the Mississippi constitution, above quoted. But what was known as the 'township aid act' of Missouri, approved March 23, 1898, authorized townships to subscribe to the capital stock of railroad companies 'whenever two-thirds of the qualified voters of the township, voting at an election called for that purpose, shall vote in favor of the subscription'; and it will be noted that the language of this 'township aid act,' 'voters of the township voting,' is precisely the same as that of our constitution, 'voters therein voting.' In that case the parties and the court agreed in construing the meaning of the legislative provision to be what we hold it to be here, that the majority meant was a majority of those who voted."

In this case, we hold that the language "without the assent of three-fifths of the voters therein voting at an election to be held for that purpose" means at an election held for the purpose of voting upon this proposition, and not for the purpose of voting on manifold propositions that may be submitted at a general election; and that the fact that the election was held at the same time and with an election for other purposes does not affect in any manner the count on the number of votes cast for the purpose of determining the proposition submitted viz., the proposition of indebtedness. This contention is also in harmony with the spirit of the de-

cision rendered by this court in *Strain v. Young*, 25 Wash. 578, 66 Pac. 64, where it was held that a statute differing from the constitution, but which was enacted in pursuance of the constitution, must be held to mean the same as the constitution, and where it was further said: "If other voters, who had the opportunity to exercise the ⁸² power of the ballot, declined to do so, they cannot now complain upon any principle of right or justice. Voters should be sufficiently interested in the public welfare to go to the polls at the time of an election and vote upon the propositions submitted. If they fail to do so, then, under our interpretation of the constitution, those who actually do the voting upon propositions submitted must determine them."

The judgment is affirmed.

Mount, C. J., Crow, Root, Hadley, Fullerton and Rudkin, JJ., concur.

The "Majority of the Electors" referred to in a constitution as requisite to the ratification of an amendment thereto, means the majority of the electors voting upon the question of amendment, and not a majority of all the electors of the state or of those voting at the election: *Green v. State Board of Canvassers*, 5 Idaho, 130, 95 Am. St. Rep. 169, and see the cases cited in the cross-reference note thereto.

The Word "Elector," when used in a statute relating to the issuance of bonds by municipal corporations, and providing that they shall not be issued unless authorized by a majority of the electors, means voters who have registered so as to entitle them to vote at municipal elections or at any election held in pursuance of the laws and constitution of the state: *Green v. Village of Rienzi*, 87 Miss. 463, 112 Am. St. Rep. 449.

STATE v. CONSTANTINE.

[43 Wash. 102, 86 Pac. 384.]

INTOXICATING LIQUORS—Sale of to Minor by Agent.—A keeper of a saloon is guilty of selling liquor to a minor, although such sale was made by his barkeeper, while such saloon-keeper was away from his place of business and had no knowledge of the sale. (pp. 1044, 1045.)

TRIAL—Reopening Case.—The reopening of a case for further testimony after a motion by defendant for a directed verdict rests in the sound discretion of the court. (p. 1046.)

INTOXICATING LIQUORS—Sale of to Minor—Instructions. It is enough to instruct the jury that a saloon-keeper is responsible

for the acts of his barkeeper in selling liquor to a minor without instructing as to the theory of the prosecution, or with the theory of the law or its policy in such case, but a case will not be reversed because such instructions were given, when they were not prejudicial. (p. 1046.)

INTOXICATING LIQUORS—Sale of to Minor—Knowledge of Minority.—To hold a saloon-keeper guilty of selling liquor to a minor, it is sufficient that it be shown that he knew or had such information from his appearance as would lead a prudent man to believe that the buyer was a minor. (p. 1047.)

Dill & Thomas, for the appellant.

Crass & Corbin, H. Crass, J. D. Atkinson, attorney general, and E. C. Macdonald, assistant attorney general, for the respondent.

103 RUDKIN, J. The appellant was convicted of the crime of knowingly selling intoxicating liquors to a minor without the written consent of the parent or guardian, and from the judgment and sentence of the court this appeal is prosecuted.

The material facts are as follows: For some time prior to the twenty-sixth day of August, 1905, the appellant was the owner of a saloon in the city of Wenatchee, and was regularly licensed to sell intoxicating liquors by the municipal authorities. On the above date one James Dunlap, a bartender and servant of the appellant, sold a glass of beer to Norman Turner, a minor of the age of seventeen years, without the written consent of the parent or guardian of such minor. At the time of this sale the appellant was absent from the city of Wenatchee, and had no notice or knowledge of the sale. The fact that the sale was made through an agent appeared on the face of the information, and upon this ground a demurrer was interposed. The demurrer was overruled, and upon the trial the appellant offered to prove that he had instructed his bartenders and servants not to sell liquor to minors nor allow them in the saloon. To this offer an objection was interposed and sustained. At the close of the state's case, the appellant requested the court to instruct the jury to return a verdict of not guilty, for the reason that it appeared from the uncontradicted testimony that no sale had been made by the appellant, but the request was refused. At the close of all the testimony the appellant again requested the court to instruct the jury that they must find that the sale was made by the appellant before they could return a verdict of guilty, but his request was likewise refused. These several ¹⁰⁴ rulings gave rise to

the principal assignments of error, and may properly be considered together.

It is undoubtedly a general rule of law that there can be no crime without a criminal intent, and that one man is not criminally responsible for the acts of another, even though such other be his agent or servant, unless something more than the mere relation of master and servant is shown, but there are many exceptions to the rule. As said by the court in *People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270, 18 N. W. 365, speaking through Cooley, chief justice: "I agree that as a rule there can be no crime without a criminal intent, but this is not by any means a universal rule. One may be guilty of the high crime of manslaughter when his fault is gross negligence, and there are many other cases where mere neglect may be highly criminal. Many statutes which are in the nature of police regulations as this is impose criminal penalties, irrespective of any intent to violate them, the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible."

In *People v. Lundell*, 136 Mich. 303, 99 N. W. 12, the same court says: "The contention that the respondent is not responsible for the act of his barkeeper in keeping his saloon open, but that the barkeeper is the only offender, has been answered too often to leave it necessary to discuss the question at any length. The court has frequently held that this statute imposes upon the keeper of a bar or saloon the affirmative duty to see that it is closed during certain hours and on holidays, and that the neglect of this duty is an offense."

In *Carroll v. State*, 63 Md. 551, 3 Atl. 29, the court said: "When the agent, as in this case, is set to do the very thing which, and which only, the principal's business contemplates, namely, the dispensing of liquors to purchasers, the principal must be chargeable with the agent's violation of legal restriction on that business. His gains are increased, and he must bear the consequences. The fact that he has given orders not to sell to minors only shows a bona fide intent to obey the ¹⁰⁵ law, which all the authorities say is immaterial in determining guilt": See, also, *State v. Kittelle*, 110 N. C. 560, 28 Am. St. Rep. 698, 15 S. E. 103, 15 L. R. A. 694; Wharton on Criminal Law, 10th ed., sec. 1503, and cases cited. There was, therefore, no error in the several rulings complained of.

When the state first rested its case, the appellant interposed a motion for a direct verdict. The court thereupon reopened

the case and permitted the state to offer further testimony. This ruling is assigned as error. The reopening of a case for further testimony after a motion of this kind has been interposed rests in the sound discretion of the trial court, and no abuse of discretion is shown here.

Exceptions were taken to nearly all of the instructions of the trial court, twenty-two in number. The second instruction excepted to merely sets forth the charge in the language of the information. The seven succeeding instructions are of similar import. The fourth and fifth are fair samples of the rest, and are in the following language:

"4. This prosecution proceeds upon the theory that the physical and mental identity of Dunlap, the servant, is merged in that of Constantine, the master, that these two persons are, for the purposes of the law, but one person, and that that person is Constantine, the master. In other words, that where Dunlap sells liquor for Constantine, under a liquor license issued to Constantine, that Dunlap's hand is Constantine's hand, that Dunlap's mind is Constantine's mind, and that Dunlap's acts and knowledge are Constantine's acts and knowledge.

"5. This theory of the law is based upon the doctrine that where a license to sell liquor is granted to A no one whomsoever has any lawful right to sell any liquor whatever under such license except A himself, and that if he desires to relieve himself from giving personal attention to the business by employing B to do it for him, and thus sets B to doing that which the law only authorizes A to do, then it can only be lawfully permitted on the theory that B, in legal contemplation becomes A himself, for if it were otherwise ¹⁰⁸ B would violate the law as well when he sold to persons entitled to buy as when he did not."

These requests should have been refused. The jury had no concern with the theory of the prosecution, or with the theory of the law or the policy of the law. It was enough for them to know that the saloon-keeper is responsible for the acts of his bartender, and this they might have been told in a single sentence. But while the instructions were out of place and might better have been omitted, we cannot see that they were prejudicial.

The tenth instruction correctly states the issue in the case. The twelfth instruction relates to the presumption of innocence and is, we think, free from objection. The thirteenth

instruction defines a reasonable doubt in substantially the language of this court. The fourteenth, fifteenth and sixteenth instructions defined the term "knowingly" as used in the statute. The substance of these instructions is that if Dunlap knew that Turner was a minor, or had such information, from his appearance or otherwise, as would lead a prudent man to believe that he was a minor, and if followed by inquiry must bring knowledge of that fact home to him, then the sale was made knowingly; and we think this is a correct statement of the law.

The evidence is sufficient to sustain the verdict, and the judgment is accordingly affirmed.

Mount, C. J., Fullerton, Hadley, Dunbar, Crow and Root, JJ., concur.

A Licensed Liquor Dealer is Criminally Liable for the unlawful sale of intoxicants to a minor: Snider v. State, 81 Ga. 753, 12 Am. St. Rep. 350; and the fact that the sale is made without his knowledge and contrary to his instructions is no defense: State v. Kittelle, 110 N. C. 560, 28 Am. St. Rep. 698. Compare, however, Commonwealth v. Stevens, 153 Mass. 421, 25 Am. St. Rep. 647.

One Who Sells Liquor to a Minor, though innocently ignorant of the fact of minority, incurs the penalty of the law forbidding such sales: See People v. Curtis, 129 Mich. 1, 95 Am. St. Rep. 404, and cases cited in the cross-reference note thereto.

SULLIVAN v. WOOD & COMPANY.

[43 Wash. 259, 86 Pac. 629.]

MASTER AND SERVANT—Negligence—Safe Appliances.—A servant has the right to rely upon the safety of the appliance selected and adjusted by his master, accompanied with assurances as to its sufficiency, the immediate placing and adjustment having been made while the servant was otherwise engaged, and he being immediately thereafter called to action in doing the work directed; and if an injury happens to the servant traceable to such acts of the master, he is guilty of negligence. This is a question for the jury to determine. (p. 1050.)

MASTER AND SERVANT—Contributory Negligence of Servant.—If a servant assisting in the construction of a gas-tank is required to stand upon a narrow walk-around, twenty-six feet above the ground, and underneath a girder that is being raised, and while thus employed, and while he could not look up all the time, is injured by the falling of a wedge used to adjust the girder, and placed in position by the master, the question of the contributory negligence of the master is for the jury. (p. 1050.)

MASTER AND SERVANT—Assumption of Risk.—The defense of assumption of risk is sustained when it is shown that the danger to the servant was so open, obvious, and apparent that a man of ordinary care and prudence, with the same knowledge and experience as such servant had, surrounded by similar conditions, would not have taken the chance or risk of injury. (p. 1051.)

MASTER AND SERVANT—Vice-principal.—If one who occupies the place of a master undertakes to perform an act, it is the act of the master for which he is liable, and his representative is not transformed into a fellow-servant, merely because he assumed to do a thing that might have been done by a fellow-servant. (p. 1052.)

MASTER AND SERVANT—Safe Appliances—Command of Vice-principal.—If, after objection by the servant as to the safety of the appliance in use, he is assured of its safety by a vice-principal, and directed and commanded to do what he was doing at the time he was injured, the master is liable. (p. 1052.)

MASTER AND SERVANT—Safe Appliances—Vice-principal. An instruction that it is the duty of the master to furnish proper and suitable appliances and to see that they are properly adjusted, and that anyone to whom the master delegates such duty becomes for such purpose the vice-principal, for whose negligent act the master is liable, is proper if amply qualified with reference to the facts in the particular case. (p. 1053.)

T. L. Stiles, for the appellant.

Ellis & Fletcher and R. E. Evans, for the respondent.

²⁶⁰ HADLEY, J. This is an action to recover damages for personal injuries. The complaint alleges that the defendant was engaged in constructing a gas-tank for a gas company in the city of Tacoma, and that the plaintiff was employed to assist in the work; that there was built around the tank and as a part of it about twenty-six feet from the ground, a platform arrangement, known as a "walk-around," about two and one-half feet in width; that plaintiff and other employés of defendant were upon said walk-around, and were directed to assist in hoisting therefrom an iron girder, the girder being so constructed that it required a wedge to be used to hold it open and in place while hoisted ready for subsequent adjustment; that for said purpose the defendant threw upon the walk-around where plaintiff was standing, a wedge, but that the same was insufficient and too small for the purpose, and ²⁶¹ that plaintiff refused to use it for fear that when the girder was hoisted in the air the wedge would slip through; that plaintiff then stated to defendant that the wedge was too small, but that the defendant thereupon assured him that it was sufficient and safe for use; that the defendant itself undertook to adjust and place the wedge in

a safe and secure manner, and then caused the girder to be hoisted to a distance of some thirty feet above the walk-around, where the plaintiff and other employés were standing; that when the girder had been so hoisted, the plaintiff was ordered to take a position under the girder, and under the wedge which had been placed therein, and to hold the girder in place by means of a rope; that relying upon defendant's assurances that the wedge was sufficient, and believing that it had been properly and securely adjusted, plaintiff took said position and was holding the girder in place as aforesaid; that while so doing, the wedge, on account of not being sufficiently large and on account of its having been carelessly and negligently adjusted, slipped from the opening in the girder and fell, striking plaintiff upon his lower jaw, breaking his jaw, knocking out two teeth, lacerating the right side of his face, chin, and lower jaw.

The answer denied the material averments of the complaint, and affirmatively alleged negligence on the part of the plaintiff and, also, that plaintiff represented himself to be an experienced workman, and that he knew the work involved the risk of danger; that the wedge slipped and fell by reason of the action of plaintiff or of his fellow-employés, and without any fault or negligence on the part of defendant. The cause was tried before the jury and resulted in a verdict for plaintiff for the sum of one thousand dollars. Judgment was entered upon the verdict, defendant moved for a new trial, which was denied, and this is defendant's appeal from the judgment.

It is first assigned that the court erred in denying appellant's motion for a nonsuit at the close of respondent's evidence. ²⁶² The evidence then before the court and jury was to the effect that respondent was employed as a helper, and that the work of appellant was, at the time of the accident, in charge of Mr. Beaston as superintendent, and also of a Mr. Campbell as foreman. It showed that the position and surroundings of respondent were substantially as stated in his complaint, reference to which is above made. Both respondent and another witness testified that respondent at first objected to the use of the wedge on the ground that it was too small, but that Beaston, the superintendent, was present on the ground below the walk-around and directed that it should be used and said it was all right. It was also testified that respondent started to put the wedge in place as directed,

but that it fell out, and that he then told Campbell, the foreman, who was upon the walk-around, that it had fallen out, and the latter then directed respondent to get a piece of rope and tie a wrench to be carried up with the girder, saying at the same time that he, Campbell, would adjust the wedge; that when respondent returned, Campbell had adjusted the wedge, and respondent relied upon his judgment and skill in the matter. The wedge was driven in from the under side of the girder, and the witnesses said that, if it had been driven from the upper side, it would not have fallen through. Immediately after the above-stated occurrences, the girder was hoisted by power supplied for that purpose, and respondent, as directed, held a guide rope to keep the girder in place as it ascended. Two men, one upon each end of the girder, were carried up with it, for the purpose of adjusting it when in position. During the ascent the wedge fell, with the results stated.

It is argued that, from the above testimony, no negligence of appellant appeared, and that the falling of the wedge was a mere incident of the work in which respondent was engaged, a transitory peril for which the master is not liable. We think the court did not err in refusing to hold, as a matter of law, that no negligence of appellant appeared. Under the ²⁶³ testimony the use of the particular wedge was directed by the superintendent of appellant, and the foreman who was in charge upon the walk-around adjusted it himself, and both assured respondent that it was all right and safe. The selection of the appliance and its adjustment for use were both made by the direct representative of the master, and therefore became the acts of the master. Whether those acts were the cause of the injury was for the jury and not for the court. If the injury was traceable to acts of appellant as testified, then appellant was negligent. Respondent had a right to rely upon the safety of the appliance selected and adjusted by the master itself, accompanied with assurances as to its sufficiency, the immediate placing and adjustment having been made while respondent was otherwise engaged, and he being immediately thereafter called to action in the way of holding the guide rope.

The question of contributory negligence on the part of respondent was also for the jury. On the narrow walk-around, twenty-six feet above the ground, respondent was necessarily required to stand under the ascending girder. The testimony

showed that it took several minutes to hoist the girder, and respondent said that he could not look up all the time because it tired his neck. Whether he could have avoided the injury by more constant watching, and whether he was neglectful in that regard were matters for the jury. We think the nonsuit was properly denied within the rules followed by this court in the following decisions: *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467, 71 Pac. 1091; *Bailey v. Cascade Timber Co.*, 32 Wash. 319, 73 Pac. 385, and 35 Wash. 295, 77 Pac. 377.

A number of specified errors are assigned upon the instructions given by the court. Objection is made to the following instruction: "To maintain the defense of assumption of risk you must find by a fair preponderance of the evidence that the dangers of plaintiff's getting injured were open and apparent and ²⁶⁴ known to him; that is, that the danger of being injured in the manner and from the cause that he was injured was so open, obvious and apparent that a man of ordinary care and prudence, with the same knowledge and experience as plaintiff has, surrounded by similar conditions, could not have taken the chance or risk of such injury. In determining this question, as well as all the other acts of the plaintiff, you must decide it by the standard of what an ordinarily careful and prudent man of similar knowledge and experience, and under similar conditions and surroundings, would do."

It is conceded that the instruction was proper in so far as it stated the rule to be that the defense of assumption of risk is sustained when it is shown that the danger "was so open, obvious and apparent that a man of ordinary care and prudence . . . surrounded by similar conditions could not have taken the chance or risk of such injury." The following expressions in the instruction are, however, criticised: "with the same knowledge and experience as plaintiff has," and "similar knowledge and experience." The rule governing such instructions is stated as follows in 1 *Labatt on Master and Servant*, section 391: "The judicial theory of imputed knowledge, which is applied in actions by a servant against his employer, is simply this: that he is or is not chargeable with a comprehension of the conditions which caused his injury and of the risks created by those conditions, according as it may reasonably be inferred that those conditions or those risks would or would not have been comprehended by a person of ordinary

prudence, whose mental and physical capacities, both natural and acquired, and opportunities for observing the facts indicative of danger, were the same as those of the servant himself. Instructions are correct or erroneous according as they are consistent or inconsistent with this principle."

We think the criticised instruction was reasonably within the above-stated rule. It did not appear in the evidence that respondent was without a reasonable amount of experience, and the substance of the words of the instruction to which ²⁶⁵ the objection is directed is comprehended in the words of the above-named author. After specifying that the risk must be comprehended by a person of ordinary prudence, he adds, "whose mental and physical capacities, both natural and acquired, and opportunities for observing the facts indicative of danger, were the same as those of the servant himself." What is said above also applies to similar criticisms upon other instructions, and we think the jury could not have been confused in this regard to appellant's prejudice.

It is also argued that it was error to instruct as to the law governing vice-principalship, for the reason that there was no such question in this case. From what has hereinbefore been said with relation to the motion for nonsuit, it will be seen that that question was in the case. It is insisted by appellant that one James, a fellow-servant, adjusted the wedge, but the evidence conflicted upon that point, respondent's testimony being to the effect that it was both selected and adjusted by a vice-principal. It is further contended, however, that the act itself was not one which the master was bound to perform, and that it was therefore the act of a fellow-servant no matter who performed it. While it may have been such an act as could have been performed by a fellow-servant, yet it does not follow that the master himself could not do it. When, therefore, one who occupied the place of master undertook to perform the act, it was the act of the master, and the latter's representative was not transformed into a fellow-servant merely because he assumed to do a thing that might have been done by a fellow-servant.

Complaint is made that the court instructed as to the rights of respondent if he acted in obedience to a command from one having authority to give it. The complaint is urged on the ground that there was no evidence of such command. We think the evidence to which we have hereinbefore referred justified the instruction, it being to the effect that respondent

was assured by the master's representative of the safety of the appliance, and was directed by a vice-principal to do what he was doing at the time he was injured.

Objection is made to the following instruction: "It is the duty of the master to furnish proper and suitable appliances and to see that the same are properly adjusted, and anyone to whom the master delegates such duty becomes for such purposes the vice-principal of the master, for whose negligent act the master is responsible."

The above is a statement of a general proposition, and if it may be incomplete for lack of elaboration as applied to the particular facts appearing by the testimony in this case, such deficiency, we think, was fully supplied by the giving of the following further instructions at the request of appellant: "The defendant is not liable in this case, in any event, unless you find that, after plaintiff had objected to using a certain wedge, the defendant's superior officer used the wedge and gave plaintiff assurance upon which he relied and had a right to rely, that the wedge used was sufficient for the purpose for which it was used. . . . If you believe from the testimony that the cause of the accident was the careless and negligent adjusting of the wedge, and that the wedge was so adjusted by James, plaintiff cannot recover in this action, for James was his fellow-servant. The master is not liable for injuries to one servant by the negligence of another in the same degree."

Under the instructions last quoted, the criticised one first set forth in this paragraph was amply qualified with reference to what appellant claims were the facts in the case. Considering the instructions as a whole, we think the jury could not have been misled as to the law of the case. Since we find no reversible error, the judgment is affirmed.

Mount, C. J., Dunbar, Crow and Fullerton, JJ., concur.

The Principles Involved in the Principal Case will be found discussed in the notes to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884; *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 289.

PAGE v. PAGE.

[43 Wash. 293, 86 Pac. 582.]

DIVORCE—Pleading—Several Cases in One Count.—A complaint in divorce alleging three statutory grounds in one count should not be treated as an action on one of the grounds stated alone, and dismissed for failure of proof thereof. Such complaint, if unchallenged, is sufficient to sustain a judgment upon any one of the grounds alleged. (pp. 1056, 1057.)

DIVORCE—Personal Indignities.—Evidence of a wife that her husband almost continuously called her vile names and charged her with infidelity, corroborated by the unimpeached testimony of a disinterested witness, supports a divorce on the ground that such husband was guilty of personal indignities toward his wife, rendering her life burdensome. (p. 1057.)

DIVORCE—Failure to Support.—Evidence by a wife that her husband spent so much of his earnings for drink that he did not make such suitable provision for her support as his earnings would warrant, if corroborated by a disinterested witness, is cause for divorce on the ground of failure to support. (p. 1057.)

DIVORCE.—Habitual Drunkenness as cause for divorce exists when one spouse has a fixed habit of frequently getting drunk, although he or she is not drunk all the time, nor necessarily incapacitated from pursuing during the working hours of the day ordinary unskilled labor. (pp. 1057, 1058.)

Richardson, Roche & Onstine, for the appellant.

R. M. Barnhard and A. J. Laughon, for the state.

²⁹³ FULLERTON, J. This is an action brought to obtain a decree of divorce. In her complaint the appellant alleged that the defendant, during the past three or four years, had become addicted to the excessive use of intoxicating liquors, so much so that he had come home drunk as often as two or ²⁹⁴ three times a week during all of such time; and that this habit had become so firmly fixed upon him that he could no longer resist the temptation to drink whenever opportunity offered, and had become an habitual drunkard. She further alleged that the respondent had during such time squandered the greater part of his earnings for drink, and had failed and refused to make suitable provision for her support, compelling her to live, in part, upon the charity of her parents and friends; that he had loathsome and filthy habits when drunk; and had been guilty of personal indignities toward her, while intoxicated, causing her great mental anguish and rendering her life burdensome.

The respondent, although personally served in the county in which the action was brought, made no appearance, and the action was defended by the prosecuting attorney. The appellant's testimony substantiated her complaint. She testified that the respondent did most of his drinking in the evening; that he worked steadily enough during the day, but would leave his home immediately after supper and come home later in the night in a drunken condition, at which times he was morose and quarrelsome, and would call her vile names, and accuse her of infidelity. She further testified that he spent most of his earnings upon himself, leaving her at times without the means to supply their home with necessities. On cross-examination she stated that her husband's habits did not incapacitate him for work; that he worked steadily during the past two years for a transfer company, with the exception of about two weeks at one time when the company discharged him, and another short period when he was ill.

The appellant was corroborated, in the main, by her sister and by a Miss Wilson, who appear to have had abundant opportunities for observation. At the conclusion of the evidence, the court adjourned the case to a day later for argument. At the time to which it was adjourned, the state produced a witness, called, so the record recites, at the instance ²⁹⁵ of the judge trying the case, who testified that he was the manager of the transfer company for whom the respondent had worked; that the respondent had worked steadily for that company for a year past in the capacity of a helper on one of the company's wagons, and during that time he had never known him to be drunk or seen him take a drink. On cross-examination, however, he testified that it would be possible for the respondent to drink to excess and the fact be unknown to him; also, that on a certain Sunday the respondent did some extra work for the company, and did not have the money earned from the work to turn in on the following Monday morning. Being asked if it were not a fact that on "one Sunday he got drunk and squandered some of the firm's money and lost some of the transfer checks," he answered, "I don't know only from hearsay. I know he didn't have the money to turn in."

The plaintiff thereupon asked leave to reopen her case and offer further testimony on the main issues. This the court denied, but permitted her to offer testimony in rebuttal of the

witness called by the state. The appellant thereupon produced two witnesses to the effect that the respondent would sometimes show signs of intoxication when he would come home to his noon meal, and that he frequently drank beer in considerable quantities with his meals.

The court thereupon made findings in which he recited that the appellant sought a decree of divorce on the grounds of habitual drunkenness on the part of the defendant, finding that the habitual drunkenness such as the statute requires to constitute a ground for a divorce was not proven; further finding, "That with reference to the use of intoxicating liquors by the defendant, the court finds that for some time prior to the commencement of this action, and during the period of time in which the plaintiff complains of defendant's drunkenness, that both the plaintiff and the defendant were in the habit of using intoxicating liquors at their home, and that the plaintiff ²⁰⁶ not only did not object to the defendant's use of said liquor, but, on the contrary, drank intoxicating liquors on different occasions with the defendant at their home." On the filing of these findings a decree of dismissal was entered, from which this appeal was taken.

The trial court apparently treated the complaint as stating but one cause for divorce, and as it found that cause not proven, refused to enter into any inquiry as to other causes that were shown by the evidence. It seems to us that this is not a correct construction of the pleadings. Plainly, the complaint states three distinct grounds which are by statute made causes for divorce. It alleges that the defendant had been guilty of personal indignities toward the plaintiff rendering her life burdensome, that he had failed to make suitable provision for the support of his family, and that he was an habitual drunkard. True, these allegations were intermingled in one paragraph or count of the complaint, in the form of a single cause of action, but if this was bad pleading or in violation of the rule of the code, which requires distinct causes of action to be separately stated, the remedy for the defect was not to ignore all of the causes of action save a single one, and determine the case on the sufficiency of the proofs as to that, but the plaintiff should have been required, by order, to conform her complaint to the rules of good pleading on the penalty of dismissal if she failed to do so. It seems to us that the court should have considered the evidence upon all of the causes alleged, or else upon neither of them.

But a complaint in the form of this one is not fatally defective. It is sufficient to sustain a judgment, and when allowed to pass unchallenged by the authority which has the right to challenge it, it should be treated as sufficient. Treating the complaint as sufficient upon these additional causes of action, we think the proofs offered in support of them justified a different finding from that made by the court. Surely no greater personal indignity could be offered the wife by the husband than to almost continually call her vile names, and ²⁹⁷accuse her of infidelity. But this is what the wife testified the respondent did do, and her statement is supported by the unimpeached testimony of a disinterested witness—a relative it may be, but so far as it appears, nevertheless, a person entitled to credit. The appellant testified, also, that the respondent spent so much of his earnings for drink that he did not make such suitable provision for her support as his earnings would warrant. And in this, again, she is supported by disinterested witnesses against whom no undue bias or partisanship is shown by the record. Moreover, the evidence with reference to these matters is wholly uncontradicted, and giving it the weight it would seem to deserve, it justifies a decree of divorce.

On the question of drunkenness, also, we think the evidence would have warranted a different finding. To be an habitual drunkard a person does not have to be drunk all the time, nor necessarily incapacitated from pursuing during the working hours of the day, ordinary unskilled manual labor. One is an habitual drunkard, in the meaning of the divorce laws, who has a fixed habit of frequently getting drunk. It is not necessary that he be constantly or universally drunk, nor that he have more drunken than sober hours; it is enough that he have the habit so firmly fixed upon him that he becomes drunk periodically, or that he is unable to resist when the opportunity and temptation is presented. As we view the evidence it shows that the respondent had reached this condition, and we think the appellant entitled to a divorce on this ground.

The finding specially quoted might have some bearing on the question of habitual drunkenness were it supported by the evidence, but we find in the evidence no justification for it. The witness who is said by counsel for the state to have so testified, as we read the record, testified directly to the contrary; and the appellant's testimony was that she occasionally

would drink a glass of beer with him, adding that it "was ²⁰⁸ very seldom though"; but this hardly justifies the conclusion drawn by the court.

We think the evidence sufficient to justify granting the prayer of the appellant's complaint, and the judgment appealed from will be reversed, and the cause remanded with instructions to grant a decree accordingly.

Mount, C. J., Hadley, Dunbar, Crow and Rudkin, JJ., concur.

A Divorce may be granted a wife on the ground that her husband indulged in profane, indecent, and insulting language toward her, charging her with unchastity and denying the paternity of his children: *Braun v. Braun*, 194 Pa. 287, 75 Am. St. Rep. 699; *Green v. Green*, 131 N. C. 533, 92 Am. St. Rep. 788; note to *Reinhard v. Reinhard*, 65 Am. St. Rep. 75. See, however, *Johnson v. Johnson*, 107 Wis. 186, 81 Am. St. Rep. 836; *Maddox v. Maddox*, 189 Ill. 152, 82 Am. St. Rep. 431. As to what degree of intemperance in the use of liquor will warrant a decree of divorce, see *Dennis v. Dennis*, 68 Conn. 186, 57 Am. St. Rep. 95; *McBee v. McBee*, 22 Or. 329, 29 Am. St. Rep. 613.

LIEDKE v. MORAN BROTHERS COMPANY.

[43 Wash. 428, 86 Pac. 646.]

MASTER AND SERVANT—Safe Place—Assumption of Risk.

A servant ordered to work upon and take down a scaffold is not required to make an examination to see if it is safe, in the absence of apparent danger, nor is he barred from recovering damages if injured while thus engaged, by reason of the faulty construction of such scaffold. (pp. 1059, 1060.)

MASTER AND SERVANT—Safe Place—Assumption of Risk.

A laborer, when ordered by his master to work, need not examine the place where he is required to work. He has a right to assume, in the absence of apparent danger, that the master has furnished him a reasonably safe place in which to work. (p. 1060.)

MASTER AND SERVANT—Assumption of Risks.—A laborer

ordered by his master to work upon and take down a scaffold does not assume the risk of injury from its faulty construction, in the absence of apparent danger, nor can knowledge that such scaffold was being taken down because of its faulty construction be imputed to him. (pp. 1060, 1061.)

TRIAL—Instructions—Damages.—If, in an action to recover

for personal injury, there is no proof as to allegations of expenditures for medical attendance and hospital charges, instructions to the effect that such items must be excluded by the jury are properly refused, if under the instructions given there is no possibility that such items could be considered by the jury. (p. 1061.)

Peters & Powell, for the appellant.

Casey & Casey and J. F. McLean, for the respondent.

⁴²⁰ DUNBAR, J. This is an action for damages for personal injuries. In brief, the plaintiff sets forth in his complaint that on the eighteenth day of March, 1905, he was in the employ of the defendant corporation; that he was ordered and directed by a representative of the defendant company to mount a scaffold; that while he was at work on this scaffold it fell on account of its faulty construction; and that in consequence of this fall he sustained the physical injuries for which he seeks damages. The answer admitted that the plaintiff was in the employ of the defendant and that he fell from a scaffold. All the other allegations of the complaint are put in issue by the answer. It was also affirmatively pleaded by the ⁴³⁰ answer that the danger of the situation was open and apparent; that plaintiff assumed the risk of being hurt by working in that situation; and that he was guilty of contributory negligence. The reply of the plaintiff denies the matters of affirmative defense. On the trial of the cause, judgment was rendered in favor of the plaintiff for one thousand dollars. From this judgment this appeal is taken.

The first error assigned is that the court erred in overruling defendant's motion for a nonsuit at the close of plaintiff's case, for the reason that the plaintiff's case itself shows that, if he received any injury through a defective scaffold, the risk was one which he in law was presumed to have assumed; and further that his own case showed contributory negligence in his going upon the scaffold if it was such as he claimed it to have been. Appellant, in support of this assignment, relies largely upon the case of *Steeple v. Panel etc. Box Co.*, 33 Wash. 359, 74 Pac. 475. But that case, it seems to us, is very plainly distinguishable from the case at bar. There a night watchman fell from a second story eight-foot platform, there being no railing on one side of the platform where he fell off, he having been at work for some time on the platform and knowing of the absence of the railing, the platform being under his supervision and control, and lanterns being at hand for his use while working where it was dark, presenting a plain case of assumption of risk. But here the circumstances are entirely different. The respondent was ordered to work upon this scaffold, and, in performing his duty, the scaffold, by reason of its faulty con-

struction, fell and he was injured. There was no apparent danger. It is true that the plaintiff stated that he did not examine the scaffold when he went onto it, but under the uniform ruling of this court, and under the provisions of the law as announced ordinarily by the court, it is not the duty of a laborer, when ordered by the master to work, to make an examination of the place where he is required to work; for it is undisputed law that he has a right to assume, ⁴²¹ in the absence of apparent danger, that the master has furnished him a reasonably safe place in which to work.

The second assignment embraces an objection to the following instruction: "But there is an obligation which the law, for the protection of society, imposes upon the employer of labor, and that it is his duty to provide his employé with a reasonably safe place within which to work, and with reasonably safe appliances with which to work; he must exercise ordinary care in that respect, to see that a reasonably safe place and reasonably safe implements are provided, and the duty of reasonable inspection to see if that condition is preserved during the course of employment. The employé has a right to assume that his master has discharged that duty, and the master has a right to assume that the servant has discharged, and will discharge, the duty which the law imposes upon him. So, in approaching the case of the plaintiff, it is for you to inquire from the evidence whether the place at which this plaintiff was put to work, if he was put to work, was a reasonably safe place; and whether the apparatus upon which he was standing, if he was rightfully and properly there, was a reasonably safe apparatus. If you should conclude from the evidence that the plaintiff was put to work by the defendant on this scaffold, that he was there in the discharge of his duty, that the scaffold was insecurely built, that it was not a reasonably safe scaffold on which to require a man to stand while at work, then your verdict will be for the plaintiff in such a sum as would fairly compensate him for the injury sustained by reason of the said action," etc.

It is admitted by the appellant that this instruction stated the law properly as an abstract proposition, and that it would have been objectionable had the respondent been using the scaffold as a platform for other work; but where the work which he was engaged in was taking down that scaffold, it is insisted that the instruction was wholly misleading, for,

if the fact that the scaffold was to be taken down was not of itself notice that its safety was not guaranteed, at all events there was no presumption of its safety for any purpose. It seems to us that there is no merit in this contention. If it is ⁴²² a master's duty to furnish the servant a safe place in which to work, it is just as much his duty to furnish that safe place, where the work to be performed is the demolition or tearing down of a building, as where it is its construction in the first instance. Here the cross-piece, on which the respondent stood while undertaking to remove a board or cross-piece above him, broke and fell, precipitating the respondent to the ground. There seems to be no good reason for depriving the servant of the right to rely upon the assumption that he was furnished a safe place to stand in the performance of this duty. Nor could the knowledge be imputed to him that the scaffold was to be torn down for the reason that it was unsafe. It might be torn down for that reason, or for many other reasons which are conceivable.

It is also assigned that the court erred in refusing appellant's requested instruction No. 13, which is as follows: "While the plaintiff claims in his complaint that he has expended money for hospital bills, medicine, and physicians' services, this is challenged by the answer, and there has been submitted no proof of these items. You will, therefore, disregard the items, whatever your verdict."

This action was brought for twenty thousand dollars, and it is alleged in the complaint that the plaintiff had been compelled to expend the sum of two hundred and fifty dollars for hospital charges and medicine, and the sum of two hundred dollars in procuring the attendance of physicians and surgeons. The verdict was for one thousand dollars, and it is contended by the appellant that the four hundred and fifty dollars claimed for hospital bills and physicians' services might have been taken into consideration by the jury and have been incorporated in the verdict. We think the question of damages in this respect was fairly placed before the jury by the instructions given by the court, and that under such instructions there is no possibility that the amount claimed and not proven was taken into consideration by the jury in arriving at their verdict.

We also think that the fourth assignment of error is without foundation, as there was sufficient testimony to go to the ⁴²³ jury tending to show that the respondent was ordered

to work upon the scaffold by an authorized agent of the appellant. The case is a simple one. Respondent was put to work upon a structure of the appellant, which was faulty in its construction. This fault of construction was not so apparent as to devolve upon the respondent the duty of examination. While in the performance of his duty, a portion of the structure fell, and the respondent was thereupon injured. The jury passed upon all the questions of fact, under instructions which were clear and concise and presented the issues to the jury fairly.

There being no error discernible, the judgment will be affirmed.

Mount, C. J., Crow and Fullerton, JJ., concur.

The Duty of an Employer to Furnish a Safe Place for his employé to work, and the doctrine of assumption of risks and contributory negligence on the part of the employé who works in an unsafe place are considered in the notes to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884; *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 289.

The Liability of a Master to His Servant for Defective Scaffolding is discussed in *Kimmer v. Weber*, 151 N. Y. 417, 56 Am. St. Rep. 630; *Chicago etc. R. R. Co. v. Maroney*, 170 Ill. 520, 62 Am. St. Rep. 396; *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315, 64 Am. St. Rep. 38; *Dougherty v. Milliken*, 163 N. Y. 527, 79 Am. St. Rep. 608; *Enright v. Oliver*, 69 N. J. L. 357, 101 Am. St. Rep. 710.

HAYES v. CITY OF SEATTLE.

[43 Wash. 500, 86 Pac. 852.]

MUNICIPAL CORPORATIONS—Streets—Open Trapdoors.—

A city is liable to a pedestrian for an injury sustained by a fall into an open and unguarded trapdoor situated upon the sidewalk of one of the principal streets of the city in constant use by pedestrians, although such door had been opened but a few moments at the time of the accident. (p. 1063.)

S. Calhoun, E. E. Todd and F. R. Conway, for the appellant.

McCafferty & Bell, for the respondent.

500 Per CURIAM. The respondent fell into an opening in a sidewalk on one of the streets of the city of Seattle and

was injured. He brought this action to recover damages for his injuries and was awarded a judgment in the sum of seven hundred and fifty-five dollars, from which the city appeals.

The opening in question was in a sidewalk on one of the principal streets of Seattle, along which a large number of people were constantly passing. It was some five feet long by four feet wide, and when not being used was covered with iron doors laid lengthwise of the opening. These doors were hinged to the side and raised up from the middle. When open they formed a kind of barrier which guarded the main opening from the approach of pedestrians. At the time of the accident to the respondent but one of the doors was open. He approached from the opposite way and walked over the ⁵⁰¹ first door and into the opening without discovering that the second had been raised up. How long the door had been open the evidence does not make very clear, but it could have been only a few moments at the longest, and it is probable that it had been open only an instant before the accident.

The city contends that it is not negligence in itself to permit an opening to be made in a sidewalk and used for the purposes for which this opening was used, and that, because it is not such negligence, it is not liable for any negligent use made of the opening unless it has knowledge, in time to correct it, of the fact that it is being negligently used; further contending that in this case there is no evidence that it had such knowledge. But we think these contentions inapplicable to the facts as shown in the record. The opening was upon a prominent thoroughfare, in constant use by pedestrians. The opening was not guarded in any way, and to open it at all was a menace to every person who happened at that time to be passing. These facts the city knew or ought to have known, and we think the court rightly held it responsible for the injury.

The judgment is affirmed.

The Liability of Municipal Corporations to persons injured by reason of defective streets is discussed in the notes to Dudley v. Flemingsburg, 103 Am. St. Rep. 257; Goddard v. Harpwell, 30 Am. St. Rep. 384; Browning v. Springfield, 63 Am. Dec. 350. Their liability in respect to hatchways and coal-holes in sidewalks is considered in Drake v. Kansas City, 190 Mo. 370, 109 Am. St. Rep. 759; McClure v. Sparta, 84 Wis. 269, 36 Am. St. Rep. 924; Duncan v. Philadelphia, 173 Pa. 550, 51 Am. St. Rep. 780; and the liability of property owners who maintain such places is considered in West Chicago Masonic

Assn. v. Cohn, 192 Ill. 210, 85 Am. St. Rep. 327; *Dickson v. Hollister*, 123 Pa. 421, 10 Am. St. Rep. 533; *Jennings v. Van Schaick*, 108 N. Y. 530, 2 Am. St. Rep. 459; *Barry v. Terkildsen*, 72 Cal. 254, 1 Am. St. Rep. 55.

SEATTLE SHOE COMPANY v. PACKARD.

[43 Wash. 527, 86 Pac. 845.]

PRINCIPAL AND AGENT—**Authority of Commercial Traveler—Drafts on Employer.**—Although a commercial traveler has drawn drafts on his employer for a number of years and they have been honored, this does not authorize him to bind his employer by a draft for advances which is cashed largely on his own personal credit. In the absence of express authorization a commercial traveler has no power to bind his employer by a draft for advances. (pp. 1065, 1066.)

PRINCIPAL AND AGENT—**Commercial Traveler's Authority.** The scope of a commercial traveler's authority as a general rule extends only to the solicitation of orders for goods, and third persons dealing with him are bound at their peril, to ascertain his real powers. (p. 1066.)

BILLS AND NOTES—**Drafts—Liability Before Acceptance.** Under a statute providing that no person shall be liable on an instrument whose name does not appear thereon, an employer upon whom a draft is drawn by his commercial traveler is not liable thereon before acceptance, although other drafts of similar nature have been honored by him. (p. 1066.)

J. W. Roberts and H. E. Warner, for the appellants.

Shank & Smith, for the respondents.

528 **DUNBAR, J.** The Seattle Shoe Company was engaged in the retail boot and shoe business in the city of Seattle. The defendants are wholesale boot and shoe manufacturers in Brockton, Massachusetts. George B. Smith was a traveling representative of defendants, Seattle being a part of his territory. Smith represented the defendants from 1895 until 1904. In the spring of 1898 Smith sold the Seattle Shoe Company, through Mr. Hicks, one of the company, a bill of goods. At that time the plaintiff, the shoe company, cashed a draft which Smith had drawn on his employers Packard & Field. During the years that followed several other drafts were drawn on Packard & Field, and were honored by them. In the spring of 1904 the following drafts were drawn:

"THE SEATTLE NATIONAL BANK.

"Seattle, Washington, June 20, 1904.

"At sight ——— \$200.00. Pay to the order of Seattle Shoe Co. Two Hundred 00-100 Dollars. Value received and charge to the account of George B. Smith.

"To Packard & Field, Brockton, Mass."

"THE SEATTLE NATIONAL BANK.

"Seattle, Washington, June 29, 1904.

"At sight ——— \$150.00. Pay to the order of Seattle Shoe Co. One Hundred & Fifty 00-100 Dollars. Value received and charge to the account of George B. Smith.

"To Packard & Field, Brockton, Mass."

These drafts when presented to Packard & Field were not paid, but were protested for nonpayment, and plaintiff as indorser was obliged to pay. This suit was brought to recover the money paid to take up these last two drafts. It is ⁵²⁰ admitted that the defendants never in any manner notified plaintiff, after the first draft, that Mr. Smith was not authorized to draw on them for his traveling expenses. Upon the close of the plaintiff's testimony, the court granted a nonsuit. Judgment was entered dismissing the case, and from such judgment this appeal was taken.

It is the contention of the appellant that by their course of conduct in paying drafts which had been indorsed by it, the respondents had made themselves liable to it for the payment of these drafts; that this transaction was equivalent to a loan to Packard & Field, and that, by authorizing these drafts for their own use, they became liable as such to the lender, irrespective of the question of acceptance. Many cases are cited by the appellant to the effect that, by a course of conduct, agency may be established, and that if acts have been done by an agent in excess of his authority and the principal on being informed of them fails to disavow them in a reasonable time, his silence may be considered as an acquiescence in the acts done, etc. But it seems to us that there is no authority express or implied proven by the appellant in this case. The most that can be said is that during a period of years other drafts which appellant indorsed had been paid by the respondents. There is no proof offered by the appellant that there was any notice to it in any other way that Smith was authorized to draw upon them, or that his drafts would be honored. There is nothing to show that it was not

Smith upon whom the appellant relied instead of upon the respondents. In fact, one of these drafts was made in part as a payment for cash advances which had already been made to Smith upon his own credit, and the whole testimony shows that there was a familiarity and friendship between Smith and the appellant which would warrant it in extending the favors which it did extend. It must have known that, in the absence of express authorization, Smith had no power to bind ⁵³⁰ the respondents. The law in relation to the scope of Smith's authority is thus stated in 6 American and English Encyclopedia of Law, second edition, page 224:

"Sec. 1. The scope of a commercial traveler's authority is well defined, and, as a general rule, extends only to the soliciting of orders for goods."

"Sec. 3. Third parties dealing with him are bound, at their peril, to ascertain his real powers; and the mere statement of the drummer that he is authorized to do any usual act will not be sufficient to bind his principal."

The principal will, of course, be bound by the drummer's acts within the apparent scope of his authority. But the borrowing of money is plainly not within such apparent scope.

But, outside of the authorities which have been cited in this case, our own statutes settle the status of the parties to a transaction of this kind. Chapter 149, found on page 340 et seq. of the Laws of 1899, a chapter relating to negotiable instruments, undertakes to establish the law of this state in relation thereto. Section 18 provides: "No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided." It will be observed that this is an action upon the draft, and it will be further observed that the signature of the respondents does not appear upon said draft, and no liability of the respondents can therefore attach unless the liability is otherwise expressly provided in the act, and no such express provision can be found. Section 19, it is true, provides that the signature of any party may be made by any authorized agent, and that no particular form of appointment is necessary for this purpose, and the authority of the agent may be established as in other cases of agency. But there was no authority of agency established here. The only presumption that could arise from the payment of drafts was the presumption that the maker of the draft had credit with the respondents at the time the draft was presented. It would be a dangerous

doctrine to announce that the honoring of a draft, or even of ⁵³¹ several drafts, during a period in which the maker of the drafts had funds in the hands of the drawee, would establish an agency under the authority of which the maker could draw on the drawee ad libitum. So far as this case is concerned, so long as Smith had credit with the respondents, his drafts were honored. When the credit was extinguished, the respondents acted within their rights by refusing to pay the drafts. The legal assent to, and acceptance of, a bill are specially set forth in section 132 of the same act, as follows: "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee."

The acceptance not having been in writing, and there having been no authority shown for the issuance of the draft, the court committed no error in granting the nonsuit.

The judgment is affirmed.

Mount, C. J., Root, Crow and Fullerton, JJ., concur.

All Persons Dealing with an Agent are bound to ascertain the scope of his authority; if they do not, they deal with him at his peril; *Moore v. Skyles*, 33 Mont. 135, 114 Am. St. Rep. 801. However, a principal is bound by the apparent, not the actual or express, authority given his agent, where third persons have in good faith relied thereon: *Antrim Iron Works v. Anderson*, 140 Mich. 702, 112 Am. St. Rep. 434. And where a principal has placed an agent in such a position that a person of ordinary prudence is justified in assuming that he is authorized to perform a particular act, the principal may be estopped to deny such authority: *General Cartage etc. Co. v. Cox*, 74 Ohio St. 284, 113 Am. St. Rep. 959. As to the application of these rules to cases involving negotiable paper, see *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113, and cases cited in the cross-reference note thereto.

LINNE v. BREDES.

[43 Wash. 540, 86 Pac. 858.]

MUNICIPAL CORPORATIONS—Water Charges—Delinquencies—Encumbrances.—A city has no power to compel a subsequent owner or occupant of property to pay delinquent water charges which he did not contract or incur as a condition precedent to the enjoyment of further water service. An ordinance making such a regulation is unreasonable and void. (p. 1074.)

VENDOR AND PURCHASER—Delinquent Water Charges—Encumbrances.—A city has no power to compel a subsequent owner or occupant of property to pay delinquent water charges which he did not contract for, and thereby virtually create a lien or encumbrance upon his property, and if such subsequent owner pays such delinquent water charges, under a void ordinance requiring him to do so to obtain further water service, he cannot recover the amount from his grantor under a promise by the latter to pay all encumbrances upon the property. (p. 1075.)

Larrabee & Wright, for the appellant.

H. A. Wilson, for the respondent.

540 CROW, J. This action was instituted by the respondent, Frank J. Linne, against the appellant, H. T. Bredes, to recover **541** damages on a breach of contract. The respondent alleged that on December 5, 1904, he entered into a written agreement with the appellant for the purchase of certain personal property, consisting of an ice plant and a lease on realty in the city of Seattle; that by said contract appellant expressly promised to pay all liens and encumbrances of every kind and nature which might be against said property; that respondent fully performed said contract on his part; that upon entering into possession he discovered that the city of Seattle had cut off the water supply from said ice plant; that said property was encumbered with delinquent water charges, amounting to four hundred and twenty-six dollars and ninety-five cents; that said city, acting under the provisions of section 349 of ordinance No. 4443, refused to supply said ice plant with water until said delinquent charges were paid; that respondent demanded of appellant that he pay said delinquent charges; that appellant refused to do so, and that respondent, to secure a supply of water, was compelled to, and did, pay the same. Appellant's demurrer to his complaint being overruled, he answered, making certain denials and pleading as an offset a claim of five

hundred dollars for services rendered by him to respondent. Upon trial to the court without a jury, findings of fact were made in accordance with the allegations of the complaint. On the issue raised by the affirmative defense, the court found that there was no express or implied contract between respondent and appellant by which respondent employed appellant to perform any services, but that all services performed by appellant were voluntary and without the expectation of payment or reward. On these findings judgment was entered in favor of the respondent for four hundred and twenty-six dollars and ninety-five cents and costs, and this appeal has been taken.

Appellant has excepted to the findings made by the trial court, and has also excepted to its refusal to make specific findings requested by him. Most of his assignments of error are based on these exceptions. Without discussing the evidence, we will state that after a careful examination of the ⁵⁴² same, we conclude that it sustains the findings made. It appears from the evidence that the appellant Bredes was not the former owner or occupant of the property who had contracted the liability to the city for the delinquent water rents. He had but recently obtained an assignment of the legal title from the former occupant who had made such default.

Having adopted the findings made by the trial court, the only question for us to consider is whether they sustain the judgment entered. This depends upon the further question whether the delinquent charges were an encumbrance upon the property. An encumbrance has been correctly defined to be "Any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee." Also, as "A burden upon land depreciative of its value, such as a lien, easement, or servitude, which though adverse to the interest of the land owner, does not conflict with his conveyance of the land in fee." This court approved these definitions in *Green v. Tidball*, 26 Wash. 338, 67 Pac. 84, 55 L. R. A. 879. Respondent, having cited said case, also directs our attention to ordinance No. 4443 of the city of Seattle, entitled "An ordinance to fix, regulate and control the use and price of water supplied by the city waterworks, and providing penalties for the violation thereof," of which section 349 reads as follows: "All water rates shall be charged against the property on which it is furnished and against

the owner thereof, and if for any cause any sums therefor become delinquent the water shall be cut off, and in no case shall it be turned onto the same property until all such delinquencies shall have been paid in full. No change of ownership or occupation shall affect the application of this section."

Respondent insists that said section confers upon the city of Seattle the right to refuse water to an occupant of property until all delinquent water charges against said property that may have been incurred by a prior owner or occupant ⁵⁴³ have been paid. If he is right in this contention, the delinquent water charges constituted an encumbrance which the appellant had agreed to pay, and the respondent is entitled to recover in this action. The test of appellant's liability, therefore, is the right or power of the city to adopt such a rule by ordinance, and whether such regulation is reasonable. We have not discovered, nor have we been cited to, any express statutory authority for such an ordinance. The appellant contends (1) that the delinquent charges were not a lien or encumbrance, and (2) that in the absence of express statutory authority they could not be made such by ordinance.

We think these contentions must be sustained. The authorities seem to hold that, in the absence of express statutory authority, delinquent water rentals cannot be made a lien or encumbrance upon property, as against a subsequent owner or occupant who did not contract said charges or make default in their payment: *Turner v. Revere Water Co.*, 171 Mass. 329, 68 Am. St. Rep. 432, 50 N. E. 634, 40 L. R. A. 657; *Sheffield Water Works v. Wilkinson*, L. R. 4 C. P. D. 410; *Leighton v. Ricker*, 173 Mass. 564, 54 N. E. 254; *Dayton v. Quigley*, 29 N. J. Eq. 77. Respondent has made numerous citations of authority, which, upon a casual examination, might seem to sustain his position; but we find none of them to be in point. All of them are subject to the criticism either (1) that they do not go to the extent of authorizing a water company, or a city operating a water system, to create a lien upon or hold property for delinquent charges due from prior owners or occupants, or (2) that where they hold the property may be subjected to a lien or encumbrance for such charges incurred by a prior owner or occupant, the right to thus create such encumbrance is expressly vested by statute.

Tacoma Hotel Co. v. Tacoma Light & Water Co., 3 Wash. 316, 28 Am. St. Rep. 35, 28 Pac. 516, 14 L. R. A. 669, cited by

the respondent, is subject to the first criticism here mentioned. There the company refused to supply water to the ⁵⁴⁴ identical party and property in default for the arrearages, and a regulation permitting such action was properly held to be reasonable. It will be observed, however, that no change of ownership or occupancy had intervened, and the company by its refusal of a water supply was not attempting to coerce one person into the payment of an obligation incurred by another. In *Jones v. Mayor etc.*, 109 Tenn. 550, 72 S. W. 985, the city refused water to the plaintiff, who was herself in default for rentals, and this was held to be a reasonable regulation. There was no attempt to hold her for the default of any other person. In *Sheward v. Citizens' Water Co.*, 90 Cal. 635, 27 Pac. 439, the dispute was over charges incurred by the plaintiff himself. The respondent has also cited the following Pennsylvania cases: *Altoona v. Shellenbeger*, 6 Pa. Dist. 544; *Appeal of Brumm (Pa.)*, 12 Atl. 855; *Girard Life Ins. Co. v. Philadelphia*, 88 Pa. 393; *Commonwealth v. Philadelphia*, 132 Pa. 288, 19 Atl. 136; *In re Gerry*, 112 Fed. 958; *Gilham v. Real Estate etc. Co.*, 203 Pa. 24, 52 Atl. 85. An examination of these cases, in connection with various statutes of that state, will show that, while some of them in substance hold that a water company or a municipal corporation operating a water system has the right to hold property for delinquent charges incurred by a former owner or occupant, thereby creating a lien or encumbrance, such right is conferred by statute. For instance, in *Appeal of Brumm (Pa.)*, 12 Atl. 855, the opinion of the court refers to, and seems to be based upon, section 13 of the act of 1854, entitled "A supplement to the act incorporating the Pottsville Water Company," etc. Said section is found at page 85 of the Pennsylvania Session Laws for the year 1854, and reads as follows: "The owners of the freehold in and upon which the said water is taken and used shall in all cases be the parties with whom the contract for the use of the water shall be made, and the said real estate shall be bound and liable for the use of the same, reserving to the said president and managers the ⁵⁴⁵ right to contract with the lessees or tenants on the responsibility of said lessees or tenants alone, if they see fit to do so." This illustration tends to show that the Pennsylvania cases are not authority here. Another illustration of the various Pennsylvania statutes on this subject is found in the Session Laws of that

state, for the year 1889, at page 311, being section 10 of article 12 of an act providing for the incorporation and government of cities of the third class. This section, which pertains to the water and lighting department, reads as follows: "The city councils shall provide by ordinance for the collection of all the lighting and water rates that may accrue from time to time, to the said city, for the use of the water or light, fixing the time when such rates shall be payable, and the penalties for nonpayment thereof; and such rates shall be charged to the respective owners of the real estate on which such water or light is used, and if the same shall not be paid in accordance with the provisions of such ordinance, claims for the amounts due shall be registered in the city lien docket in the same manner as is herein provided in the case of unpaid city taxes on real estate, with the like force and effect as to the lien thereof."

When a legislature by statute authorizes or gives a lien on land for unpaid water rentals, as it has the power to do, of course such a right so conferred can be asserted and enforced by proper ordinances and rules (1 Farnham on Waters, sec. 166), but we have no such statute in the state of Washington.

Respondent also cites *Atlanta v. Burton*, 90 Ga. 486, 16 S. E. 214, in which the decision is based upon an express charter provision. Having carefully examined each and all the authorities cited by respondent, we fail to find one that is pertinent or controlling in the case at bar. In *Howe v. Orange*, 70 N. J. Eq. 648, 62 Atl. 777, the New Jersey court of chancery held that section 10 of the act of 1876 (Gen. Stats. 649), quoted in the opinion, made water rents a lien upon the premises ⁵⁴⁶ supplied, until the same were paid and satisfied, even though the water for which the rents were delinquent was furnished to a building while it belonged to a previous owner. The ruling, however, is expressly based on said statute, and in commenting thereon the court said: "In other jurisdictions similar legislation to that in this state upon this subject has received consideration, and the courts have held that the city or the water company has the power to shut off the water, and will not be restrained with respect thereto. It is held that the premises to which the water is furnished are liable, that indulgence with respect to the time of shutting the water off will not be held to operate against the right to do so, and that the fact that the title has

changed hands since the furnishing of the water is immaterial: *Girard L. Ins. Co. v. Philadelphia*, 88 Pa. 393; *Appeal of Brumm (Pa.)*, 12 Atl. 855; *Atlanta v. Burton*, 90 Ga. 486, 16 S. E. 214." This language not only discloses the theory of the doctrine announced by the New Jersey court, but also the basis of the doctrine announced by the Pennsylvania and Georgia courts in the very cases cited by the respondent.

The case of *Turner v. Revere Water Co.*, 171 Mass. 329, 68 Am. St. Rep. 432, 50 N. E. 634, 40 L. R. A. 657, cited by appellant, contains a full discussion of the questions here involved, and not only announces principles of law which we think should be controlling here, but also reviews and distinguishes most of the cases cited by the respondent Linne.

It has been held that the corporate powers of a municipal corporation do not require it to furnish water to its inhabitants, but that it may elect to do so, and when it does so elect, it does not act by virtue of the exercise of the power of sovereignty. In *Appeal of Brumm (Pa.)*, 12 Atl. 855, cited by respondent, the supreme court of Pennsylvania says: "A municipal corporation which supplies its inhabitants with gas or water does so in its capacity of a private corporation, and not in the exercise of its powers of local sovereignty. If this power is granted to a borough or city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. In separating ⁵⁴⁷ the two powers—public and private—regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character; but if the grant was for purposes of private advantages and emolument, though the public may derive a common benefit therefrom, the corporation quo ad hoc is to be regarded as a private company. It stands upon the same footing as would any individual or body of persons, upon whom the like special franchises had been conferred. . . . It would seem necessarily to follow from the authorities, that an ordinance regulating the supply of water by a municipal corporation has the same force, and no more, of a by-law of a private corporation, whose powers, in this respect, are of a like character, and conferred for the same purpose."

The above language correctly states the law, and it necessarily follows that in the absence of express statutory author-

ity conferring upon the city of Seattle power to create a lien or encumbrance for delinquent water rents incurred by a previous owner or occupant, the ordinance above quoted would have no more effect than the rules and regulations of a private corporation operating a system of waterworks. The supreme court of Pennsylvania, in Brumm's Appeal (Pa.), 12 Atl. 855, would undoubtedly have held as we now hold, except for the express statutory authority which we have quoted from the Session Laws of 1854.

The very recent case of *Chicago v. Northwestern Mut. Life Ins. Co.*, 218 Ill. 40, 75 N. E. 803, 1 L. R. A., N. S., 770, decided by the supreme court of Illinois, is directly in point here. The appellant, by foreclosure, became the owner of various properties in the city of Chicago, against which there were delinquent water charges incurred by previous owners or occupants. It offered to pay the city the regular current charges for supplying it with water, but the city refused to turn on the water or supply the same until the appellee had paid all of said prior charges. It became necessary for the appellee to pay, and it did pay, the same, in order that it might ⁵⁴⁸ secure water service. Having made such payment under protest, it afterward instituted action against the city to recover the money so paid, its contention being that the city had no right to collect said delinquent rentals from it or encumber the property with the same. The supreme court of Illinois held that it was entitled to recover. In the absence of any express statutory authority conferring on the city of Seattle the power to compel a subsequent owner or occupant of property to pay delinquent charges, which he did not contract or incur, as a condition precedent to the enjoyment of further water service, and to thereby virtually create a lien upon or encumber his property, we hold that an ordinance making such a regulation, or attempting to warrant such a procedure, is unreasonable, and cannot be enforced. From this holding it follows that the delinquent water rent was not an encumbrance or lien which respondent was obliged to pay as a condition precedent to securing water service. It was the debt of a prior owner or occupant, for the payment of which he was not liable. The appellant was not liable under his contract for the payment of said delinquent water rents, as they were neither a lien nor an encumbrance.

The judgment is reversed, and the cause remanded, with instructions to dismiss the action.

Mount, C. J., Dunbar, Hadley, Fullerton and Rudkin, JJ., concur.

A Rule of a Water Company that water may be shut off from customers in all cases of nonpayment of water rents is unreasonable and void, if so construed as to permit the water to be shut off because a former occupant has not paid his bill: *Turner v. Revere Water Co.*, 171 Mass. 329, 68 Am. St. Rep. 432; *Burke v. City of Water Valley*, 87 Miss. 732, 112 Am. St. Rep. 468.

SAMUELS v. TOWN OF HARRINGTON.

[43 Wash. 603, 86 Pac. 1071.]

OFFICERS—De Facto and De Jure—Payment of Salary.—A municipality which has paid the salary of an officer de facto when it was due and he was in possession of the office, is not liable to the officer de jure for such salary, upon his establishing his right to the office. (pp. 1076, 1077.)

OFFICERS De Facto and De Jure—Collection of Salary—Election of Remedies.—An officer de jure who has recovered judgment against an officer de facto for salary of the office paid to the latter has elected his remedy, and cannot recover the amount of such salary from the municipality, on failure to collect such judgment. (p. 1078.)

A. J. Grant, J. T. Mulligan and H. N. Martin, for the appellant.

H. A. P. Myers, for the respondent.

603 FULLERTON, J. On June 20, 1904, the respondent was appointed marshal of the town of Harrington by the authority in whom rested the power of appointment. On August following he qualified for the office by filing his bond and taking the required oath. At that time one James A. Snyder held the office under some claim of right which he thought paramount to the respondent's right, and refused to surrender it on the respondent's demand. The respondent thereupon instituted quo warranto proceedings against Snyder, praying that he be ousted and excluded from the office, and that the respondent have judgment against him for the salary of the 604 office he had drawn during the time of his wrongful incumbency. The case was not tried until the following De-

ember, practically at the end of the term during which the respondent was entitled to hold the office by virtue of his appointment, and the court allowed him a judgment for the salary accruing during the entire term, which amounted to three hundred dollars.

In April, 1905, the respondent began the present action to recover the same salary from the respondent town. The town for answer denied its liability, and by way of affirmative defense pleaded the proceedings and judgment against Snyder as an estoppel. The case was tried without a jury, and resulted in a judgment for the respondent. The town appeals.

The principal question suggested by the record, namely Is a municipality which has, before judgment of ouster, paid to a de facto officer the salary of an office due at the time of payment liable to the de jure officer for such salary? has been a frequent subject of controversy in the courts. Where the emoluments of the office have been the fees for the services rendered, the courts have had no difficulty. They hold, with substantial uniformity, that neither the municipality nor the person who paid such fees to the de facto officer are liable to the de jure officer for their repayment, but that the sole remedy of the officer de jure is against the de facto officer; and in some jurisdictions it is even held that he cannot recover of the de facto officer anything more than the reasonable profits of the office, allowing that officer to retain the actual value of the services rendered. But where the emoluments of the office is a salary, the decisions are not so uniform. There is a well-considered line of cases which maintain the doctrine that the officer de jure has a property right in the salary of the office, and that in consequence any payment to another person is a wrongful payment, in no way binding upon him. One of the best of these, perhaps, is *Rasmussen v. Commissioners of Carbon County*, 8 Wyo. 277, 56 Pac. 1098, 45 L. R. A. 295, where the cases are collected. See, also, Mr. Freeman's note to the case of *Andrews v. Portland*, 10 Am. St. Rep. 284 (79 Me. 484, 10 Atl. 458).

But the weight of authority, and we think the better reason, is the other way. On principle there can be no difference between the fees of an officer and the salary of an office with respect to the property rights of the officer de jure therein. If the right to an office carries with it a property right in the salary of the office, so does the right to the office carry with it a property right in the fees of the office, and the payment

of the one to an officer de facto is no more a wrongful payment than is the payment of the other. If the premise is sound, the payment in either case is wrongful and in effect no payment, and the person entitled to the fees or salary may at his election pursue either the person making the payment or the person receiving it.

But we think reasons of public policy require that such payments be held valid as to the person or municipality making them. These reasons cannot be better stated than in the language of Andrews, J., in *Dolan v. Mayor*, 68 N. Y. 274, 23 Am. Rep. 168, where it is said: "If fiscal officers, upon whom the duty is imposed to pay official salaries, are only justified in paying them to the officer de jure, they must act at the peril of being held accountable in case it turns out that the de facto officer has not the true title; or, if they are not made responsible, the department of the government they represent is exposed to the danger of being compelled to pay the salary a second time. It would be unreasonable, we think, to require them, before making payment, to go behind the commission and investigate and ascertain the real right and title. This, in many cases, as we have said, would be impracticable. Disbursing officers, charged with the payment of salaries, have, we think, a right to rely upon the apparent title, and treat the officer who is clothed with it as the officer de jure, without inquiring whether another has the better right.

606 "Public policy accords with this view. Public offices are created in the interest and for the benefit of the public; such, at least, is the theory upon which statutes creating them are enacted and justified. Public and individual rights are, to a great extent, protected and enforced through official agencies, and the state and individual citizens are interested in having official functions regularly and continuously discharged. The services of persons clothed with an official character are constantly needed. They are called upon to execute the process of the courts and to perform a great variety of acts affecting the public and individuals. It is important that the public offices should be filled, and that at all times persons may be found ready and competent to exercise official powers and duties. If, on a controversy arising as to the right of an officer in possession, and upon notice that another claims the office, the public authorities could not pay the salary and compensation of the office to the de facto

officer, except at the peril of paying it a second time, if the title of the contestant should subsequently be established, it is easy to see that the public service would be greatly embarrassed and its efficiency impaired. Disbursing officers would not pay the salary until the contest was determined, and this, in many cases, would interfere with the discharge of official functions": See, also, *State v. Milne*, 36 Neb. 301, 38 Am. St. Rep. 724, 54 N. W. 521, 19 L. R. A. 689; *Commissioners of Saline County v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171; *Auditors of Wayne County v. Benoit*, 20 Mich. 176, 4 Am. Rep. 382; *Demarest v. New York*, 147 N. Y. 203, 41 N. E. 405; *People v. Nolan*, 101 N. Y. 539, 5 N. E. 446; 8 Am. & Eng., Ency. of Law, 2d ed., 814.

On the principal question, therefore, we think the judgment should be reversed. But if it were otherwise, there is another reason why recovery from the town cannot be had in this case. By statute the officer de jure may recover of the officer de facto the salary or fees of an office paid to the latter: *Ballinger's Code*, secs. 5785, 5788 (P. C., secs. 1439, 1442); *State* ⁶⁰⁷ *v. Van Brocklin*, 8 Wash. 557, 36 Pac. 495. In this case, as we have stated, the respondent did so recover. This was an election of remedies, and he cannot now have judgment against the town, merely because he failed in execution against his judgment debtor.

The judgment is reversed and the cause remanded, with instructions to enter a judgment for the appellant town of Harrington.

Mount, C. J., Hadley, Rudkin, Dnubar and Crow, JJ., concur.

Root, J., concurs in the result.

The Payment of a Salary to an Officer De Facto is usually regarded as a defense to an action therefor by the officer de jure: *Brown v. Tama County*, 122 Iowa, 745, 101 Am. St. Rep. 296; *Coughlin v. McElroy*, 74 Conn. 397, 92 Am. St. Rep. 224, and cases cited in the cross-reference note thereto; note to *Andrews v. Portland*, 10 Am. St. Rep. 284.

WOODHOUSE v. POWLES.

[43 Wash. 617, 86 Pac. 1063.]

LIBEL—Report by Credit Association—Damages.—A retail grocer, by mistake reported delinquent to a wholesale dealers' association and refused credit, is not entitled to recover more than nominal damages for libel, it appearing that the mistake was corrected and his credit restored at the earliest possible moment, and it not appearing that he suffered from injury to his feelings or to his credit. (p. 1080.)

LIBEL—Report by Credit Association—Damages.—An agreement between the members of a wholesale dealer's association to report delinquent retailers and refuse them credit until their debt is paid, with notice to all retailers in advance of such agreement, is valid. A mistaken report of such association of the delinquency of a retailer does not render such false report libelous per se, from which malice is presumed, entitling such retailer, in itself, to recover substantial damages without proof of any other facts. (p. 1081.)

LIBEL—Report by Credit Association—Damages.—If a wholesaler's association reports one of its retail customers as delinquent when in fact he is not, it is liable for the actual or compensatory damages suffered by him, but in determining the amount of damages the question of malice is of no moment in a jurisdiction where punitive or exemplary damages cannot be recovered. (p. 1082.)

LIBEL—Actionable per Se—Damages—Evidence.—It is not necessary, to enable a person to recover general damages for a libel actionable per se, that he show some actual pecuniary loss, or that his injury be capable of some definite money valuation. Injury to feelings, mental suffering, injury to character and reputation, and similar injuries, incapable of definite money valuation, can be recovered for when proven in actions for libel. (p. 1083.)

DAMAGES—Nonsuit.—If the sole object of an action is the recovery of damages, a failure to prove substantial damages is a failure to prove the substance of the issue, and entitles the defendant to a nonsuit, although the plaintiff may be entitled to nominal damages. (p. 1083.)

F. A. Gilman, for the appellant.

J. Kiefer, for the respondents.

619 FULLERTON, J. The appellant, at the time of the transactions hereinafter mentioned, was a groceryman in the city of Seattle engaged in the business of conducting a retail grocery store. The respondents were wholesale fruit and produce dealers in the same city, and were members of a voluntary association, composed of some fourteen other dealers engaged in the same business, known as the Seattle Produce Association. The object of the association was to establish a uniform credit system. The members drew up articles

of agreement, fixing the terms on which credit would be granted to the retail dealers, in which, among other things, they provided that bills for produce sold to retail dealers should become due and payable on a day certain following the sale, and if not paid on that day the dealer should be declared delinquent, and thereafter the members of the association would not extend credit to him until he was reported clear upon the books of the dealer who had sold him the produce. Copies of this agreement with a circular letter calling attention to it was sent to all the retail dealers in Seattle and vicinity, one of such copies being received by the appellant.

On January 5, 1904, the appellant's employé applied for certain green groceries of one of the dealers belonging to the association, and was informed by him that the appellant had been reported delinquent, and that any goods sold him would have to be paid for in cash. The employé reported to the appellant what the dealer had said, and was directed to return without the goods. On the next morning the employé again appeared and inquired which of the dealers had returned the appellant as delinquent. On being informed that the respondents had so reported, he went to their place of business, when the matter was inquired into. It was then ascertained that the respondents had returned the appellant as delinquent by mistake, as he was not then indebted to them in any sum whatsoever—the mistake arising from the fact that a salesman ⁶²⁰ of the respondents had failed to report to their bookkeeper that the appellant had countermanded an order for a case of lettuce which had been set apart for him and charged to his account earlier in the day. Immediately on discovering the mistake the appellant's credit was restored, and he was permitted to purchase produce on the usual terms.

The appellant conceived that he was damaged in the sum of five thousand dollars by the act of the respondents, and brought this action to recover that sum. On the trial, at the conclusion of his evidence, the trial judge sustained a motion for a nonsuit, and afterward entered judgment dismissing the action, from which judgment this appeal is taken.

The ruling of the trial judge was based on the finding that the evidence on behalf of the appellant failed to show that he had suffered any actual pecuniary loss other than would be covered by mere nominal damages. Our perusal of the evidence leads us to the same conclusion. Nowhere in his

evidence does the appellant claim that he had suffered from feelings of disgrace, shame, humiliation, mortified pride, or mental anguish of any kind, because of the act of the respondents, or that his credit or reputation for honesty as a merchant had been in any manner impaired by that act. On the contrary, his evidence shows that it was no new experience for him to be on the association's delinquent list; and that he regarded the position as nothing more than a mere inconvenience, since its effect was to require him to pay cash for his green groceries on delivery, instead of settling for them at the end of the week. He did testify, however, that because he could not fill certain orders given on the day he procured no produce he lost some trade, and possibly some customers, but he was not able to give even an estimate as to the amount of his losses in this respect. This, as we say, might justify a recovery of nominal damages, but clearly no recovery for substantial damages could be sustained under ^{§ 21} such proofs, if the appellant is to recover only compensatory damages for his injury.

Counsel for the appellant, however, as we understand his argument, takes the position that the association was in itself unlawful, and that the act of the respondents in notifying their fellow-members that the appellant was delinquent on one of his purchases when he was not so delinquent was an act libelous per se from which malice is presumed, and entitles him in itself to recover substantial damages without proofs of any other fact. As to the first position, we do not think it tenable. Courts, it is true, uniformly hold it libelous for a person or association of persons to attempt to coerce the payment of debts by holding the debtors out to the world as being dishonest and unworthy of credit, or to publish their names in circulars, pamphlets and books for distribution among dealers, as persons who have contracted debts and failed to pay them; but no court, so far as we are advised, has held it unlawful for dealers in a common line of goods to agree among themselves not to extend credit to a person who had defaulted in a payment to some one of them. The right that each one has to protect his legitimate interests justifies such an agreement. And it being lawful to enter into such an agreement, it is, of course, lawful, and hence not libelous, for one party to the agreement to report to the others the names of such of his customers as have become delinquent; and especially is this so where, as in this case, the purchaser is

informed in advance of his purchases that a denial of further credit will be the consequence of his failure to pay at the required time.

An illustrative case of the class holding it unlawful to attempt the collection of debts by advertisements tending to bring the debtor into public contempt is *Muetze v. Tuteur*, 77 Wis. 236, 20 Am. St. Rep. 115, 46 N. W. 123, 9 L. R. A. 86. There an association having for its expressed objects "the collection of bad debts" undertook to coerce the payment of a ⁶²²disputed claim in favor of one of its subscribers by sending to the debtor letters contained in envelopes of a conspicuous character, indorsed with the name and object of the association together with the words "Main Office Notice," and afterward printing and circulating a book containing the name of the debtor, with others, as being a person unworthy of credit. These acts were held libelous and the debtor allowed to recover. But the principle upon which the case rests differs from that involved in the case before us. Public policy forbids the resort to this method for the purpose of collecting debts, but no rule of public policy forbids a wholesaler to refuse to credit a retail dealer who has made default in his payments to another wholesaler, and it follows, as of course, that he may resort to any legitimate method for ascertaining who is in default. As we hold that the method pursued in this case was a legitimate one, no action can be founded on that act alone. For cases illustrating the general question, see *White v. Parks*, 93 Ga. 633, 20 S. E. 78; *Traynor v. Sielaff*, 62 Minn. 420, 64 N. W. 915; *McIntyre v. Weinert*, 195 Pa. 52, 45 Atl. 666; *Ulery v. Chicago Livestock Exchange*, 54 Ill. App. 233; *Hartnett v. Plumbers' Supply Assn.*, 169 Mass. 229, 47 N. E. 1002, 38 L. R. A. 194.

But, while it was lawful for the respondents to enter into the agreement shown, and to report the appellant as delinquent if in fact he was delinquent, they are liable for an abuse of the right, and are liable to the appellant for all actual damages suffered by him if they reported him as delinquent when he was not in fact delinquent. In determining the amount of damages, however, the question of malice is of no moment. In this jurisdiction punitive or exemplary damages cannot be recovered, unless their recovery is especially provided for by statute: *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 26 Am. St. Rep. 842, 25 Pac. 1072, 11 L. R. A. 689; *Wilson v. Northern Pac. R. Co.*, 5 Wash. 621,

32 Pac. 468, 34 Pac. 146; Sloan v. Langert, 6 Wash. ⁶²³ 26, 32 Pac. 1015; Seattle Crockery Co. v. Haley, 6 Wash. 302, 36 Am. St. Rep. 156, 38 Pac. 650; Atrops v. Costello, 8 Wash. 149, 35 Pac. 620; Levy v. Fleischner, 12 Wash. 15, 40 Pac. 384. And, as proof of malice is not necessary to recover actual or compensatory damages, but are shown only for the purpose of enabling the plaintiff to recover punitive or exemplary damages (Davis v. Tacoma R. & Power Co., 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802; Byrne v. Funk, 38 Wash. 506, 80 Pac. 772; 18 Am. & Eng. Ency. of Law, 2d ed., 1002), it must follow that a plaintiff may recover all of the damages to which he is entitled by reason of the false publication regardless of any motive the defendant may have had in publishing it; that is to say, he is entitled to recover such damages as will actually compensate him for the injury suffered, and nothing more.

It is not, of course, intended to be asserted that it is necessary in order to enable a person to recover general damages for libels actionable per se that he must show some actual pecuniary loss, or that his injuries are capable of some definite money valuation. Injuries to feelings, and mental suffering, injuries to character and reputation, and similar injuries incapable of definite money valuation can be recovered for, when proven, in actions for libel as in actions for corporal injuries, but we do hold that there must be some evidence that such injuries actually followed from the libel before a recovery can be had, as they are not to be inferred from the mere fact that a libel has been proven.

Since we hold that the appellant offered no evidence of substantial damages, the foregoing considerations require us to hold that the trial court did not err in refusing to submit the question of the amount of his damages to the jury. It has been suggested, however, that as the evidence justified a recovery of nominal damages the court erred in taking the case from the jury entirely, but should have instructed them to return a verdict of nominal damages, allowing the plaintiff ⁶²⁴ the costs of the action. But there was no error in this respect. This court in common with many other courts, has held that where the sole object of the recovery is damages, a failure to prove substantial damages is a failure to prove the substance of the issue and entitles the defendant to a judgment of nonsuit, or a judgment that the appellant take nothing by his action. It is only where the verdict of the

jury will determine some property or personal right, having value of itself as a right, that the verdict must be taken regardless of the question whether the amount returned is substantial or nominal: *Commercial Inv. Co. v. National Bank of Commerce*, 36 Wash. 287, 78 Pac. 910; *Johnson v. Cook*, 24 Wash. 474, 64 Pac. 729; *Tracy v. Hackett*, 19 Ind. App. 133, 65 Am. St. Rep. 398, 49 N. E. 185.

The judgment is affirmed.

Mount, C. J., Hadley, Rudkin, Dunbar and Crow, JJ., concur.

For Authorities on the Question involved in the principal case, see the note to Holmes v. Clisby, 104 Am. St. Rep. 145.

STATE v. GREAT NORTHERN RAILWAY COMPANY.

[43 Wash. 658, 86 Pac. 1056.]

CONSTITUTIONAL LAW—Regulation of Carrier's Charges. A statute arbitrarily fixing the weight of standards for lumber cars at one thousand pounds to be deducted from the net weight of the lumber carried on the car, regardless of the actual weight of such standards, is unconstitutional because it requires the carrier to carry freight on each car free of charge, and therefore is a taking of property without due process of law. (p. 1085.)

CARRIERS—Regulation of Charges.—Any regulation of freight charges or rates which arbitrarily fixes the weight of cars or equipment at more or less than the actual weight, is unreasonable, although the difference is small. A reasonable regulation requires the shipper to pay the carrier in each case for the freight actually carried, no more and no less; and no arbitrary regulation of weights can be said to be reasonable. (pp. 1086, 1087.)

CONSTITUTIONAL LAW—Regulation of Carrier's Charges. Although a provision in a statute that the shipper shall furnish the weight of standards for lumber cars, and that the weight of the equipment shall be added to the weight of the car, "so that the freight shall be charged by the carriers only on the cargo carried," is reasonable, yet it does not cure an unreasonable regulation contained in another part of the statute, requiring "one thousand pounds to be deducted from the net weight of the lumber carried." The latter regulation is unconstitutional as depriving carriers or persons of their property without due process of law. (p. 1088.)

Danson & Williams, for the appellant.

M. J. Gordon and C. A. Murray, for the respondent.

⁶⁵⁸ MOUNT, C. J. This case depends upon the validity of section 2 of the act of 1905, requiring railroad companies and other ⁶⁵⁹ common carriers to include in the weight of cars used for the shipment of lumber the weight of standards, etc. The act is found in the Laws of 1905, at page 238. Section 2 of this act arbitrarily fixes the weight of such standards, etc., at one thousand pounds, and provides that one thousand pounds shall be deducted from the net weight of the lumber carried on the car, and that freight shall be charged on the balance only. The question was raised below by the application of the appellant for a writ of mandamus to compel the Great Northern Railway Company to furnish appellant with an empty flat car containing the necessary standards and equipments, on which the said appellant could load a car of lumber. Appellant demanded that the weight of such standards and equipments should be taken and considered as a part of the weight of said car, and the same should be fixed at one thousand pounds and deducted from the net weight of the lumber carried on said car. The railroad company refused to furnish the car upon the conditions of the demand. It is conceded that the railroad company "has ever been and now is ready and willing to furnish cars to relator and others in the discharge of its duties as a common carrier, deducting from the freight charges in said service the actual weight of the cars and the usual equipments, including the actual weight of standards, supports, stays, railings, equipments, appliances, and appurtenances thereto, which weight will in no case exceed four hundred pounds per car, making its freight charges depend solely upon the actual weight of lumber or manufactured lumber product shipped upon such cars." The lower court held that section 2 of the act referred to was unconstitutional, because it requires the respondent to carry freight on each car free of charge, and is therefore a taking of property without due process of law.

We think this position must be sustained. If the legislature may say that the carrier must deduct one thousand pounds from the net weight carried, then there is no limit to ⁶⁶⁰ which it may not go. This arbitrary deduction is not based upon the right to regulate the rates of freight, because such rates must necessarily be based upon the actual weight or bulk carried. There can be no doubt that it is the duty of a common carrier to furnish cars suitable for what is carried,

and the carrier is liable in damages for a failure of its duty in this respect: *Emerson v. St. Louis etc. R. Co.*, 111 Mo. 161, 19 S. W. 1113; *Beard v. Illinois Cent. R. Co.*, 79 Iowa, 518, 18 Am. St. Rep. 381, 44 N. W. 800, 7 L. R. A. 280. This duty is conceded by the respondent, and the authority of the legislature to provide for a suitable equipment is not questioned in the case. When the legislature defines by statute what shall constitute a reasonable or proper equipment, it cannot go further and arbitrarily fix the weight of such equipment, and then say the weight thereof shall be deducted from the net weight of freight carried on the car because the equipment is no part of the freight carried. If the legislature may provide for deducting the weight of the equipment from the net weight of the freight, it may for the same reason deduct the weight of the car from the weight of the freight, and thus require the carrier to carry freight to the amount of the weight of the car and equipment free.

Appellant contends that it is only where the regulation is so unreasonable as to result in depriving the carrier of its property that the court will interfere and declare the regulation void, and that one thousand pounds is so small when compared with the weight of a carload of lumber as to be immaterial. The first contention may be conceded, but as to the second, the weight of the standards and other equipments and the weight of cars used may be easily and accurately ascertained, and a reasonable regulation would require the carrier to weigh the cars and equipment when such weight becomes material in determining freight charges. Any regulation, therefore, which fixes the weight of cars or their equipment at less or more than the actual weight cannot be ⁶⁶¹ a reasonable regulation. Cars as well as equipment do not weigh the same. The weight must depend upon the materials used in the construction. Such weight is easily and readily determined. If the average weight of equipment of a car is one thousand pounds and may be fixed at that weight by law, regardless of its actual weight, then the shipper on a car having equipment weighing more than one thousand pounds would be required to pay freight on a weight which he did not ship, and where the equipment weighed less than one thousand pounds, the carrier would be required to carry freight free. Thus, in either event, such regulation would take property from one and give it to another without compensation. While it may be true that the average would

balance in the end, yet a reasonable regulation requires the shipper to pay the carrier in each case for the freight actually carried, no more and no less. Any arbitrary regulation of weights cannot be said to be reasonable. In other words, this kind of regulation amounts to confiscation. When it is once conceded that the legislature may require forty thousand pounds to be carried as thirty-nine thousand pounds or less, then the right to confiscation is at once maintained.

A state cannot require a railway company to carry property without reward, or, as said in the Railroad Commission Cases, 116 U. S. 307, at page 331 (6 Sup. Ct. Rep. 334, 29 L. ed. 636): "This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward. Neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." See, also, *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. Rep. 1028, 31 L. ed. 841, and cases cited; *Chicago etc. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. Rep. 462, 702, 33 L. ed. 970. Under the conceded facts in this case, if the validity ⁶⁰² of this section of the statute is maintained, the carrier is required to carry six hundred pounds of freight free on each car. This is a small amount, to be sure, when compared with the capacity of a car, but it is a substantial quantity, and involves the principle that the legislature may require the railway company to carry freight free, which, as we have seen, is a taking of property under the decision of the supreme court of the United States.

Appellant also contends that the act contemplates that the shipper will furnish the standards, supports, etc., and the weight thereof will be included in the weight of the lumber shipped upon the car. Section 1 of the act provides that the equipment named shall be considered a part of the car, and the weight of the equipment shall be added to the weight of the car. "So that the freight charges shall be charged by the carriers only on the cargo carried." These are reasonable and proper provisions, but there is no provision in the act that the weight of the standards shall be included in the weight of the lumber, and then deducted, except as it may be inferred from section 2, which is as follows:

"Sec. 2. For the purpose of this act, the weight of such standards, supports, stays, railings, equipments, chains, appliances, contrivances, etc., provided for in the first section of this action shall be, and the same is hereby fixed at 1,000 pounds, and in estimating and adjusting the freight charges on all lumber and manufactured lumber products carried on cars by a railroad company or other common carrier in this state, 1,000 pounds per car shall in each case be deducted by such railroad company or other common carrier from the net weight of the lumber and manufactured lumber products so carried upon such car, and freight shall be charged on the balance only": Laws 1905, p. 238, sec. 2.

If the words "net weight of the lumber carried" mean to include the weight of standards and other equipments with the weight of the lumber, then there would be force in the position that the weight of the standards is to be included in ~~ess~~ the weight of the lumber. But the words "net weight," as commonly used, means the weight of the lumber only, exclusive of anything else. Furthermore, the act makes no distinction between the case where the shipper furnishes the standards and where the carrier furnishes them. In either event section 2 requires one thousand pounds to be deducted from the net weight of the lumber carried on each car, and freight shall be charged on the balance only. This is clearly not a reasonable regulation, and if the legislature intended that the shipper should furnish the standards, etc., and have the weight thereof deducted, the language used does not express that idea. The case is argued here upon the theory that, under the admitted facts, the respondent is required to carry six hundred pounds of freight free. It may be doubted that the validity of a statute may be said to depend upon the admissions of a party or the facts in a particular case. We do not base this decision upon the facts pleaded and admitted. It rests upon the statute itself, which plainly provides an arbitrary weight for standards, etc., which the first section makes a part of the car and which the second section requires to be deducted from the net weight of the freight carried, thus requiring freight to be carried free. For these reasons, we are satisfied that section 2 of the act is in contravention of section 1, article 14 of the constitution of the United States, and is therefore void.

The judgment is therefore affirmed.

Dunbar, Crow and Hadley, JJ., concur.

The Constitutionality of Statutes regulating the freight rates of railway companies is discussed in *State v. Minneapolis etc. R. R. Co.*, 80 Minn. 191, 89 Am. St. Rep. 514; *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361, 41 Am. St. Rep. 278. It has recently been decided that the state corporation commission, in the exercise of the police power of the state, has power to require two railroad companies to make connection at a certain station at a certain time; *North Carolina Corp. Commission v. Atlantic Coast Line R. R. Co.*, 137 N. C. 1, 115 Am. St. Rep. 636.

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See Warehousemen.

BANKS AND BANKING.

In General.

1. BANKS AND BANKING—Application of Deposits.—A bank into whose hands money comes by mistake in the name of one who has no interest therein cannot apply it to the satisfaction of his debt to

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the bank as against the true owner. (Iowa) *McLennan v. Farmers' Saving Bank*, 439.

2. BANKS AND BANKING—Duty of Depositors as to Return of Passbook and Vouchers.—A bank depositor is under obligation to the bank to examine within a reasonable time, or have examined by some competent person, in good faith and with ordinary care, the account rendered in his passbook and the vouchers returned, and to report any errors discovered. Failing in this, he is negligent, and may be held liable for the payment of a forged check. (Va.) *First Nat. Bank v. Richmond Electric Co.*, 1014.

Checks—Acceptance and Payment.

3. BANKS AND BANKING—Checks—Acceptance.—A right of action does not exist in favor of the holder of a check against the drawee bank when there has been by the latter no acceptance or promise to pay in writing, especially when the statute has expressly so provided. (Colo.) *Van Buskirk v. State Bank*, 182.

4. BANKS AND BANKING—Checks—Liability of Drawee.—If a check drawn on one bank is presented to another for payment and the latter telephones the drawee bank and is informed by it that the check is good and thereupon pays it, but before presentation to the drawee the drawer notifies it not to pay, an action will not lie against the drawee bank by the bank paying the check, in the absence of fraud or false representation by the drawee bank. (Colo.) *Van Buskirk v. State Bank*, 182.

5. BANKS AND BANKING—Payment of Forged Checks.—If the officers of a bank, before paying a forged or altered check, could, by the exercise of proper care and skill, have detected the forgery, it is not entitled to a credit for the amount of the check, even if the depositor omitted all examination of his account returned to him by the bank. (Va.) *First Nat. Bank v. Richmond Electric Co.*, 1014.

6. BANKS AND BANKING—Forged Checks—Principal and Agent.—In the commission of a forgery an employé is not the agent of his principal, and his knowledge cannot be imputed to the principal; but after forged checks have been paid and returned to the depositor as vouchers with the bank account written up and balanced according to the usual business methods, if the depositor assigns the duty of examining such vouchers and account to his clerk, who has had an opportunity of committing and has committed a forgery, such employé in the discharge of this duty is the agent of the depositor, who is chargeable with his agent's knowledge of the fraud. (Va.) *First Nat. Bank v. Richmond Electric Co.*, 1014.

Collections.

7. BANKS AND BANKING—Collections.—A bank undertaking to collect a claim may by custom be allowed to employ subcollecting agents, but it is bound to select such agents with judgment and care. (Ala.) *Farley Nat. Bank v. Pollock*, 44.

8. BANKS AND BANKING—Collections—Custom.—A bank, or person who is to pay paper, is not the proper person to whom the paper should be sent for collection by the collecting bank, and a custom to that effect is unreasonable and void, rendering the collecting bank liable for damages to the payee of the paper, if damages result from acting on such custom. (Ala.) *Farley Nat. Bank v. Pollock*, 44.

BENEFIT ASSOCIATIONS.

See Insurance, 34-37.

BIBLE.

See Schools.

BILLS AND NOTES.

1. **BILLS AND NOTES—Drafts—Liability Before Acceptance.**—Under a statute providing that no person shall be liable on an instrument whose name does not appear thereon, an employer upon whom a draft is drawn by his commercial traveler is not liable thereon before acceptance, although other drafts of similar nature have been honored by him. (Wash.) *Seattle Shoe Co. v. Packard*, 1064.

2. **BILLS AND NOTES.**—The Unauthorized Indorsement of a check confers no title. (Ind. App.) *Hamilton Nat. Bank v. Nye*, 333.

3. **BILLS AND NOTES—Unauthorized Indorsement—Subsequent Indorsees.**—If the first indorsement on a check is unauthorized, subsequent indorsees have no title as against the drawer. (Ind. App.) *Hamilton Nat. Bank v. Nye*, 333.

4. **BILLS AND NOTES—Unauthorized Indorsement.**—The delivery of a check with an unauthorized indorsement is in effect its delivery without any indorsement, and in the hands of anyone, other than the payee, it is not negotiable paper. (Ind. App.) *Hamilton Nat. Bank v. Nye*, 333.

5. **BILLS AND NOTES—Authority of Agent to Indorse Principal's Check.**—A mere selling agent has no implied authority to indorse checks to his principal. (Ind. App.) *Hamilton Nat. Bank v. Nye*, 333.

BONDS.

See Elections, 1.

BOUNDARIES.

1. **BOUNDARY, Agreement Undertaking to Establish What the Parties Know not to be Correct.**—An agreement between coterminous owners, though in writing, undertaking to establish as a boundary between their lands a line which they know not to be the true boundary will not be enforced. If its object is to pass the title to land, it cannot be conceded that effect unless it contains apt words of conveyance. (Cal.) *Lewis v. Ogram*, 151.

2. **AGREEMENT to Establish Boundary, When Without Consideration.**—An agreement purporting to establish the boundary between the lands of coterminous proprietors at a line where both know such boundary is not, and the result of which, if it is given effect, must be to transfer to the one lands which both know do not belong to him, is without consideration and inoperative. (Cal.) *Lewis v. Ogram*, 151.

3. **ESTOPPEL, When not Created by an Agreement Purporting to Establish a Boundary Line.**—If two persons having the right to acquire title to adjoining tracts of public land, the boundary between which, as both know, has already been flagged by a government surveyor, but not finally located, enter into an agreement in writing

purporting to establish such boundary at a line ten chains distant from the line so flagged, and to stipulate that one of them will not include in his filing any lands north of such line, nor the other in his filing any land south thereof, and each thereafter files upon and acquires title to the land he was entitled to acquire from the government, neither is estopped by such agreement from claiming all the land included in his patent. (Cal.) *Lewis v. Ogram*, 151.

See Navigable Waters.

BOYCOTTING.

See Injunctions, 8-10.

BUILDING CONTRACT.

See Principal and Surety.

CANCELLATION OF INSTRUMENTS.

1. **CONVEYANCES—Rescission of for Mistake—Notwithstanding Covenant for Title.**—Although a vendee has a right to proceed at law upon his covenants for title, he also has a right, when the grantor has made a mistake in the description of the property conveyed, which he is unable to correct and which is material in its character and affects the very substance of the transaction, to go into a court of equity upon the ground of mistake, and have the deed canceled and the purchase money refunded. (Va.) *Lee v. Laprade*, 1021.

2. **DEEDS—Cancellation for Mistake—Interest on Purchase Money.**—If a deed is canceled on the ground of mutual mistake in the description of the land conveyed, and a decree is rendered for the repayment of the purchase money, the latter should bear interest from the time when the mistake was discovered and demand made. (Va.) *Lee v. Laprade*, 1021.

3. **MISTAKE OF FACT, Canceling Contracts for.**—Mutual consent is requisite to the creation of a contract, and if there is a mistake of fact of one of the parties, going to the essence of the contract, no agreement in fact is made, and equity will grant the remedy of cancellation. (Ill.) *Steinmeyer v. Schroepfel*, 224.

4. **MISTAKE OF FACT Due to Want of Care and Diligence.**—To warrant relief in equity because of a mistake of fact, it must not have resulted from want of the care and diligence exercised by persons of reasonable prudence under the same circumstances. (Ill.) *Steinmeyer v. Schroepfel*, 224.

5. **A MISTAKE Which will Justify Relief in Equity must affect the substance of the contract, and not a mere incident or the inducement for entering into it.** (Ill.) *Steinmeyer v. Schroepfel*, 224.

6. **MISTAKE OF FACT—Error in Adding Figures.**—An error of more than four hundred dollars in adding prices of articles correctly set down on a paper, whereby the person for whom such adding was made was caused to enter into a contract to furnish such articles for a sum more than four hundred dollars less than if the adding had been correct, is not a mistake of fact for which equity will cancel the contract. (Ill.) *Steinmeyer v. Schroepfel*, 224.

CARRIERS.*Of Passengers.*

1. **RAILROADS—Duty to Passengers.**—Railroad companies must exercise the highest degree of care toward passengers on their trains, and are liable for assaults committed upon them by employes. (Iowa) *Garvik v. Burlington etc. Ry. Co.*, 432.

2. **RAILROADS—Liability for Rape by Employé.**—A railroad company is liable in damages for a rape committed by one of its employes on one of its passengers. (Iowa) *Garvik v. Burlington etc. Ry. Co.*, 432.

Of Baggage.

3. **CARRIERS—Sample Trunks as Baggage—Knowledge of Contents.**—Courts take judicial notice of the fact that it is the general custom of common carriers by rail to carry sample trunks with their contents of merchandise as the baggage of traveling salesmen, but not of the conditions or limitations, if any there be, under which this is done, and it is not necessary to prove knowledge on the part of the carrier or his agent of the contents of such trunks by evidence of a direct statement made by the traveling salesman, or by other direct evidence. Such fact may be inferred from the circumstances of the transaction. (Minn.) *McKibbin v. Wisconsin Cent. Ry. Co.*, 689.

4. **CARRIERS—Baggage—Gratuitous Bailee.**—A railway carrier is not, as a matter of law, liable only as a gratuitous bailee of baggage regularly checked, although the passenger owning it does not go on the same train with it. (Minn.) *McKibbin v. Wisconsin Central Ry. Co.*, 689.

5. **CARRIERS—Baggage—Loss of Merchandise.**—If a traveling salesman regularly checks his sample trunks as baggage to a certain point by railway, where they are destroyed through the carrier's negligence while in his station-house, the salesman may recover for their loss, although he did not go on the same train with them, if he, in good faith, intended to follow them on a later train. (Minn.) *McKibbin v. Wisconsin Central Ry. Co.*, 689.

Of Goods.

6. **CARRIERS—Liability for Loss by Delay—Negligence.**—A carrier is not permitted to invoke the act of God which destroys goods while in transportation, as an excuse for unreasonable delay and failure to deliver, when, if the carrier had discharged his duty, the goods would not have been destroyed. (Ala.) *Alabama Great Southern R. R. Co. v. Quarles*, 54.

7. **CARRIERS—Loss of Goods by Delay—Negligence—Act of God.**—If a carrier is intrusted with goods for transportation and they are lost, he is responsible therefor unless the loss was caused by the act of God or the public enemy, and to avail himself of such exemption he must show that he was free from fault at the time. If there is an unreasonable delay on the part of the carrier in forwarding the goods and they are destroyed by the act of God during this delay, or such delay causes their destruction, the carrier is liable. (Ala.) *Alabama Great Southern R. R. Co. v. Quarles*, 54.

8. **CARRIERS—Delay in Delivery—Conversion.**—A failure by the carrier to deliver goods within a reasonable time does not establish a conversion but is a mere breach of contract, and the consignee

cannot refuse to accept the goods on the ground of the delay and recover their full value, unless the delay destroyed the value of the goods entirely, or caused what is equivalent to a total loss. A mere delay being no conversion, the consignee must receive the goods, although he at that time has no use for them, and he cannot refuse to accept and recover their full value. (Ala.) *Central of Georgia Ry. Co. v. Montmollen*, 58.

9. **CARRIERS—Delay in Delivery—Missing Goods.**—Although there has been a delay in delivery of goods by a carrier, the mere fact that some of the articles shipped are missing does not justify the consignee in refusing to receive, nor entitle him to maintain an action for failure to deliver. (Ala.) *Central of Georgia Ry. Co. v. Montmollen*, 58.

10. **CARRIERS—Delay in Delivery—Damage to Goods—Burden of Proof.**—In an action to recover for failure to deliver goods offered to be delivered by the carrier and delivery refused, the damages recoverable are limited to those sustained to the goods together with those arising from the delay in making delivery. (Ala.) *Central of Georgia Ry. Co. v. Montmollen*, 58.

11. **CARRIERS—Delivery at Unusual Place—Waiver.**—If a carrier fails to deliver goods after the consignee has absolutely refused to receive them, although delivery is sought to be made at an unusual place, the consignee by such refusal waives the right to insist upon delivery at the usual place. (Ala.) *Central of Georgia Ry. Co. v. Montmollen*, 58.

12. **CARRIERS—Action by Commission Agent for Damages.**—When goods consigned to a commission agent are negligently delayed in transit and converted by the carrier, so that sales previously made by the consignee are canceled, he may in his own name recover damages on account of his lost commissions and also for the value of the property. (Kan.) *Missouri Pacific Ry. Co. v. Peruvian Zandt Implement Co.*, 468.

13. **CARRIERS—Delay in Transit—Damages in Excess of Freight.**—When a carrier negligently delays the delivery of goods so that the damages thereby occasioned amount to more than the charges due for transportation, the consignee may demand delivery without paying the freight, and the refusal of the carrier to surrender possession amounts to a conversion. (Kan.) *Missouri Pacific Ry. Co. v. Peruvian Zandt Implement Co.*, 468.

14. **CARRIERS—Knowledge of Effect of Delay in Shipment.**—When a threshing-machine is consigned in June to an implement dealer in Kansas, the carrier will be deemed to have notice that the machine, if not already sold, is intended for immediate sale, and that a delay until the close of the threshing season will defeat the purpose of the shipment. (Kan.) *Missouri Pacific Ry. Co. v. Peruvian Zandt Implement Co.*, 468.

15. **CARRIERS—Damages for Delay in Shipment.**—When machinery consigned to a commission agent is negligently delayed in transit and converted by the carrier, so that sales previously made by the consignee are canceled, the measure of damages in an action for the loss of his commission and the value of the property is the amount for which the sale had been made. (Kan.) *Missouri Pacific Ry. Co. v. Peruvian Zandt Implement Co.*, 468.

See Constitutional Law, 12-16; Railroads; Street Railways.

CERTIORARI.

CERTIORARI—Questions Reviewable on.—The whole judgment of the lower court is reviewable on certiorari, though as to one of the questions involved, it was decided not on its merits, but because the case must necessarily find its way to the supreme court on the other questions involved. (Mich.) *Township of West Bloomfield v. Detroit United Ry.*, 628.

CHATTEL MORTGAGES.

1. **CHATTEL MORTGAGE—Description, When Insufficient.**—The description, "One 15 H. P. traction engine, Westinghouse make; one O a 32x47 Westinghouse grain thresher, one Woods self-feeder main drive belt wagon box elevator tank pump and hose," is insufficient in a chattel mortgage made by a husband and wife, though the mortgage describes the county of their residence, and no other threshing outfit of the same number and style was in the county, as against one having no actual notice of the mortgage, though it is of record, when it does not expressly state which of the mortgagors owns the property. (Iowa) *Westinghouse Co. v. McGrath*, 421.

2. **CHATTEL MORTGAGES—Description—Constructive Notice.**—To constitute the record of a chattel mortgage constructive notice, the description of the property must be sufficiently definite to direct the mind of the searcher of the record to facts from which he may ascertain the property with reasonable certainty. (Iowa) *Westinghouse Co. v. McGrath*, 421.

3. **CHATTEL MORTGAGES not Satisfied by Substitution of Property.**—If a contract for the sale of a mule provides that the vendee may return it and receive another in case it proves unsatisfactory, such return and substitution do not satisfy the note and mortgage executed by the vendee to the vendor for the purchase price at the time of the original sale. (Ark.) *Jones v. Wolfert*, 101.

4. **CHATTEL MORTGAGES to Secure Future Advances.**—A chattel mortgage may be made to secure future advances which are in contemplation of the parties at the time of the making of the mortgage, and when the indebtedness to be secured, including the advances contemplated, has been fully satisfied and discharged, the mortgage is canceled and extinguished by operation of law. Such a mortgage cannot, however, by subsequent agreement between the parties, be made to cover other advances not in contemplation at the time the mortgage was made unless, possibly, such agreement amounts to a new mortgage in parol. (Iowa) *Wright v. Voorhees*, 429.

5. **CHATTEL MORTGAGES—Future-acquired Property—Description.**—A chattel mortgage covering "future acquisitions of the above-described property" is not sufficient in description to cover all future acquisitions of property by the mortgagor. (Iowa) *Wright v. Voorhees*, 429.

CHECKS.

See Banks and Banking.

CHILD LABOR ACT.

See Constitutional Law, 18-24.

CLOUD ON TITLE.

See Taxation, 2-5.

COMMERCE.

See Constitutional Law, 12.

Note.

Commissioners and Referees, contempt, power of to punish, 957, 958.

CONSTITUTIONAL LAW.

Departments of Government and Their Functions.

1. **CONSTITUTIONAL LAW—De Facto Legislature.**—The acts of a de facto legislature, so long as its members remain actual incumbents of their offices, are valid. (N. Y.) Sherrill v. O'Brien, 841.

2. **CONSTITUTIONAL LAW—Conferring Legislative Power on Courts.**—A statute providing for the extension of the corporate limits of cities and towns, designating the circuit judges of the state in which the premises lie as the governmental agency for carrying out the provisions of the statute, and conferring upon them the power to determine the boundaries, and the necessity for and expediency of extending such limits, is not unconstitutional as conferring legislative power on such courts. (Va.) Henrico County v. City of Richmond, 1001.

Interpretation of Constitution.

3. **CONSTITUTIONAL and Statutory Construction.**—Where a Word in the Amendment or Re-enactment of a Constitution or Statute is Omitted, the omission must be assumed to have been intentional. (N. Y.) Sherrill v. O'Brien, 841.

4. **CONSTITUTIONAL LAW—Interpretation of Constitution by Aid of Proceedings in the Constitutional Convention.**—The courts may properly look, when construing the constitution, to proceedings in the convention proposing it. (N. Y.) Sherrill v. O'Brien, 841.

Constitutionality of Statutes.

5. **CONSTITUTIONAL LAW.**—The Authority of the Judicial Department Both of the State and of the National Government to Determine the Validity of Legislative Acts is no longer an open question. (N. Y.) Sherrill v. O'Brien, 841.

6. **CONSTITUTIONAL LAW—Presumption of Constitutionality, and of Facts Required to Support a Statute.**—The presumption is that an act of the legislature is constitutional, and when this depends upon the existence or nonexistence of some fact, or state of facts, the determination thereof is primarily for the legislature, and the courts will acquiesce in its decision, unless error clearly appears. (Cal.) In re Spence, 137.

7. **CONSTITUTIONAL LAW.**—A statute will not be declared unconstitutional unless there is a clear violation of some explicit provision of the constitution. (Va.) Henrico County v. City of Richmond, 1001.

Liberty of Press.

8. **CONSTITUTIONAL LAW—Liberty of Press.**—A statute providing, among other things, that no account of the details of an execution of a convict, beyond the statement of the fact that such convict was on the day in question duly executed according to law,

shall be published in any newspaper, and making a violation of the statute a misdemeanor, is in all respects constitutional and does not violate the right of liberty of the press. (Minn.) *State v. Pioneer Press Co.*, 684.

Regulation of Business and Occupation.

9. **CONSTITUTIONAL LAW**.—A Statute Forbidding the Sale of Theater Tickets at a Price Higher than Paid for Them infringes a right of property guaranteed by the constitution, and is void. (Cal.) *Ex parte Quarg*, 115.

10. **THE POLICE POWER** Extends Only to Such Measures as are Reasonable in Their Application and Tend in Some Appreciable Degree to promote, protect or preserve the public health, morals or safety, or the general welfare. (Cal.) *Ex parte Quarg*, 115.

11. **CONSTITUTIONAL LAW**—Class Legislation—Due Process of Law.—A statute and city ordinance imposing a privilege tax on each person loaning money secured by bill of sale or mortgage on designated kinds of personal property, but not imposing such tax on lenders otherwise securing their loans, are unconstitutional and void as class legislation, and as depriving persons of their property without due process of law. (Miss.) *Rodge v. Kelly*, 733.

Regulation of Carriers.

12. **CONSTITUTIONAL LAW**—Carriers—Interstate Commerce.—Statutes requiring carriers by rail to trace freight or express shipped over their lines and the line of the connecting carrier, and making the initial carrier liable for shipment over its own and connecting lines unless a receipt from the connecting carrier is produced, and making the bill of lading issued by the initial carrier prima facie evidence of liability for the loss of or damage to goods in course of transportation, do not unlawfully regulate interstate commerce. (S. C.) *Skipper v. Seaboard Air Line Ry.*, 901.

13. **CONSTITUTIONAL LAW**—Regulation of Railroad Rates—*Mileage Tickets*.—A state may prescribe a maximum scale of rates for the transportation of passengers, but it cannot compel a railroad company to contract with any individual or class for carriage at a charge less than the established or regular scale of fares. It cannot arbitrarily fix a maximum passenger rate on mileage-books and require the carrier always to keep them on sale to all who apply for them, and to redeem them at a later period than he has theretofore redeemed mileage-books. A statute to such effect is class legislation, a discrimination in favor of the wholesale buyer, invades the right of the carrier to manage his own affairs, denies to him the equal protection of the law and of his property without due process of law, and hence is unconstitutional. (Va.) *Commonwealth v. Atlantic Coast Line Ry. Co.*, 983.

14. **CONSTITUTIONAL LAW**—Regulation of Carrier's Charges.—A statute arbitrarily fixing the weight of standards for lumber cars at one thousand pounds to be deducted from the net weight of the lumber carried on the car, regardless of the actual weight of such standards, is unconstitutional because it requires the carrier to carry freight on each car free of charge, and therefore is a taking of property without due process of law. (Wash.) *State v. Great Northern Ry. Co.*, 1084.

15. **CARRIERS**—Regulation of Charges.—Any regulation of freight charges or rates which arbitrarily fixes the weight of cars

or equipment at more or less than the actual weight, is unreasonable, although the difference is small. A reasonable regulation requires the shipper to pay the carrier in each case for the freight actually carried, no more and no less; and no arbitrary regulation of weights cannot be said to be reasonable. (Wash.) *State v. Great Northern Ry. Co.*, 1084.

16. CONSTITUTIONAL LAW—Regulation of Carrier's Charges. Although a provision in a statute that the shipper shall furnish the weight of standards for lumber cars, and that the weight of the equipment shall be added to the weight of the car, "so that the freight shall be charged by the carriers only on the cargo carried," is reasonable, yet it does not cure an unreasonable regulation contained in another part of the statute, requiring "one thousand pounds to be deducted from the net weight of the lumber carried." The latter regulation is unconstitutional as depriving carriers or persons of their property without due process of law. (Wash.) *State v. Great Northern Ry. Co.*, 1084.

Payment of Wages.

17. CONSTITUTIONAL LAW—Laborer's Wages.—A statute providing for the semi-monthly payment by employers of their employes in money, and in default thereof, after demand made, subjecting employers to the payment of exemplary damages and necessary attorneys' fees for collecting such wages, is constitutional in all respects, nor is it in conflict with a constitutional provision that no law shall grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens. (Ind.) *Seelyville Coal etc. Co. v. McGlosson*, 396.

Child Labor Act.

18. CONSTITUTIONAL LAW—Class Legislation, When Proper.—Minors are peculiarly entitled to legislative protection, and form a class to which legislation may be exclusively directed without falling under the constitutional prohibition of special legislation and unfair discrimination. (Cal.) *In re Spencer*, 137.

19. CONSTITUTIONAL LAW—Child Labor, Prohibition of in Certain Occupations Only.—A statute prohibiting the employment and laboring of children under fourteen years of age in certain designated occupations will not be held to be unlawful class legislation on the ground that there are other employments not falling within the prohibited classes, which are equally hurtful to children. The decision of the legislature that the specified occupations are more injurious to children than other occupations not mentioned, and that they constitute practically all the injurious occupations in which children are employed at all is not so manifestly incorrect as to justify the court in declaring it unfounded and the law consequently invalid. (Cal.) *In re Spencer*, 137.

20. CONSTITUTIONAL LAW—Child Labor Statute.—The fact that a statute prohibiting the employment of children under fourteen years of age contains a proviso permitting such employment, if either of its parents makes a sworn statement to the judge of the juvenile court that the child is more than twelve years of age, and that its parent or parents are unable, from sickness, to labor, such judge may, in his discretion, issue a permit allowing the child to work for a time specified therein, does not render the statute uncon-

stitutional. It does not create a discrimination against orphan and abandoned children. (Cal.) In re Spencer, 137.

21. CONSTITUTIONAL LAW—Child Labor Statute—Exception During Vacation in Schools.—A statute forbidding the employment and working of children in designated occupations may contain a provision permitting such employment, as to children more than twelve years of age, during the time of regular vacations, upon a permit from the principal of the school attended by the child during the term next preceding such vacation. This does not give the principals of public schools the exclusive right to issue permits. (Cal.) In re Spencer, 137.

22. CONSTITUTIONAL LAW—Separating the Invalid from the Valid Parts of a Statute.—Those portions of the statute relating to the employment of children declaring that no child under sixteen years of age shall work at any gainful occupation during the hours the public schools are in session, unless such child can read English at sight and write simple English sentences, or is attending night school, and that no minor under sixteen shall work in any mercantile institution, office, laundry, manufacturing establishment or workshop, between 10 o'clock in the evening and 6 o'clock in the morning, are separable and independent provisions, and might be unconstitutional without rendering the whole statute invalid. (Cal.) In re Spencer, 137.

23. CONSTITUTIONAL LAW—Child Labor Statutes—Special Provision Concerning Illiterate Children.—A statute regulating and forbidding the employment of children may contain special provisions relating to those who are unable to read and write English, and forbidding their employment when under sixteen years of age, unless they attend night school. (Cal.) In re Spencer, 137.

24. CONSTITUTIONAL LAW—Child Labor Statutes—Exception in Favor of Agricultural, Viticultural, Horticultural or Domestic Labor.—A statute regulating and forbidding the employment and laboring of children under designated ages may exempt agricultural, viticultural, horticultural or domestic labor, because it is generally carried on at home and under the care and supervision of parents or those occupying the place of parents. (Cal.) In re Spencer, 137.

25. CONSTITUTIONAL LAW—Right to Resell.—The constitutional right of "acquiring, possessing and protecting property" includes the right to dispose of such property in such manner as the purchaser pleases, and at such prices as he can obtain at fair barter. (Cal.) Ex parte Quarg, 115.

Apportionment Act.

26. CONSTITUTIONAL LAW.—The Authority of the Supreme Court of New York to Consider and Determine the Validity of an Apportionment Act dividing the state into senatorial districts is expressly conferred by the constitution of that state. (N. Y.) Sherrill v. O'Brien, 841.

27. CONSTITUTIONAL LAW—Review by the Courts of Legislative Apportionments.—The courts have jurisdiction to determine whether or not an act of apportionment is in conflict with the limitations of the constitution, and if such conflict is found, to declare the act void. (N. Y.) Sherrill v. O'Brien, 841.

28. CONSTITUTIONAL LAW—Legislative Apportionments, Cases in Which Reviewable by the Courts.—The courts may review legislative action in reapportioning the state (1) when the question to be

determined on the appeal is as to whether the legislature has obeyed the mandatory provisions of the constitution, and (2) when the legislature, though assuming to exercise a discretion extended to it, does a thing which is a mere exercise of arbitrary power, and which, in view of the provisions of the constitution, is beyond all reasonable controversy a gross and deliberate violation of the plain intent of the constitution and a disregard of its spirit and the purpose for which express limitations were inserted therein. (N. Y.) *Sherrill v. O'Brien*, 841.

29. CONSTITUTIONAL LAW.—The Authority of the Representatives in the Legislature is a Delegated Authority and is wholly derived from, and dependent upon, the constitution, but, having been granted in general terms by the constitution, is absolute and unlimited, except as restricted therein. (N. Y.) *Sherrill v. O'Brien*, 841.

30. CONSTITUTIONAL LAW.—Legislative Apportionment, Principles Which Should Control.—Under the several constitutions at various times in force in New York equal representation in proportion to the population has been and is a cardinal principle which should control legislation in reapportioning the state. (N. Y.) *Sherrill v. O'Brien*, 841.

31. CONSTITUTIONAL LAW.—Apportionment Legislation, Limitations upon.—As the discretion of the legislature respecting the relative number of inhabitants in a Senate district arises from necessity, it should cease where the necessity for discretion ends. (N. Y.) *Sherrill v. O'Brien*, 841.

32. CONSTITUTIONAL LAW.—Legislative Apportionment.—Every provision of the constitution which allows any discretion by the legislature in apportionment must, to some extent, be affected and controlled by every other provision of the constitution, but in the division of the state into senatorial districts, matters of mere convenience and individual taste are not subjects for consideration. (N. Y.) *Sherrill v. O'Brien*, 841.

33. CONSTITUTIONAL LAW.—Apportionment—Legislative Extent of Discretion with Respect to Senate Districts.—The legislature, in dividing the state into senate districts, must make as close an approximation to equality in the number of inhabitants as reasonably possible in view of the other constitutional provisions, and such approximation is the limit of legislative discretion. (N. Y.) *Sherrill v. O'Brien*, 841.

34. CONSTITUTIONAL LAW.—Apportionment Legislation.—The words "contiguous thereto," as used in the constitution in providing for apportionment legislation, do not mean near by or in the neighborhood or locality of, but territory touching, adjoining and connected, as distinguished from territory separated, by other territory. (N. Y.) *Sherrill v. O'Brien*, 841.

35. CONSTITUTIONAL LAW.—Apportionment of Senate Districts, Each County, When Entitled to One.—Every county having a citizen population in excess of the ratio required for a Senate district is entitled by the constitution to at least one senator without being joined with any other county. (N. Y.) *Sherrill v. O'Brien*, 841.

36. CONSTITUTIONAL LAW.—Apportionment Legislation.—Under a constitution requiring Senate districts to be in as compact a form as practicable, an apportionment statute may be declared unconstitutional because a Senate district as provided for therein is not reasonably compact. (N. Y.) *Sherrill v. O'Brien*, 841.

37. CONSTITUTIONAL LAW—Apportionment Legislation, When may be Declared Wholly Void.—If under an apportionment statute its provisions concerning two Senate districts must be declared void, the whole statute must also be adjudged unconstitutional and void. (N. Y.) *Sherrill v. O'Brien*, 841.

38. CONSTITUTIONAL LAW—Legislative Apportionment, Effect of Declaring Unconstitutional.—If a legislative apportionment is pronounced unconstitutional, the next general election at which members are chosen must be held under the pre-existing statute, unless in the meantime a new and valid apportionment has been made. (N. Y.) *Sherrill v. O'Brien*, 841.

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CONTEMPT.

1. CONTEMPT—Inferior Tribunals are Without Inherent Power to Punish for Contempt.—This rule applies to a justice of the peace engaged in the preliminary examination of a criminal charge. (S. Dak.) *Farnham v. Colman*, 944.

2. EQUITY JURISDICTION—Injunction—Power to Punish for Contempt.—A court having jurisdiction to issue an injunction, has inherent power to punish for contempt those who violate it, and if such violation constitutes a crime, the court by punishing for the contempt is not exercising the criminal laws, but only securing to suitors the rights to which it has adjudged them entitled. (Colo.) *People v. Tool*, 198.

3. JURY TRIAL—Contempt.—The right of trial by jury does not extend to charges of contempt of court. (Colo.) *People v. Tool*, 198.

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CONTRACTS.

Execution and Enforcement by Courts.

1. **CONTRACTS—Execution and Enforcements by Courts.**—Courts cannot make contracts for the parties to an action. They can only enforce the contracts as made. (Ind.) *Ohio Farmers' Ins. Co. v. Vogel*, 382.

Entire or Divisible Contracts.

2. **CONTRACTS—Entire or Divisible.**—Whether a contract is entire or divisible cannot be determined by a single term, phrase, or sentence, though it be large enough to include such meaning, unless throughout the whole agreement and from the surrounding circumstances it definitely appears that it was the intention of the parties that the contract should be entire and indivisible. (Miss.) *Ganong v. Brown*, 731.

3. **CONTRACTS—Entire or Divisible—Partial Performance.**—If a person contracts to paint and paper a house for a fixed sum, "to be completed in good, workmanlike style, work to begin and be finished as soon as possible," and before the completion of such work the house is accidentally destroyed by fire, such person can recover the value of his materials and labor put upon the house before its destruction, especially when he gave an order for a partial payment on the owner before the fire, and the latter collected fire insurance to the full value of the building as a completed and finished building. (Miss.) *Ganong v. Brown*, 731.

4. **CONTRACTS—Severability—Parol Evidence to Vary.**—If a contract for the sale of two articles for one sum is entire, the acceptance of one amounts to the acceptance of both, and parol evidence is not admissible to explain the consideration. (Wash.) *Buckeye Buggy Co. v. Montana Stables*, 1032.

5. **CONTRACTS—Severability.**—If several articles are sold for a single and entire consideration, the contract of sale is entire and cannot be severed, except by agreement of the parties, but, on the other hand, if several articles are sold, and a separate price is agreed upon for each, although a single instrument of transfer may be executed reciting a single consideration for the whole, then for sufficient cause shown, the contract may be rescinded as to a part and enforced as to the remainder. (Wash.) *Buckeye Buggy Co. v. Montana Stables*, 1032.

6. **CONTRACTS—Severability—Parol Evidence.**—If two articles are sold at the same time and the contract recites a single consideration for both, parol evidence is admissible to show that a separate price was agreed upon for each. (Wash.) *Buckeye Buggy Co. v. Montana Stables*, 1032.

7. **CONTRACTS—Evidence of Parol Contemporaneous Agreement.**—A written contract entered into with an agent for the purchase of two articles, reciting that no agreement should be recognized unless written therein, and that no verbal agreement should be recognized, cannot be varied by evidence of a contemporaneous oral agreement. (Wash.) *Buckeye Buggy Co. v. Montana Stables*, 1032.

Validity of Contract—Illegal Consideration.

8. **CONTRACTS** Entered into in Contravention of statute are utterly void. (Ind.) *Cheney v. Unroe*, 391.

9. **CONTRACTS—Illegal Consideration.**—A Note and Mortgage, a part of the consideration of which is illegal because based upon a transaction pronounced criminal by statute, are wholly void. (Kan.) *State v. Wilson*, 479.

10. **CONTRACTS—Illegal Consideration.**—When Two Notes secured by a mortgage are given for a consideration in part illegal, both the notes and mortgage are wholly void. (Kan.) *State v. Wilson*, 479.

Restraint of Trade.

11. **CONTRACTS in Restraint of Trade—Monopoly.**—A contract to sell all of certain goods made during "the remainder of the year" to a certain person is not monopolistic and void within the meaning of a statute providing that all contracts by persons who "control the output of said article of merchandise" made to prevent competition, "in the importation or sale of articles imported into" the state, shall be void. (Ind. App.) *Over v. Byram Foundry Co.*, 327.

12. **CONTRACTS in Restraint of Trade—Monopoly.**—A contract to sell all of certain goods manufactured during "the remainder of the year" to a certain person is not void as creating a monopoly. (Ind. App.) *Over v. Byram Foundry Co.*, 327.

13. **CONTRACTS in Restraint of Trade.**—A contract binding a manufacturer to sell exclusively to one person during a limited period, is valid, and not in restraint of trade. (Ind. App.) *Over v. Byram Foundry Co.*, 327.

14. CONTRACTS in Restraint of Trade—Monopolies.—Combinations between individuals or firms for the regulation of prices, and of competition in business, are not monopolies, and are not unlawful as in restraint of trade, so long as they are reasonable, and do not include all of a commodity or trade, or create such restrictions as to materially affect the freedom of commerce. (Ind. App.) *Over v. Byram Foundry Co.*, 327.

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CORPORATIONS.*In General.*

1. **CORPORATIONS—Right to Purchase Their Own Stock.**—Corporations may purchase, hold and sell shares of their own stock, provided they act in good faith and without intent to injure their creditors. (Va.) *United States Mineral Co. v. Camden & Driscoll*, 1028.

2. **CORPORATIONS—Preferred Claims Against by Subrogation.**—One who advances money to a going corporation to pay off claims of its laborers is not entitled, upon its subsequent insolvency, to any preference over other creditors, by way of subrogation to the liens of the laborers. (Ark.) *Bank of Commerce v. Lawrence County Bank*, 85.

Corporation Commission.

3. **STATE CORPORATION COMMISSION—Power of.**—The state corporation commission of Virginia, created by constitutional authority, is the instrumentality through which the state exercises its governmental powers for the regulation and control of public service corporations, and for these purposes it is clothed with legislative, judicial and executive powers, and may declare a statute imposing a fine or forfeiture on a corporation for refusing to do a certain act unconstitutional and void. (Va.) *Commonwealth v. Atlantic Coast Line Ry. Co.*, 983.

COSTS.

COSTS—Liability for.—If an indemnity insurance company does not defend the suit of the insured and he has to defend it, the insurance company is liable for the costs upon its policy of indemnity. (Ky.) *Travelers' Ins. Co. v. Henderson's Cotton Mills*, 585.

COTENANCY.

See Tenancy in Common.

COURTS.

COURTS.—The Opinions of the Commissioners of the supreme court of Nebraska designated as "unofficial" are of no value as authority or precedent, within the meaning of the doctrine of stare decisis. The court has not necessarily approved all the propositions of law advanced either as indicated in the syllabi or in the opinions themselves. (Neb.) *Flint v. Chaloupka*, 771.

CREDITOR'S BILL.

1. **CREDITOR'S SUIT—Attaching of Lien.**—The beginning of a creditor's suit gives a specific lien upon the property sought to be reached which continues until the final determination of the cause. The issuance of execution on the judgment is unnecessary in order to keep the judgment alive so far as the specific property is concerned. (Neb.) *Flint v. Chaloupka*, 771.

2. **CREDITORS' BILLS—Life Insurance—Pleading.**—In a proceeding by creditor's bill to subject a policy of life insurance payable to a beneficiary on the death of the insured, but in which he has a surrender value to the payment of such creditor's claim, he must,

to maintain his bill, make a case, both by his pleadings and proof, that would entitle him to subject property of his debtor not reachable, on execution, to the payment of his debt. (Colo.) *National Bank of Commerce v. Appel Clothing Co.*, 186.

3. **CREDITORS' BILLS—Life Insurance—Pleading.**—In a proceeding by creditor's bill to subject a policy of life insurance, payable to a beneficiary on the death of the insured, but in which he has a surrender value, to the payment of his debt, a complaint not alleging that the insured was insolvent at the time the policy issued or was assigned to the beneficiary, nor that the indebtedness sought to be enforced existed at the time the policy issued, nor that the policy was taken out or assigned with a view to the creation of future obligations, nor that there was any fraud either on the part of the insured or the beneficiary, is insufficient to entitle the plaintiff to equitable relief. (Colo.) *National Bank of Commerce v. Appel Clothing Co.*, 186.

4. **CREDITORS' BILLS—Life Insurance.**—A proceeding by creditor's bill to subject a life insurance policy in which a beneficiary has an interest and the insured a surrender value to the payment of his debts must be governed by the same rules that prevail in creditor's suits against other kinds of property, and before a court of equity is authorized to compel the surrender of such policy and the application of the proceeds to the payment of such debts, it must be alleged and proved that debts existed at the time of the issuing or the assignment of the policy to the beneficiary, or that it was issued or assigned with a view of contracting future indebtedness. (Colo.) *National Bank of Commerce v. Appel Clothing Co.*, 186.

CRIMINAL CONVERSATION.

See Husband and Wife, 18-22.

CRIMINAL LAW.

1. **STATUTES, Interpretation of.**—In interpreting a Statute Which Defines an Offense Well Known at the Common Law, the courts are entitled to seek aid from common-law definitions of such offense. (N. Y.) *Adamson v. City of New York*, 863.

2. **CRIMINAL LAW—Accused as Witness.**—An Instruction Concerning the Testimony of the Accused given in his own behalf which concludes with the words: "You are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true or made in good faith, or only for the purpose of avoiding conviction," is erroneous. (Neb.) *Donner v. State*, 789.

3. **CRIMINAL LAW—Accused as Witness.**—If in a criminal trial the accused testifies in his own behalf, the court should not, by conduct or instructions, in any manner disparage his testimony. (Neb.) *Donner v. State*, 789.

DAMAGES.

1. **CONTRACTS—Breach—Damages.**—If two persons have made a contract which one of them has broken, the damages which the other ought to receive in respect to such breach should be such as may fairly and reasonably be considered either arising naturally from the breach of the contract, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of its breach. (Ind. App.) *Kagy v. Western Union Tel. Co.*, 278.

2. **DAMAGES—Nonsuit.**—If the sole object of an action is the recovery of damages, a failure to prove substantial damages is a failure to prove the substance of the issue, and entitles the defendant to a nonsuit, although the plaintiff may be entitled to nominal damages. (Wash.) *Woodhouse v. Powles*, 1079.

3. **TRIAL—Excessive Verdict.**—A verdict for two thousand dollars for a personal injury, in the absence of evidence of serious external injury, and almost conclusive evidence that the internal injury relied upon could not have resulted from the accident, is excessive. (Iowa) *Heinmiller v. Winston Bros.*, 405.

4. **TRIAL—Instructions—Damages.**—If, in an action to recover for personal injury, there is no proof as to allegations of expenditures for medical attendance and hospital charges, instructions to the effect that such items must be excluded by the jury are properly refused, if under the instructions given there is no possibility that such items could be considered by the jury. (Wash.) *Liedke v. Moran Brothers Co.*, 1058.

5. **NEGLIGENCE—Gross — Punitive Damages.**—Instructions to find punitive damages if the jury believe from the evidence that the injury complained of was the result of gross negligence is reversible error if there is no evidence whatever of such negligence. (Ky.) *Covington Sawmill etc. Co. v. Drexilius*, 593.

See Telegraphs and Telephones.

DEEDS.

Acceptance and Cancellation.

1. **DEED.**—The Acceptance of a Deed by the grantee is essential to the passage of title. (Ark.) *Ames v. Ames*, 68.

2. **DEED—Revesting of Title by Cancellation.**—The title to land cannot be revested in the grantor by a surrender and cancellation of the deed. (Ark.) *Ames v. Ames*, 68.

3. **DEED—Estoppel to Claim Under After Cancellation.**—If a grantee, a short time after the execution of the deed, goes to the grantor and, asserting that he has destroyed the deed and never accepted it because not executed in accordance with his wishes, demands the execution of a new deed to his wife and children, which is done, he and his grantees are estopped to claim under the original deed. (Ark.) *Ames v. Ames*, 68.

Parent and Child.

4. **DEEDS—Consideration.**—A deed from a parent to his child will not be set aside upon the ground of mere inadequacy of consideration. (Ala.) *McLeod v. McLeod*, 41.

5. **DEEDS—Parent and Child—Presumption of Undue Influence.**—A deed of gift from parent to his child alone and of itself raises no presumption of undue influence, as the parent is presumed to be the dominant party. (Ala.) *McLeod v. McLeod*, 41.

6. **DEEDS—Parent and Child—Undue Influence—Burden of Proof.**—In an action by a parent against his child to set aside a conveyance made by the former to the latter, on the ground that it was executed under undue influence, the burden of proof is upon the former to establish that fact. (Ala.) *McLeod v. McLeod*, 41.

7. **DEEDS—Undue Influence—Confidential Relations.**—If the donor and the donee stand in confidential relations, a presumption

of undue influence affecting the validity of the gift arises only where the doner is the weaker party. (Ala.) *McLeod v. McLeod*, 41.

Quitclaim Deed.

8. **QUITCLAIM DEED, Effect of as Against Prior Unrecorded Warranty Deed.**—An unrecorded warranty deed has precedence over a subsequently executed and recorded quitclaim deed purporting to remise, release, and quitclaim the grantor's interest in the premises. (S. Dak.) *Fowler v. Will*, 938.

See Vendor and Vendee.

DE FACTO LEGISLATURE.

See Constitutional Law, 1.

DEFINITIONS.

DEFINITIONS.—The Word "Interest" means any right, in the nature of property, less than title. (Kan.) *Garner v. Milwaukee Mechanics' Ins. Co.*, 460.

DIVORCE.

Grounds for Divorces.

1. **DIVORCE—Pleading—Several Cases in One Count.**—A complaint in divorce alleging three statutory grounds in one count should not be treated as an action on one of the grounds stated alone, and dismissed for failure of proof thereof. Such complaint, if unchallenged, is sufficient to sustain a judgment upon any one of the grounds alleged. (Wash.) *Page v. Page*, 1054.

2. **DIVORCE—Personal Indignities.**—Evidence of a wife that her husband almost continuously called her vile names and charged her with infidelity, corroborated by the unimpeached testimony of a disinterested witness, supports a divorce on the ground that such husband was guilty of personal indignities toward his wife, rendering her life burdensome. (Wash.) *Page v. Page*, 1054.

3. **DIVORCE—Failure to Support.**—Evidence by a wife that her husband spent so much of his earnings for drink that he did not make such suitable provision for her support as his earnings would warrant, if corroborated by a disinterested witness, is cause for divorce on the ground of failure to support. (Wash.) *Page v. Page*, 1054.

4. **DIVORCE—Habitual Drunkenness.**—As cause for divorce exists when one spouse has a fixed habit of frequently getting drunk, although he or she is not drunk all the time, nor necessarily incapacitated from pursuing during the working hours of the day ordinary unskilled labor. (Wash.) *Page v. Page*, 1054.

Alimony.

5. **DIVORCE—Assignment of Alimony.**—Alimony granted in a suit for divorce is not assignable. (Mich.) *Fournier v. Clutton*, 638.

6. **DIVORCE—Assignment of Alimony—Tender—Waiver of Restoration of Consideration.**—If before seeking by suit to set aside an assignment of a decree for alimony, the plaintiff undertakes to make a tender of the consideration received therefor, which the assignee refuses to accept, a more formal tender is excused. (Mich.) *Fournier v. Clutton*, 638.

DOGS.

See Husband and Wife, 16, 17; Nuisance, 1.

DRAFTS.

See Bills and Notes; Principal and Agent.

DYING DECLARATION.

See Homicide, 6.

EASEMENTS.

1. **RIGHTS OF WAY** by Prescription.—To establish a way by prescription the use must be adverse, uninterrupted, exclusive, continuous, and under a claim of right. (Ill.) Schmidt v. Brown, 261.

2. **RIGHT OF WAY**, Use of, When Adverse and not Under a Mere License.—If an agreement between land owners, though oral and therefore void under the statute of frauds, purports to give a right of way to one over the lands of the other, and the use of the right of way continues under a claim of right for twenty years, the use is adverse and will ripen into a prescription. (Ill.) Schmidt v. Brown, 261.

3. **PRESCRIPTION**—The Claim of Right Need not be Well Founded to create title by prescription if adverse possession is held under it. Hence the claim may rest on a parol agreement, void under the statute of frauds. (Ill.) Schmidt v. Brown, 261.

4. **PRESCRIPTION**—Use, When Need not be Exclusive.—It is not fatal to the claim to a right of way by prescription that others as well as the claimant used such way. (Ill.) Schmidt v. Brown, 261.

5. **A WAY** is an Inheritable Estate if appurtenant, and passes to the heirs and grantees of the land to which it is attached. (Ill.) Schmidt v. Brown, 261.

6. **A WAY** is Appurtenant to Land if it leads thereto, and is useless except in connection with it, and has been used solely for access to it. (Ill.) Schmidt v. Brown, 261.

7. **A WAY** is in Gross When there is not a dominant estate to which it is attached. (Ill.) Schmidt v. Brown, 261.

8. **SERVITUDE**, Purchase of Property Subject to.—A purchaser of a servient estate charged with an easement discoverable on examination takes his title subordinate thereto. (Ill.) Schmidt v. Brown, 261.

9. **WAYS**, Right to Remove Obstruction.—One having a right of way over the lands of another, who places obstructions therein, may lawfully enter upon the land subject to such way and peaceably remove the obstructions therefrom, because, as to him, they constitute a private nuisance which he has the right to abate. (Ill.) Schmidt v. Brown, 261.

ELECTION.

See Wills, 15.

ELECTION OF REMEDIES.

ELECTION OF REMEDIES—When not Conclusive.—If, in attempting and designing to make an election, one does an act or com-

mences an action in ignorance of substantial facts which proffer an alternate remedy, and the knowledge of which is essential to an intelligent choice of procedure, he may, when informed, adopt a different remedy. (Neb.) *Lamb v. Rooney*, 795.

ELECTIONS.

In General.

1. **ELECTION FOR BONDS—Three-fifths of Voters.**—A constitution providing for the assent of three-fifths of the voters therein, voting at a municipal election to be held for that purpose, authorizing a bond issue, and a city charter providing for the assent of three-fifths of the voters voting on such question at such election, require only three-fifths of the voters actually voting on such question, although the vote may have been taken at a general election, at which many persons voting for public officers cast no vote on the bond question. (Wash.) *Fox v. City of Seattle*, 1037.

2. **ELECTIONS—Canvassing Returns.**—If, in canvassing election returns, a discrepancy is found to exist between the tally list and the certificate of the officers of election as to the number of votes any candidate received, the certificate only can be considered by the canvassers of the returns. (Colo.) *People v. Tool*, 198.

Injunction to Prevent Election Fraud,

3. **ELECTIONS—Injunction to Prevent Frauds.**—An application for an injunction to restrain election officers from committing election frauds presents a purely judicial, and not a political, question. (Colo.) *People v. Tool*, 198.

4. **ELECTIONS—Injunction—Original Jurisdiction.**—The supreme court of a state has original jurisdiction to issue an injunction upon the application of the attorney general to restrain election officers from committing, or permitting others to commit, election frauds. (Colo.) *People v. Tool*, 198.

5. **EQUITY JURISDICTION—Injunction to Prevent Election Frauds—Canvassing Returns.**—If a court of equity has issued an injunction to prevent election frauds, it has inherent power to render the injunction effectual by undoing frauds committed in violation of it, and preventing advantage being taken of such frauds, and to this end may restrain election officers from canvassing returns which are clearly the result of a fraud committed at such elections. (Colo.) *People v. Tool*, 198.

6. **INJUNCTION to Prevent Election Frauds.**—The state, through its attorney general, has a right to an injunction to restrain the commission of a conspiracy to violate the election laws by padding election lists, permitting repeating and falsifying returns. (Colo.) *People v. Tool*, 198.

EMINENT DOMAIN.

1. **EMINENT DOMAIN—Damage to Property Taken for Public Use.**—A constitutional provision forbidding the taking or damaging of private property for a public use except on due compensation being made to the owner, while primarily intended for formal condemnation proceedings, is equally protective of the owner of private property, when no condemnation is had and his property is taken or damaged by a public use. (Miss.) *King v. Vicksburg Ry. etc. Co.*, 749.

2. **EMINENT DOMAIN—Public Use.—Due Compensation** for private property taken or damaged by a public use is such as will make the owner whole pecuniarily for appropriating or injuring his property by any invasion of it cognizable by the senses, or by interference with some right in relation to property whereby its market value is lessened by the direct result of the public use. (Miss.) *King v. Vicksburg Ry. etc. Co.*, 749.

3. **EMINENT DOMAIN—Evidence.**—If, in proceedings to condemn land for railroad purposes, the land owner expressly disclaims the right to recover damages for increased fire risk, evidence concerning the insurance rate on his buildings is inadmissible. (Mich.) *Boyne City etc. R. R. Co. v. Anderson*, 642.

4. **EMINENT DOMAIN—Appeal—Rulings on Evidence.**—Questions raised over the introduction of evidence in condemnation proceedings cannot ordinarily be considered on appeal, though evidence clearly improper might justify a reversal if it appear that it caused a substantial error on the part of the jury. (Mich.) *Boyne City etc. R. R. Co. v. Anderson*, 642.

5. **EMINENT DOMAIN—Review of Award of Damages.**—The amount of damages awarded in condemnation proceedings will not be reviewed by the supreme court on appeal, further than to ascertain that the finding is supported by the evidence. (Mich.) *Boyne City etc. R. R. Co. v. Anderson*, 642.

6. **EMINENT DOMAIN—Attorney's Fees—Review.**—The lower court is the final arbiter as to the amount of attorney's fees to be awarded in condemnation proceedings, and that question cannot be reviewed on appeal. (Mich.) *Boyne City etc. R. R. Co. v. Anderson*, 642.

EMPLOYER'S LIABILITY.

See Master and Servant.

EQUITY.

1. **EQUITY JURISDICTION—Retention of Jurisdiction.**—If courts of equity have once acquired jurisdiction, a subsequent statute which gives to or enlarges the jurisdiction of the common-law courts over the same subject does not deprive the equity courts of their jurisdiction, although the statute may furnish a complete and adequate remedy at law unless such statute uses prohibitory or restrictive words. (Va.) *Herring v. Wilton*, 997.

2. **EQUITY JURISDICTION.**—If courts of equity have once acquired jurisdiction, they do not lose it merely because courts of law have been subsequently authorized to administer the same or similar relief. (Va.) *Herring v. Wilton*, 997.

ESTATES OF DECEDENTS.

See Executors and Administrators.

ESTOPPEL.

1. **ESTOPPEL by Silence.**—If a person, by the execution of a mortgage on land, secures a loan in the presence and with the knowledge of another, the mortgagee cannot successfully set up an estoppel against such other to claim the land from the fact of his mere silence, if he was ignorant of his rights at the time, or if his

title to the land was duly recorded, or if the mortgagee did not rely upon his acts or conduct. (Miss.) Scottish American Mtg. Co. v. Buckley, 763.

2. **ESTOPPEL BY SILENCE** does not Exist Unless the party against whom the estoppel is invoked has stood by and seen the other party committing an act infringing on his rights, and his failure to speak has induced the person committing the act to believe that he assents to its being committed. (Cal.) Crisman v. Lanterman, 167.

3. **ETOPPEL**—When does not Arise from Consenting to a Sale of Property Free from Encumbrances.—If a decedent was liable on indebtedness secured by a mortgage and also by a trust deed, consent by the executor to a sale of the property under the trust deed free from encumbrances, and to the subsequent release of the mortgage as to the property sold, does not estop him from insisting that, because of such release, the decedent's estate was relieved from liability for the mortgage debt. (Cal.) Crisman v. Lanterman, 167.

EVIDENCE.

In General.

1. **EVIDENCE Taken on Former Trials** and used by both parties should be considered by the jury and given the same effect as though taken in open court. (Iowa) Garvik v. Burlington etc. Ry. Co., 432.

2. **EVIDENCE of Other Accidents from Same Cause**.—If a horse is frightened while being driven along the highway, by a steam shovel belonging to a railway company and on its right of way near a crossing, and such fright terminates in an injury to the driver, evidence that other horses were frightened by such shovel at about the same time, and while the shovel was in about the same place, is admissible and does not introduce a collateral issue. (Iowa) Heinmiller v. Winston Brothers, 405.

3. **AGE**—Evidence of.—The age of a son may be shown by the declarations of his father since deceased. (Ky.) Travelers' Ins. Co. v. Henderson's Cotton Mills, 585.

4. **EVIDENCE**.—Under a General Denial plaintiff must establish a cause of action upon which he has a right to recover, and any fact which goes to destroy, not to avoid, the plaintiff's cause of action is provable under the general denial. (Ind.) Cheney v. Unroe, 391.

5. **EVIDENCE**—Phonographs as.—In proceedings to condemn land for railroad purposes, the land owner, after laying the proper foundation, is entitled to operate a phonograph in the presence of the jury to reproduce sounds claimed to have been made by the operation of trains in proximity to his hotel and other premises. (Mich.) Boyne City etc. R. R. Co. v. Anderson, 642.

Opinion Evidence.

6. **EVIDENCE**—Opinions—Value of Property.—The market value of property may be proved by the opinions of witnesses based on hearsay. (Ala.) Alabama Consolidated Coal etc. Co. v. Turner, 61.

7. **EVIDENCE**—Opinions.—Horseman may testify as to whether a steam shovel situated on a railway right of way near a highway crossing is calculated to frighten horses of ordinary gentleness while approaching such crossing. (Iowa) Heinmiller v. Winston Brothers, 405.

See Criminal Law; Homicide; Witnesses.

EXECUTIONS.

1. EXECUTIONS—When Issued.—An execution is duly issued when it is made out and signed by the clerk ready to be levied and marked "to lie," although it has not been placed in the hands of an officer to be levied, and another execution may be issued within the statutory period from the return day of such execution. (Va.) *Davis v. Roller*, 977.

2. EXECUTIONS—Statute of Limitations.—If the collection of an execution is suspended by a decree in chancery, the period of suspension is to be excluded in the computation of the time within which another execution must be issued on the judgment to prevent the bar of the statute of limitations. (Va.) *Davis v. Roller*, 977.

EXECUTORS AND ADMINISTRATORS.

1. ESTATE OF DECEDENT, When not Bound by Act of Executor.—If the executor of an estate is also a comaker with the decedent on promissory notes secured by a mortgage and also by a trust deed, attends the trustee's sale and demands that the proceeds thereof be applied first to his own debt, and last to that which, for the benefit of the estate, should have been paid first, he may well be deemed to be acting in his individual, rather than in his representative, capacity. (Cal.) *Crisman v. Lanterman*, 167.

2. MORTGAGE, Title to, is in him who furnishes the money, though another is named as payee. If A loans his money, receiving and retaining therefor a note and mortgage in which B is designated as the payee, the latter acquires no interest therein, and if A has died, the title to the note is in his estate. (Kan.) *Hanrion v. Hanrion*, 453.

3. JURISDICTION of the Estates of Decedents.—There cannot be Two Valid Administrations of the same estate, at the same time, and in the same state. When any court acquires jurisdiction of an estate, such jurisdiction is exclusive. (Cal.) *Dungan v. Superior Court*, 119.

4. JURISDICTION of the Estates of Decedents—Concurrent When Becomes Exclusive.—Though two or more courts may be equally entitled to exercise jurisdiction over the estate of a nonresident who has died without the state, the jurisdiction becomes exclusive in the courts of the county in which a petition for letters of administration is first filed. (Cal.) *Dungan v. Superior Court*, 119.

5. ESTATES OF DECEDENTS.—An Application for Letters of Administration is Deemed Made when a petition therefor is filed with the clerk of the superior court. (Cal.) *Dungan v. Superior Court*, 119.

6. JURISDICTION of Court—Power of the Legislature to Limit to One County.—Though the constitution purports to confer on the superior court jurisdiction in all matters of probate, the legislature may prescribe general rules determining which of the many superior courts shall exercise jurisdiction in any particular estate, and may, therefore, declare that jurisdiction of the estate of any nonresident dying beyond the state, shall be in any county in which he left property and in which application for letters shall first be made. (Cal.) *Dungan v. Superior Court*, 119.

7. JURISDICTION of Estates of Decedents, Collateral Attack Upon.—If a petition for letters of administration on the estate of a deceased nonresident alleges that she left estate in the county in

which the petition was filed, the truth of such allegation must be determined by such court, and it cannot be ousted of jurisdiction by the subsequent filing of a similar petition in another county and proving under the latter petition that decedent did not leave any estate in the other county, as long as the petition therein remains undetermined. (Cal.) *Dungan v. Superior Court*, 119.

8. EXECUTORS AND ADMINISTRATORS—Care Required of.—An executor must manage the estate committed to him with the same care and diligence that a prudent and cautious person would bestow on his own concerns, and consequently is liable for losses to the estate due to his negligence. (S. C.) *Parks v. McDaniel*, 879.

9. EXECUTORS AND ADMINISTRATORS—Deposit in Bank—Liability for Loss.—If an administrator deposits money as administrator in a bank then in good standing and credit, and without any negligence on his part the deposit remains in such bank until it fails, he is not liable for the loss. (Mich.) *Fishbeck's Estate*, In re, 646.

10. EXECUTORS AND ADMINISTRATORS—Deposit in Bank—Liability for Loss.—If an executor retains funds of the estate in his hands for the care of the testator's widow, and such funds consist of the proceeds of a mortgage which, without negligence on his part, he has deposited in a bank, then of good standing and credit, he is not liable for a loss caused by the subsequent failure of such bank. (Mich.) *Fishbeck's Estate*, In re, 646.

11. EXECUTORS AND ADMINISTRATORS—Right to Erect Vault and Keep It in Repair.—The expenditure of a reasonable amount of money by an administrator for the erection of a vault for the deceased in a cemetery and keeping such vault in repair, is a proper charge against the estate of the deceased, although the title to the lots on which such vault is erected is taken in the names of the widow and sons of the deceased. (Mich.) *Fishbeck's Estate*, In re, 646.

12. EXECUTORS AND ADMINISTRATORS—Collection of Debts—Interest.—If, on the settlement of a deceased administrator's account, it does not appear at what time a mortgage belonging to the estate was paid, such administrator is chargeable with interest only to the time of the appraisal of the estate. (Mich.) *Fishbeck's Estate*, In re, 646.

13. EXECUTORS AND ADMINISTRATORS—Payment of Judgment by—Subrogation—Burden of Proof.—If the payment by an executor of a judgment obtained against him is assailed, the question is not merely whether he was negligent in the conduct of the suit leading to the judgment, but whether he acted in such bad faith toward his trust or in such utter disregard of his duty, as would warrant the setting aside of the judgment, or in depriving him of any equitable right to be subrogated to the position of the judgment, or in treating the judgment as of no avail as a protection for its payment. The burden of proof is upon the party assailing the payment of the judgment, at least to show the invalidity of the claim, and that the judgment was the result of the executor's breach of duty. (S. C.) *Parks v. McDaniel*, 878.

14. EXECUTORS AND ADMINISTRATORS—Payment of Judgment by—Subrogation.—A statute providing that a nonregistered physician cannot recover for his services does not apply in an action against an executor to require him to account for the payment of a judgment obtained against him by such a physician for services rendered his testator. (S. C.) *Parks v. McDaniel*, 878.

15. EXECUTORS AND ADMINISTRATORS—Compensation.—Heirs cannot complain of the allowance of statutory fees to an administrator who took care of the real estate, consisting of a homestead farm, promptly collected the funds of the estate, cared for the decedent's widow and promptly paid to each heir his share of the estate. (Mich.) *Fishbeck's Estate*, In re, 646.

EXEMPTIONS.

1. EXEMPTIONS—Feed for Exempt Stock.—A statute that exempts to the head of a family the necessary food for the support of his exempt stock does not entitle him to claim an exemption in grain which he does not intend to feed his animals but which he intends to sell in order to obtain other grain for their food. (Kan.) *Voss v. Goss*, 457.

2. EXEMPTIONS—Garnishment—Injunction.—A person whose wages are garnished to satisfy a judgment against him, and who desires to claim such wages as exempt, must contest the garnishment and claim his exemption in the court in which the garnishment proceedings are pending. Otherwise he waives his legal right to do so, and a court of equity is without jurisdiction to aid him by injunction restraining the issue of the garnishment. (Miss.) *Sturges v. Jackson*, 754.

EXTRADITION.

1. EXTRADITION—Federal and State Legislation.—The legislation of Congress on extradition does not exclude state legislation on that subject. (Neb.) *Dennison v. Christian*, 817.

2. EXTRADITION—Fugitive from Justice.—No Extradition is allowable, under the Nebraska statutes, unless the accused is a fugitive from justice. (Neb.) *Dennison v. Christian*, 817.

3. EXTRADITION—Fugitive from Justice.—It is not Necessary That the Warrant issued by this state upon the requisition of the governor of another state should contain an express recital that he found the accused was a fugitive from justice. The fact of the issuance of the warrant justifies the presumption that the governor so found, until evidence to the contrary is produced. (Neb.) *Dennison v. Christian*, 817.

4. EXTRADITION—Return on Habeas Corpus.—On habeas corpus to obtain the release of a fugitive from justice held under the governor's warrant in extradition, it is not indispensable that the officer's return to the writ should contain direct traversable allegations of all the facts upon which the extradition proceedings are based. It is enough if the return, the warrant of the governor which accompanies it, and the application for the writ together show facts sufficient to justify the detention of the accused. (Neb.) *Dennison v. Christian*, 817.

5. EXTRADITION.—The Decisions of the Supreme Court of the United States upon the subject of extradition between states are binding upon all persons and upon all courts. (Neb.) *Dennison v. Christian*, 817.

6. EXTRADITION—Findings of Governor.—When requisition is made on the governor in extradition proceedings two questions are presented to him: 1. Whether the person demanded is substantially charged with a crime against the laws of the state from whose justice it is alleged that he has fled, by an indictment or affidavit prop-

erly certified; and 2. Whether he is a fugitive from justice from the state demanding him. When it is made properly to appear to the court upon what showing the governor acted, it becomes a question of law for the court to determine whether the accused has been substantially charged with a crime against the laws of the demanding state. (Neb.) *Dennison v. Christian*, 817.

7. **EXTRADITION.**—Courts will not Review the Decision of the Governor in extradition proceedings upon a question of fact made before him which he ought to decide and as to which there was evidence pro and con. (Neb.) *Dennison v. Christian*, 817.

FALSE PRETENSES.

FALSE PRETENSES—Evidence in Favor of Accused.—In a prosecution for obtaining money under false pretenses through selling as unencumbered cattle which in fact are mortgaged, the defendant may show that the mortgage, although fair on its face, is void because based in part upon a consideration made illegal by an anti-trust statute. (Kan.) *State v. Wilson*, 479.

FRAUDS, STATUTE OF.

1. **STATUTE OF FRAUDS.**—A Parol Agreement for a Private Way is within the statute of frauds, and cannot operate as a grant or conveyance. (Ill.) *Schmidt v. Brown*, 261.

2. **STATUTE OF FRAUDS—Contract for Work or of Sale.**—An agreement by one person to construct a tombstone especially for or according to the plans of another, whether or not at an agreed price, although the transaction is to result in a sale of the article, is a contract for work and labor, not for a sale, and is not within the statute of frauds. (Ark.) *Moore v. Camden Marble and Granite Works*, 87.

3. **STATUTE OF FRAUDS—Verbal Agreement to Form Partnership—Enforcement of Contract of Purchase.**—If two persons make a verbal agreement to form a partnership and each to buy in his own name certain town lots, both thereafter to pay for and own them as copartners, such agreement constitutes a partnership and is not within the statute of frauds, and if after they make such purchase at auction sale, the owner of the lots tenders them a joint deed thereto and demands a compliance with the terms of the sale, which is refused, he is entitled to enforce a specific performance of the contract in a joint action against them. (Ky.) *Garth v. Davis*, 571.

4. **STATUTE OF FRAUDS—Auctioneer's Memorandum**, signed by him, describing the lots sold and stating the terms of the sale, is sufficient to bind both the seller and the purchaser, and is a compliance with the statute of frauds. (Ky.) *Garth v. Davis*, 571.

5. **STATUTE OF FRAUDS—Real Estate Partnership.**—An agreement to become partners in dealing in real estate is neither a contract to buy nor a contract to sell real estate, as between the parties to it, and is not within the statute of frauds, and need not be in writing if it is to be begun and may end within a year, although as a fact it may not be terminated for more than a year. (Ky.) *Garth v. Davis*, 571.

6. **STATUTE OF FRAUDS—Partnership.**—If a partnership is formed, though by parol, and the status of the copartners has become thereby fixed, the firm's transactions as between it and others con-

cerning lands are subject to the same terms under the statute of frauds as individuals are. The firm, if it proposes to buy or sell land, will be bound or not in the transaction as an individual would be under the same circumstances. (Ky.) *Garth v. Davis*, 571.

7. STATUTE OF FRAUDS.—Partnership Lands in equity and for partnership purposes are to be treated as personality within the meaning of the statute of frauds. (Ala.) *Tillis v. Folmar*, 31.

8. STATUTE OF FRAUDS—Sale of Land—Part Performance.—A contract of sale of several lots of land is not within the statute of frauds, if one of the parcels has been taken into the possession of the purchaser. In such case taking possession of one parcel is equivalent to taking possession of them all. (Ala.) *Tillis v. Folmar*, 31.

See Trusts.

FRAUDULENT CONVEYANCE.

1. FRAUDULENT CONVEYANCES—Insolvent Debtor.—While a vigilant creditor may procure payment of his debt against a failing or insolvent debtor by a purchase of his property, he cannot go beyond the permissible purpose of securing his own demand, and confer a benefit upon the debtor by purchasing much more than is necessary and paying the difference to the debtor, and if he thus hinders and delays other creditors and impairs their rights, the purchase and conveyance will be set aside. (Iowa) *Sly v. Bell*, 417.

2. FRAUDULENT CONVEYANCES—Unnecessary Purchase from Insolvent Debtor.—A creditor of an insolvent debtor may, with knowledge of his insolvency and fraudulent purpose, purchase of him sufficient property to pay his debt, and pay the debtor a reasonable cash difference if necessary, but if he unnecessarily purchases a large additional amount of property from his debtor and pays him the difference in cash, the whole transaction is fraudulent at the suit of the other creditors. (Iowa) *Sly v. Bell*, 417.

Note.

Gambling, contracts in violation of laws against, 506.

contract, money loaned to be used in, 506.

contract to construct building with knowledge that it is to be used for, 506.

GARNISHMENT.

GARNISHMENT—Exemptions—Injunction.—A court of equity cannot restrain a creditor from the exercise of the right granted him by law to issue a writ of garnishment seeking to subject the exempt wages of his debtor to the payment of a just debt, and the fact that the corporation for whom the debtor works has promulgated a rule that its employes will be discharged if their wages are garnished, cannot aid such debtor. (Miss.) *Sturges v. Jackson*, 754.

GAS.

STATUTES Respecting the Price of Illuminating Gas, Construction of.—Under a statute providing that in cities of a specified class no corporation or person shall charge for illuminating gas to exceed a price designated per thousand feet, the maximum price so fixed must be deemed reasonable, and the city, in an action against it for gas furnished to it, is not entitled to defend on the ground

that the price charged, though less than that thus specified, is not reasonable. (N. Y.) *Brooklyn Union Gas Co. v. City of New York*, 868.

GIFTS.

1. **GIFTS CAUSA MORTIS** may be **Effectuated** by a delivery to a third person in trust for the donee, though the gift does not come to the knowledge of the donee until after the donor's death. (Minn.) *Varley v. Sims*, 694.

2. **GIFTS CAUSA MORTIS**—Presumption.—It is presumed that the person to whom delivery of a gift causa mortis is made takes as a trustee for the donee. (Minn.) *Varley v. Sims*, 694.

3. **GIFTS CAUSA MORTIS**—Bank Check—Delivery.—A bank check delivered as a gift causa mortis to a third person for the use and benefit of the donee, with instructions to deliver it to the latter, is a sufficient delivery, though it does not reach the hands of the donee until after the donor's death. (Minn.) *Varley v. Sims*, 694.

4. **GIFTS CAUSA MORTIS**—Presumption of Acceptance.—If a gift causa mortis is beneficial to the donee and imposes no burden upon him, acceptance is presumed as matter of law. (Minn.) *Varley v. Sims*, 694.

5. **GIFTS CAUSA MORTIS**—Bank Checks.—A bank check for the entire amount of the drawer's credit in the bank, delivered to a person as a gift of the money, though unaccepted by the bank, operates as an assignment of the fund, sufficient to sustain a gift causa mortis, when the intention to make such gift is free from doubt, and no question of fraud or the rights of creditors is involved, although the check is not presented for payment until after the death of the donor. (Minn.) *Varley v. Sims*, 694.

6. **GIFTS CAUSA MORTIS** Require no Consideration to support them. (Minn.) *Varley v. Sims*, 694.

7. **GIFTS CAUSA MORTIS**—Bank Check.—A bank check which is the subject of a gift causa mortis need not disclose on its face that it covers the entire bank credit of the donor. That fact may be shown by evidence dehors the instrument. (Minn.) *Varley v. Sims*, 694.

GUARDIAN AND WARD.

1. **THE RELATION** of Guardian and Ward Continues as long as the estate of the latter is in the hands of the former. (Ill.) *Baum v. Hartmann*, 246.

2. **WHERE A PARENT** is Guardian of His Child, though the latter has attained the age of majority, any transaction between them whereby the former obtains an advantage at the loss of the latter will be regarded with the highest degree of suspicion. The presumption against the transaction is so strong that it is hardly possible to overcome it. (Ill.) *Baum v. Hartmann*, 246.

3. **GUARDIAN AND WARD**—Constructive Fraud.—From the confidential relations existing between guardian and ward, who are also parent and child, all transactions between them prejudicially affecting the interests of the ward are constructively fraudulent. (Ill.) *Baum v. Hartmann*, 246.

4. **GUARDIAN AND WARD**, Dealings Between Shortly After Termination of the Relation.—Where the Guardianship has Ceased by the Majority of the Ward, the courts will not permit transactions between the guardian and the ward to stand, even when they occurred

after the minority, if the intermediate period was short, unless the circumstances demonstrate, in the highest sense of the term, the fullest deliberation on the part of the ward and the most abundant good faith on the part of the guardian. (Ill.) *Baum v. Hartmann*, 246.

5. GUARDIAN AND WARD—Presumption of Undue Influence—Burden of Proof.—Whenever a transaction between guardian and ward, prejudicial to the latter, is brought before a court of equity, there is a strong presumption that the transaction resulted from the undue influence of the former on the latter, and the guardian must assume the burden of proving to the satisfaction of the court that the act proceeded from the independent and uninfluenced will of the ward. (Ill.) *Baum v. Hartmann*, 246.

6. GUARDIAN AND WARD—Gratuitous Receipt.—Where it appears that a ward a short time after attaining her majority was brought before a probate court by her guardian, who was also her father, and after informing the judge that she had received no part of the estate, executed a receipt stating that she had received the whole thereof, such judge fully advising her of the effect of the receipt, and she, notwithstanding his admonitions, insisting on executing it, and the judge thereupon enters an order of discharge, a presumption arises that her action was the fruit of the undue influence of her father, and his sureties still remain liable on their official bond if they have in no way been misled into changing their position by the alleged statement. (Ill.) *Baum v. Hartmann*, 246.

HABEAS CORPUS.

HABEAS CORPUS—Pleading.—A return to a writ of habeas corpus is a response to the writ itself and not an answer to the petition therefor, and the respondent should in his return simply seek to relieve himself from the imputation of having imprisoned the petitioner without lawful authority by statements in the return from which the legality of the imprisonment may be determined without regard to the statements of the petition for the writ. He is not required to make any issue on the petition for the writ, but simply to answer the writ. (Colo.) *Moyer, In re*, 189.

See Insurrection.

HERDING STOCK.

See Animals.

HIGHWAYS.

Contracts for Working.

1. HIGHWAYS—Contracts for Working—Advertisements for Bids.—A statute providing that the county commissioners "may" advertise in the county newspaper for working highways by contract should not be construed as "shall" or "must"; and a city council having the same powers over streets as county commissioners have over highways is not required to advertise for bids in the county newspaper for paving streets as a condition precedent to the exercise of the power to contract therefor. (S. C.) *Dillingham v. City Council of Spartanburg*, 917.

Automobiles.

2. AUTOMOBILES—Use of Highways—Negligence.—The employment of the automobile on the public highway as a means of

transportation is a lawful use of the road, and if it results in injury to one traveling by another mode, the autoist cannot be held liable unless he was using his machine at a time, or in a manner, or under circumstances inconsistent with a proper regard for the rights of others. (Ind.) McIntyre v. Orner, 359.

3. **AUTOMOBILES—Negligence—Care Required.**—One using an automobile upon the highway must take notice that the appearance and operation thereof are likely to frighten horses, and must govern himself and his machine accordingly. (Ind.) McIntyre v. Orner, 359.

4. **AUTOMOBILES—Negligence—Care Required.**—If a person operating an automobile on the highway sees, or by the exercise of ordinary caution could see, that a team of horses in front of him were, under excitement, forcibly crowding off the road, and manifesting unmistakable fright, ordinary care requires him to slow up, stop his machine, or do whatever is reasonably required to relieve persons in the vehicle attached to the horses from their perilous situation, and, failing in this, he is guilty of negligence. (Ind.) McIntyre v. Orner, 359.

5. **AUTOMOBILES—Contributory Negligence.**—A complaint alleging that defendant drove his automobile past plaintiff's team while going one way, causing the team to become badly frightened to defendant's knowledge, and that he, on the return trip, negligently drove his automobile at a high rate of speed up to within fifteen feet of plaintiff's team, does not show that the latter was guilty of contributory negligence in failing to alight from her carriage when she saw the automobile coming. (Ind.) McIntyre v. Orner, 359.

6. **AUTOMOBILES—Negligence.**—If a person is running an automobile at a high rate of speed, the assertion that the running of the machine required his undivided attention is no justification for his negligence in failing to look ahead and see the perilous situation of the driver of a team which has become frightened at the approach of the automobile. (Ind.) McIntyre v. Orner, 359.

7. **AUTOMOBILES—Negligence.**—A person using an automobile when he sees that his approach is endangering the safety of the occupants of a vehicle in the highway must stop or check his machine until such danger is over, and on failing to do so is guilty of negligence, regardless of contributory negligence on the part of the occupants of such other vehicle. (Ind.) McIntyre v. Orner, 359.

8. **AUTOMOBILES—Negligence—Sudden Peril.**—An instruction that if plaintiff, finding herself in sudden peril caused by the negligence of an automobile in approaching at a high rate of speed, in jumping from her carriage acted naturally and as an ordinary person might act under similar circumstances, she would not be guilty of contributory negligence, is proper. (Ind.) McIntyre v. Orner, 359.

See Negligence, 5-7.

HOMESTEADS.

1. **HOMESTEADS—Encumbrances—Nonjoinder of Wife.**—A deed or mortgage of a homestead without the wife joining is an absolute nullity. (Miss.) McDonald v. Sanford, 758.

2. **HOMESTEADS—Encumbrances—Foreclosure—Nonjoinder of Wife—Injunction.**—A mortgage of a homestead executed by a husband alone and the foreclosure thereof by the mortgagee without making the wife a party to the suit, are nullities, and the husband
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and wife may enjoin the sale under the foreclosure by showing that the land was their homestead and occupied by them as such at the time of the execution of the mortgage. (Miss.) McDonald v. Sanford, 758.

3. **HOMESTEADS—Encumbrances—Nonjoinder of Wife.**—No conveyance or mortgage of a homestead without the wife joining in the conveyance is anything less than utterly void, and a foreclosure of such mortgage without making her a party, if it shall result in a decree of sale, results in a decree which is void, for the reason that she was an essentially necessary party thereto. (Miss.) McDonald v. Sanford, 758.

HOMICIDE.

Self-defense.

1. **HOMICIDE—Self-defense.**—A blow from the hand or fist, under ordinary circumstances, neither justifies nor excuses the use of a deadly weapon, and it is for the jury to decide in a particular case whether the facts thereof are within the ordinary reason or not. (Ala.) George v. State, 17.

2. **HOMICIDE.**—Instruction that the jury may take into consideration the relative weight, age, size, and physical condition of two combatants terminating in a homicide, in determining whether the defendant was at the time in imminent danger of loss of his life or was exposed to great bodily harm, is erroneous as being argumentative and as giving undue prominence to certain facts. (Ala.) George v. State, 17.

3. **HOMICIDE—Self-defense—Threats.**—If the other elements of self-defense exist and the deceased has made threats against the defendant, which have been communicated to him, he has the right to act upon any overt act or hostile demonstration which may have led to the honest belief that he was in imminent peril, although such act or demonstration may not have amounted to a felonious assault. (Ala.) George v. State, 17.

Evidence.

4. **HOMICIDE—Evidence.**—A declaration by the deceased that he was cut is admissible in evidence although he did not state who cut him. (Ala.) George v. State, 17.

5. **HOMICIDE—Evidence—Threats.**—General threats made by a person accused of homicide having no reference to the deceased are not admissible in evidence, against him. (Ala.) George v. State, 17.

6. **EVIDENCE—Dying Declarations of Husband—Proof of by Widow.**—On the trial of one for homicide the dying declarations of the deceased, made under a sense of impending death, may be proved by his widow. (Ky.) Bright v. Commonwealth, 590.

Verdict.

7. **MURDER—Verdict Begging Mercy—Sentence.**—A verdict in a murder case that "We, the jury, find the defendant guilty as charged and beg the mercy of the court," followed by a sentence of death, the court being silent as to the plea for mercy, cannot be sustained. (Miss.) Avant v. State, 737.

8. **MURDER—Clouded Verdict.**—The legal effect of a verdict in a murder that "We, the jury, find the defendant guilty as charged and beg the mercy of the court," is to impose the death sentence;

but, in such case, the court should require the jury to remove the cloud from the finding and make the meaning of the verdict plain. (Miss.) *Avant v. State*, 737.

HUSBAND AND WIFE.

Interest of Spouses in Each Other's Property.

1. **HUSBAND AND WIFE**—Descent and Distribution.—Husband and wife, by virtue of the marital right, have each a contingent interest in the other's property, which, in the event of death, becomes fixed in the survivors, and which can be abridged or taken away only to the extent stipulated in a marriage settlement. (Ind. App.) *Unger v. Mellinger*, 348.

2. **HUSBAND AND WIFE**—Conveyances of Inchoate Rights.—The inchoate interest of husband or wife in the other's property cannot be conveyed without conveyance of the property of the other. (Ind. App.) *Unger v. Mellinger*, 348.

Antenuptial Contracts.

3. **MARRIAGE**—Antenuptial Contracts.—An antenuptial contract providing that, in consideration of the contemplated marriage, and the release and relinquishment by the intended husband of all his rights and interests in the property of his intended wife, she agrees to provide from her estate, after her death, an annual income to him so long as he should remain unmarried, is not in restraint of marriage, but only a limitation on the duration of the income at the election of the husband, and is therefore valid. (Minn.) *Appleby v. Appleby*, 709.

4. **MARRIAGE**—Antenuptial Contracts—An Antenuptial Contract providing that, in consideration of the contemplated marriage, and the release and relinquishment by the intended husband of all his rights and interests in the property of his intended wife, she agrees to provide, from her estate, an annual income to him so long as he shall remain unmarried, provided the parties were, at the time of the death of the wife, living and cohabiting together as husband and wife, does not tend to induce a separation between husband and wife, and is therefore valid. (Minn.) *Appleby v. Appleby*, 709.

5. **MARRIAGE**—Antenuptial Contracts—Consideration.—An agreement to marry is a sufficient consideration to support an antenuptial contract definitely fixing the property rights of the parties. (Minn.) *Appleby v. Appleby*, 709.

6. **MARRIAGE**—Antenuptial Contracts—Consideration.—Although an original engagement to marry is absolute and entered into some months before the execution of an antenuptial contract between the parties, the agreement to marry remains as a sufficient consideration to support such contract. (Minn.) *Appleby v. Appleby*, 709.

7. **MARRIAGE**—Antenuptial Contract cutting off the homestead right of the husband and his statutory one-third interest in his wife's property is valid. (Minn.) *Appleby v. Appleby*, 709.

8. **MARRIAGE**—Antenuptial Contracts in anticipation of marriage, equitably and fairly entered into, exclude the operation of law in respect to the property rights, so that so far as the contract extends, it, and not the law, furnishes the measure of such rights. (Minn.) *Appleby v. Appleby*, 709.

9. **MARRIAGE**—Antenuptial Contracts.—A valid antenuptial contract respecting the property rights of the parties fully performed

by one of them after the marriage and before her death, will not be declared void at the instance of the surviving husband merely because one of the provisions of the contract might be so construed as to have justified the one performing in adopting a course before her death that would have rendered the contract inoperative. (Minn.) *Appleby v. Appleby*, 709.

10. **MARRIAGE—Antenuptial Contracts—Wills.**—A valid antenuptial contract definitely settling the property rights of the parties so far as the husband is concerned is a sufficient assent on his part to the provisions of the will of his wife, disposing of the remainder of her property in trust to a charity, especially when the terms of the will are in substantial compliance with the contract. (Minn.) *Appleby v. Appleby*, 709.

11. **MARRIAGE—Antenuptial Contracts—Wills.**—If an antenuptial contract in favor of the contemplated husband definitely settling the property rights of the parties is fully performed after the marriage, the wife has the right to dispose of the remainder of her property by will in trust for a charity, and in so doing she does not violate the statutes against uses and trusts. (Minn.) *Appleby v. Appleby*, 709.

12. **HUSBAND AND WIFE—Antenuptial Settlements—Consideration.**—Marriage furnishes a consideration for an antenuptial agreement, which will be effective to control the marital right of each in the estate of the other, although the statute may provide a different rule. (Ind. App.) *Unger v. Mellinger*, 348.

Postnuptial Settlements.

13. **HUSBAND AND WIFE—Postnuptial Settlements—Consideration.**—Marriage furnishes no consideration for a postnuptial settlement. (Ind. App.) *Unger v. Mellinger*, 348.

14. **HUSBAND AND WIFE—Postnuptial Settlements—Consideration.**—A postnuptial promise by a husband to release his wife's property from any claim of marital right is no consideration for a promise by his wife to release her marital rights in her husband's property. (Ind. App.) *Unger v. Mellinger*, 348.

15. **HUSBAND AND WIFE—Postnuptial Settlements.**—A postnuptial agreement by a husband to release his claim of marital rights in his wife's property, in consideration that she release her marital rights in his property, is executory and without consideration, and may be disregarded by either. (Ind. App.) *Unger v. Mellinger*, 348.

Liability of Wife for Harboring Dogs.

16. **DOGS.—A Married Woman cannot be Charged with Harboring a dog** "as owners usually do" under proof showing no more than that the dog belonged to her husband, and that she allowed it to remain on the home premises, the legal title to which was in her. (Iowa) *Burch v. Lowary*, 443.

17. **DOGS—Married Women as Owners of.**—A married woman who owns her own home, and permits dogs belonging to her husband to remain on the premises, is not liable as their owner or as "harboring them as owners usually do" for injuries caused by them to one driving along the public highway. (Iowa) *Burch v. Lowery*, 443.

Criminal Conversation.

18. **CRIMINAL CONVERSATION—Trial—Instructions.**—If, in an action for criminal conversation, the charge of the court makes the

whole case turn upon the sole question of whether the defendant was guilty of the act of intercourse alleged, and the defendant disclaimed any theory of conspiracy, and the jury finds for the plaintiff, a refusal to charge that collusion cannot be inferred from certain facts appearing in the case is not prejudicial to the plaintiff. (Mich.) *Smith v. Hockenberry*, 615.

19. **CRIMINAL CONVERSATION—Condonation—Mitigation of Damages.**—In an action to recover for criminal conversation, the fact that the plaintiff has continued to live and cohabit with his wife after learning of the wrong may be considered in mitigation of damages. (Mich.) *Smith v. Hockenberry*, 615.

20. **CRIMINAL CONVERSATION—Evidence of Character of Wife—Mitigation of Damages.**—In an action to recover for criminal conversation, evidence tending to show the criminal intimacy of plaintiff's wife with other men, her association with women of bad repute, and of her general reputation for chastity, is admissible in mitigation of damages. (Mich.) *Smith v. Hockenberry*, 615.

21. **CRIMINAL CONVERSATION—Evidence of Character of Wife—Mitigation of Damages.**—In an action for criminal conversation, evidence that plaintiff's wife consulted counsel in regard to bringing suit before plaintiff did, offered solely for the purpose of showing the depravity of plaintiff's wife and as tending to show that the alleged criminal conversation was brought about by her under circumstances indicating that discovery was expected, is admissible in mitigation of damages. (Mich.) *Smith v. Hockenberry*, 615.

22. **CRIMINAL CONVERSATION—Evidence.**—In an action for criminal conversation a female witness having testified to seeing the defendant and plaintiff's wife in a compromising situation, it may be shown that such witness had stated that there was an understanding between herself and plaintiff's wife to get money out of the defendant. This is not collateral matter, but bears directly upon the truthfulness of the witness, and tends to show a conspiracy. (Mich.) *Smith v. Hockenberry*, 615.

Note.

Ill-fame, illustration of contracts void as being connected with the maintenance of houses of, 510-512.
sale of goods to be used in houses of, 509, 510.

INJUNCTION.

In General.

1. **INJUNCTION—Denials of Averments of a bill upon which the right to injunctive relief is based** do not necessarily demand the refusal of the writ, and they may be disregarded when the respondent does not assert a right to commit the acts sought to be enjoined. In all cases the comparative injuries which may result to the contending parties by granting or refusing to grant the writ may be considered. (Colo.) *People v. Tool*, 198.

To Restrain Shooting.

2. **INJUNCTION Against Shooting—Increased Hazard—Nuisance.** As the hazard from the use, or threatened use, of dangerous instrumentalities, such as shotguns, to land owners increases, the responsibility of the persons employing them becomes stricter and may amount to an insurance of safety, and all remedial resources of law and equity may be exercised to prevent such peril to person or prop-

erty, or to prevent conduct likely also to result in a breach of the peace. (Minn.) *Whittaker v. Stangvick*, 703.

3. **INJUNCTION Against Use of Shotguns.**—Shooting shotguns over another's land, so as to cause considerable damage, and impair the value of the land owner's shooting privileges, is such a wrong as may be restrained by injunction. (Minn.) *Whittaker v. Stangvick*, 703.

To Restrain Crime.

4. **INJUNCTION to Restrain Crime.**—Suits for injunction may be maintained by private parties to restrain crimes when their commission will injuriously affect their property rights. (Colo.) *People v. Tool*, 198.

5. **INJUNCTION to Restrain Crime.**—The state may, by injunction, restrain the commission of a crime when its interests or the interests of those entitled to its protection, are injuriously affected. (Colo.) *People v. Tool*, 198.

6. **INJUNCTION to Restrain Conspiracy.**—Individuals cannot invoke the power of a court of equity to enjoin a conspiracy to commit illegal acts affecting the entire state, but the state, in its sovereign capacity, as *parens patriae*, has a right to enjoin the commission of such acts and protect its citizens when they are incompetent to act for themselves. (Colo.) *People v. Tool*, 198.

7. **INJUNCTION at Suit of State.**—When Acts, Though Constituting Crime, will interfere with the liberties, rights and privileges of citizens, the state not only has the right, but it is its duty, to restrain by injunction the commission of such acts. (Colo.) *People v. Tool*, 198.

To Restrain Boycotting.

8. **BOYCOTTING, Injunction Against.**—An injunction will issue against members of a local union of stablemen to prevent their continuing a boycott carried on by them by means of pickets or representatives in front of complainant's place of business, carrying placards, for the purpose and having the effect of intimidating employes and patrons of complainant from entering his place of business. (Cal.) *Goldberg, Bowen & Co. v. Stablemen's Union*, 145.

9. **CONSTITUTIONAL LAW—Statutes Undertaking to Forbid an Injunction Against Boycotting.**—If a statute may be construed as prohibiting the courts from enjoining acts in the nature of boycotting, and which are done for the purpose and have the effect of intimidating complainant's patrons and employes from entering his place of business, such statute must be pronounced void as violative of his right to acquire, possess, enjoy and protect property. (Cal.) *Goldberg, Bowen & Co. v. Stablemen's Union*, 145.

10. **INJUNCTION Against Boycotting, When too Comprehensive.**—An injunction against members of a stablemen's union engaged in an unlawful boycott must not assume to restrain them from mere expressions of opinion as to complainant and his business, which, at most, consist of slander which could not be reached in the suit in equity, nor from doing other acts not connected with or incidental to the main acts and therefore acts properly enjoined, and the judgment will be modified on appeal by striking out the matters properly enjoined. (Cal.) *Goldberg, Bowen & Co. v. Stablemen's Union*, 145.

See Contempt; Elections, 3-5; Exemptions, 2; Garnishment; Nuisance, 1; Taxation, 2-6.

INSURANCE.

Marine Insurance.

1. **INSURANCE, MARINE—Constructive Total Loss.**—Under a policy of marine insurance stipulating that there shall be no abandonment of the vessel insured as for a "constructive total loss" unless the cost of the necessary repairs required solely by the disaster, exclusive of the cost of raising or rescuing the vessel and taking her to the dock, be equivalent to seventy-five per cent her agreed value, the words "constructive total loss" mean such a loss as that the repairs made necessary thereby, exclusive of raising or rescuing and taking her to the dock, would be equivalent to seventy-five per cent of her value, and when the cost to repair the vessel is less than that, the insured cannot abandon her and recover as for a constructive total loss. (Miss.) *Searles v. Western Assur. Co.*, 741.

2. **INSURANCE, MARINE—Constructive Total Loss—Abandonment of Vessel.**—Under a policy of marine insurance stipulating that there shall be no abandonment of the vessel insured as for a "constructive total loss," unless the cost of the necessary repairs required solely by the disaster, exclusive of the cost of raising or rescuing the vessel and taking her to the dock, be equivalent to seventy-five per cent of her agreed value, the insured cannot justify an abandonment of the vessel, as for a "constructive total loss" by proof that there were no facilities where she sank for raising her, and by making the expense of bringing her to a dock an element of damage, showing that as to him she was worthless. (Miss.) *Searles v. Western Assur. Co.*, 741.

3. **INSURANCE, MARINE.**—A provision in a marine insurance policy giving the insurer the right to recover and repair the insured vessel if at any time he believes that his interests demand such action, does not defeat his right to resist any claim for damage made by the insured. (Miss.) *Searles v. Western Assur. Co.*, 741.

4. **INSURANCE MARINE—Acceptance of Premium After Loss.** If the insurer, in a policy of marine insurance, accepts the balance of the premium due after disaster to the insured vessel, he does not thereby waive the defense that no such loss has occurred as that sued for. (Miss.) *Searles v. Western Assur. Co.*, 741.

Fire Insurance.

5. **INSURANCE—Form of Policy—Construction—Conditions.**—If a fire insurance policy is intended to cover property occupied by the owner, and provides that it shall become void if such property shall become unoccupied or occupied by a tenant, but is used to insure property exclusively occupied by tenants to the knowledge of the insurer at the time of issuing the policy, such conditions for forfeiture are inapplicable and cannot be enforced. (Ind.) *Ohio Farmers' Ins. Co. v. Vogel*, 382.

6. **INSURANCE—Construction of Contracts.**—Policies of insurance are to be construed like any other contracts. (Ind.) *Ohio Farmers' Ins. Co. v. Vogel*, 382.

7. **INSURANCE—Forfeiture—Knowledge of Breach.**—Courts in the absence of fraud, will refuse to enforce a condition of forfeiture on an insurance policy in favor of an insurer who has knowledge of such condition broken when he delivers the policy, accepts and retains the premium. (Ind.) *Ohio Farmers' Ins. Co. v. Vogel*, 382.

8. **INSURANCE—Interest of Owner.**—A vendee in possession of land under a conveyance in fee simple, although part of the pur-

chase money, secured by vendor's lien, is unpaid, is the sole and unconditional owner, within the meaning of an insurance policy providing that it shall be void unless the insured shall be such owner of the property. (Miss.) Insurance Co. v. Pitts, 756.

9. **INSURANCE, FIRE—Occupancy of Premises.**—Under an insurance policy providing that it shall be void if the insured premises shall become vacant and remain unoccupied for ten days, the insurer is liable if the premises are occupied at the time they are burned, although they may have become vacant and remained unoccupied for ten days during the life of the policy. The insurance is revived by occupancy, though suspended during the vacancy. (Miss.) Insurance Co. v. Pitts, 756.

10. **INSURANCE—Vacancy Provisions—Construction.**—Vacancy provisions in fire insurance policies are to be construed with relation to the character or class of property insured, and should not have the same interpretation when applied to houses to be occupied by the owner, as to houses to be occupied by tenants. (Ind.) Ohio Farmers' Ins. Co. v. Vogel, 382.

11. **INSURANCE—Vacancy Provisions.**—If a fire insurance policy is taken on tenement property, a provision for forfeiture in case the premises become vacant will operate only after a reasonable time has elapsed in which to obtain other tenants. (Ind.) Ohio Farmers' Ins. Co. v. Vogel, 382.

12. **FIRE INSURANCE—Forfeiture by Change "in Interest."**—The word "interest" in a policy providing a forfeiture "if any change takes place in the interest, title or possession of the subject of insurance" applies only where the insured owns a right in the property less than the title. (Kan.) Garner v. Milwaukee etc. Ins. Co., 460.

13. **FIRE INSURANCE—Forfeiture by Contract to Sell.**—Where one who owns the title of property procures a policy of insurance thereon which provides that it shall be void "if any change takes place in the interest, title or possession of the subject of insurance," a forfeiture does not result from his making a contract to convey the property, under which he receives the consideration but does not actually transfer the title or the possession. (Kan.) Garner v. Milwaukee etc. Ins. Co., 460.

14. **INSURANCE—Breach of Condition—Election.**—The breach of a condition in an insurance policy that it shall be "void if the building insured now is, or shall hereafter be, occupied by a tenant," does not render the policy void in case the premises are so occupied, but voidable merely at the election of the insurer, and when an election has once been exercised, the insurer will be confined to its choice. (Ind.) Ohio Farmers' Ins. Co. v. Vogel, 382.

15. **INSURANCE—Breach of Condition—Retention of Premium—Election.**—The retention of the premium on a fire insurance policy after knowledge of the breach of a condition involving a right to forfeiture is an election to waive such breach and continue the policy in force, and the policy should then be construed as though such condition had ever existed. (Ind.) Ohio Farmers' Ins. Co. v. Vogel, 382.

16. **INSURANCE—Waiver of Proof of Loss.**—Denial of liability by an insurance company within the time fixed for filing proof of loss is a waiver of the right to such proof. (Ind.) Ohio Farmers' Ins. Co. v. Vogel, 382.

17. INSURANCE—Waiver of Proof of Loss—Authority of Adjuster.—When an insurance company has been notified of a loss under a policy issued by it, and sends an adjusting agent to inquire into the loss, and he, while engaged in or at the conclusion of such business, refuses payment and denies all liability of the company under the policy, his action, if within the time stipulated in the policy for the making of formal proofs of loss, is a waiver of such proof by the company. (Ind.) *Ohio Farmers' Ins. Co. v. Vogel*, 382.

Fidelity Insurance.

18. FIDELITY INSURANCE—Construction Against Insurer.—The bond of a surety company, like any other insurance policy, must, when doubtful or ambiguous, be given the strongest interpretation against the insurer that it will reasonably bear. (Ark.) *American Bonding Co. v. Morrow*, 72.

19. FIDELITY INSURANCE—Extent of Liability in Case of Renewals.—If a bond stipulates that it shall not, if renewed, lapse at the end of the period for which it is executed, but that the liability of the surety shall not be cumulative, the total liability of the surety, after several renewals, is the amount named in the original undertaking. (Ark.) *American Bonding Co. v. Morrow*, 72.

20. FIDELITY INSURANCE—Auditing Accounts.—When an application for the renewal of a cashier's bond stipulates that his accounts shall be audited monthly, the examination need not be made on precisely the same date of each month, but only at some time during each month. (Ala.) *American Bonding Co. v. Morrow*, 72.

21. FIDELITY INSURANCE—Examination of Accounts.—A provision in the application for a cashier's bond that his accounts shall be examined monthly by the auditing committee of the bank directors does not call for an examination by a committee of expert accountants. (Ark.) *American Bonding Co. v. Morrow*, 72.

22. FIDELITY INSURANCE—Warranty as to Employment.—A statement in an application for a cashier's bond that he is not "engaged in other business or employment than the bank's service," which is made a warranty by the terms of the bond, will be deemed to refer to important and material matters calculated to affect the risk, not to unimportant ones that have no effect or bearing on the risk. (Ark.) *American Bonding Co. v. Morrow*, 72.

Employer's Indemnity Insurance.

23. INSURANCE—Indemnity—Pleading.—In suing on a policy of employes' indemnity insurance, providing that the employé shall be over twelve years of age, it is not essential that the complaint allege that the injured person was over twelve years of age. (Ky.) *Travelers' Ins. Co. v. Henderson Cotton Mills*, 585.

24. INSURANCE—Indemnity—Void Conditions.—A condition in an employes' indemnity insurance policy that no action shall be maintained thereon unless brought within thirty days after payment of loss by the insured is opposed to public policy and void. (Ky.) *Travelers' Ins. Co. v. Henderson Cotton Mills*, 585.

25. INSURANCE, CASUALTY—Indemnity—Right of Action.—A casualty insurance policy providing that "no action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within sixty days from date of such judgment and after trial of the issue," con-

stitutes a contract of indemnity, and such judgment may be paid and satisfied by the assured by the execution and delivery of notes in good faith and so accepted by the judgment creditor, and the assured is thereupon entitled to recover against the insurance company. (Minn.) *Kennedy v. Fidelity and Casualty Co.*, 658.

Accident Insurance.

26. **INSURANCE, ACCIDENT**—Voluntary Exposure to Danger.—A policy of accident insurance exempting from liability for injuries resulting from "voluntary or unnecessary exposure to danger," means cases in which there is a realization that an accident will in all probability result, and an injury follow, from the action about to be taken, and the danger of injury must be obvious. (Mich.) *Hunt v. United States Accident Association*, 655.

27. **INSURANCE, ACCIDENT**—Voluntary Exposure to Danger—Indoor Baseball.—An insured, under an accident policy exempting the insurer from liability for injuries resulting from "voluntary and unnecessary exposure to danger," is entitled to recover for a broken ankle caused by putting out his foot to prevent his running against a wall while playing indoor baseball. (Mich.) *Hunt v. United States Accident Assn.*, 655.

Life Insurance—Suicide.

28. **INSURANCE, LIFE**—Suicide as Defense.—Self-destruction cannot be presumed from the mere death of an insured in an unknown manner, and where death may have resulted from accident or mistake. In such case the presumption is against suicide and if that defense is relied upon, the burden of proving it is upon the insurer. (Ind. App.) *Equitable Life Ins. Co. v. Hebert*, 324.

29. **INSURANCE, LIFE**—Suicide Question for Jury.—Whether or not an insured person committed suicide is to be determined as any other question of fact; and where the evidence is conflicting, such question must be determined by the jury. (Ind. App.) *Equitable Life Ins. Co. v. Hebert*, 324.

30. **SUICIDE**—Presumption—Burden of Proof.—The presumption is against suicide, and the burden of proof is upon the one who asserts it as a fact to prove it by a fair preponderance of the evidence. (Minn.) *Lindahl v. Supreme Court I. O. F.*, 666.

31. **SUICIDE**—Evidence.—When the facts proved with reference to a death admit equally of the inference that such death resulted from accident or suicide, the presumption is that the death was accidental. (Minn.) *Lindahl v. Supreme Court I. O. F.*, 666.

32. **SUICIDE**.—When Circumstantial Evidence is Relied upon to establish a death by suicide, the party asserting the fact must prove it by facts which exclude every reasonable hypothesis of natural or accidental death. (Minn.) *Lindahl v. Supreme Court I. O. F.*, 666.

33. **SUICIDE**.—Burden of Proof that the death of a person was caused by suicide is upon the party who sets up that fact. (Minn.) *Olson v. Court of Honor*, 676.

Benefit Societies.

34. **INSURANCE**—Benefit Societies—Validity of By-laws—Resort to Courts.—The constitution and by-laws of an insurance benefit society denying the right of resort to the civil courts until after all remedies within the order are exhausted, if reasonable, are valid and

binding upon assenting members and upon their beneficiaries, but if they are of such a nature as to nullify the contract by rendering its enforcement so difficult and uncertain as to destroy its value, they will not be enforced by the courts. (Minn.) *Lindahl v. Supreme Court I. O. F.*, 666.

35. INSURANCE—Benefit Societies—Unreasonable By-laws.—By-laws or provisions of an insurance benefit society which require a beneficiary to submit his claim to an appellate tribunal of the society, which will hold its next session three years in the future in a foreign country, are unreasonable and nonenforceable, and the beneficiary is entitled to bring his action in the civil courts without reference to such by-laws, although the member had assented to them when he became a member of the society. (Minn.) *Lindahl v. Supreme Court I. O. F.*, 666.

36. BENEFICIAL ASSOCIATIONS—Change in By-laws—Effect on Members.—The general consent and agreement of a member of a mutual fraternal benefit society in his application and certificate to be bound by any future changes in the constitution, by-laws and rules of the society that it may enact in the future are subject to the implied condition that they must be reasonable. Otherwise the member is not bound thereby. (Minn.) *Olson v. Court of Honor*, 676.

37. BENEFICIAL ASSOCIATIONS—Unreasonable Change in the By-laws.—If an insurance benefit association, reserving the right to change its by-laws, provides by by-laws at the time of issuing a benefit certificate to an assenting member, that it will not pay the benefit to a member who commits suicide, whether sane or insane, unless he is at the time under treatment for insanity, and thereafter and before the death of such member in good standing, it amends its by-laws, so as to limit the benefit in case of suicide to five per cent of the face of the certificate for each year a member "shall have been continuously a member of the society," such change in the by-laws is unreasonable and void as to such member. (Minn.) *Olson v. Court of Honor*, 676.

See *Creditor's Bill*, 2-4.

INSURRECTION.

1. INSURRECTION—Power to Call Out Militia.—It is the duty of the governor to determine as a fact when a state of insurrection exists in any given locality, such as to demand that in the discharge of his duties as chief executive of the state he shall employ the state militia to suppress, and his determination of such fact cannot be controverted. (Colo.) *In re Moyer*, 189.

2. INSURRECTION—Power of Militia to Arrest.—If the governor has called out the militia of the state to suppress an insurrection, such militia has authority to arrest and imprison any person taking part in it or aiding and abetting the insurrection, and to detain him in custody until it is suppressed. (Colo.) *In re Moyer*, 189.

3. INSURRECTION—Military Arrest—Habeas Corpus.—If while the military authorities are engaged in suppressing an insurrection, they arrest and imprison a person for aiding and abetting it, his arrest is legal and his detention in the custody of such authorities until the insurrection is suppressed is also legal, and he is not entitled to his release on habeas corpus. (Colo.) *In re Moyer*, 189.

INTEREST.

1. **INTEREST**—Time from Which to Compute.—When it is agreed, in a controversy between a bank and others over the proceeds to certain property, that the property shall be sold and the proceeds deposited in the bank to wait the action of the court, interest on the sum deposited can be recovered only from the date of the judgment. (Ark.) *Citizens' Bank v. Arkansas Compress etc. Co.*, 102.

2. **INTEREST**.—Under Prayer for General Relief interest may be allowed on a claim from the time of the filing of the suit, although such interest is not specifically prayed for in the petition. (Ky.) *Travelers' Ins. Co. v. Henderson Cotton Mills*, 585.

See Annuities, 1; Usury.

INTERSTATE COMMERCE.

See Constitutional Law, 12.

INTOXICATING LIQUORS.*Sales to Minors.*

1. **INTOXICATING LIQUORS**—Sale of to Minor by Agent.—A keeper of a saloon is guilty of selling liquor to a minor, although such sale was made by his barkeeper, while such saloon-keeper was away from his place of business and had no knowledge of the sale. (Wash.) *State v. Constantine*, 1043.

2. **INTOXICATING LIQUORS**—Sale of to Minor—Instructions.—It is enough to instruct the jury that a saloon-keeper is responsible for the acts of his barkeeper in selling liquor to a minor without instructing as to the theory of the prosecution, or with the theory of the law or its policy in such case, but a case will not be reversed because such instructions were given, when they were not prejudicial. (Wash.) *State v. Constantine*, 1043.

3. **INTOXICATING LIQUORS**—Sale of to Minor—Knowledge of Minority.—To hold a saloon-keeper guilty of selling liquor to a minor, it is sufficient that it be shown that he knew or had such information from his appearance as would lead a prudent man to believe that the buyer was a minor. (Wash.) *State v. Constantine*, 1043.

Civil Damage Acts.

4. **INTOXICATING LIQUOR**, Damage Due to the Selling of, When Sufficiently Proven.—If, in an action against a saloon-keeper and his sureties, evidence is received tending to show that the husband of the plaintiff during the last months of his life was in the habit of becoming intoxicated and spending nearly all his time and earnings in the saloon of the defendant, and purchasing and drinking liquor there, from which he became and was kept intoxicated until he committed suicide, leaving no means of support to the wife and child, the jury was warranted in finding that the liquor sold by the defendant saloon-keeper caused the decedent to neglect his family and to end his life, and hence supports a verdict in favor of the plaintiff for damages. (S. Dak.) *Garrigan v. Kennedy*, 927.

5. **INTOXICATING LIQUORS**, Suicide, When may be Found to have been Due to the Selling of.—If a man is practically intoxicated for a long time, during which he is furnished liquors at a

saloon, and the intoxication is followed by suicide, the jury, in an action by the wife of the decedent against the saloon-keeper and his sureties, are justified in finding that the suicide was due to the action of the saloon-keeper in furnishing such liquors, and therefore in awarding damages to the widow. (S. Dak.) *Garrigan v. Kennedy*, 927.

6. **EVIDENCE to Show Damages.**—In an Action Against a Saloon-keeper and His Sureties by a widow to recover damages for the death of her husband through his suicide, evidence that she had a son dependent on her for support, and that her husband, when sober, had a shop of his own and furnished proper support for his wife and son, is properly admitted. (S. Dak.) *Garrigan v. Kennedy*, 927.

7. **DAMAGES**—Loss of Support After Death of Husband.—In an Action by a Widow Against a Saloon-keeper and His Sureties for damages resulting from the suicide of her husband through intoxication, she is entitled to recover for the loss of support after his death. (S. Dak.) *Garrigan v. Kennedy*, 927.

8. **INTOXICATING LIQUORS, Suicide Due to Use of.**—Though a Man is Sober at the Time He Commits Suicide, his wife may recover against a saloon-keeper and his sureties for such death, if it was approximately caused by the selling and furnishing of intoxicating liquors to the decedent at dates prior to such suicide. (S. Dak.) *Garrigan v. Kennedy*, 927.

JUDGMENTS.

Res Judicata.

1. **RES JUDICATA.**—A Right, Question, or Fact distinctly put issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies, even though the second suit is for a different cause of action. (Neb.) *Chicago etc. R. R. Co. v. Cass County*, 806.

2. **RES JUDICATA.**—Although a Claim for Taxes under an assessment for one year is not adjudicated by a prior adjudication of the validity of a tax upon the same property under an assessment for a different year, still, if the liability to taxation depends upon a charter right of exemption, the adjudication of such right in one litigation will estop the parties to question that exemption in subsequent litigation. (Neb.) *Chicago etc. R. R. Co. v. Cass County*, 806.

3. **RES JUDICATA**—Taxation.—The West Half of a Railroad Bridge owned by the corporation which operates through trains from Nebraska across such bridge and thence through adjoining states, is a "part of the continuous line of road" within the meaning of sections 39 and 40 of the revenue act of 1901. It is assessable by the state board, not by local assessors, and a prior adjudication that the bridge is not a "part of the continuous line of road" is not an adjudication of fact, and does not operate as an estoppel against the parties to such prior litigation. (Neb.) *Chicago etc. R. R. Co. v. Cass County*, 806.

4. **JUDGMENTS**—*Res Judicata.*—A decree in a suit that complainant is not the owner of certain land by virtue of certain deeds is not *res judicata* in a second suit by him against the same defendant, for the same land based on entirely different grounds, wholly independent of the two deeds involved in the former suit. (Miss.) *Scottish-American Mtg. Co. v. Bunkley*, 763.

5. JUDGMENTS—Res Judicata.—A judgment, to constitute *res judicata*, must not be open to argument or inference whether the same cause was decided in the former suit. There must be certainty that the very matter in dispute has been the subject of judicial determination. (Miss.) *Scottish-American Mfg. Co. v. Buckley*, 763.

Lien of Judgment—Priority.

6. JUDGMENTS are Liens only on the interests of the defendants. (Iowa) *Moore v. Scruggs*, 437.

7. LIEN OF JUDGMENT—Equitable Interests.—A judgments of the district court is not a lien upon an equitable interest in the real estate of the debtor. (Neb.) *Flint v. Chaloupka*, 771.

8. JUDGMENTS—Liens—Priorities.—A surety in a judgment to whom part of it has been assigned cannot assert his lien to the prejudice of an assignee of another part of the judgment who has by execution acquired a lien on all the personal property of the judgment debtors. (Va.) *Davis v. Roller*, 977.

9. JUDGMENTS—Assignment in Parts—Priorities.—If a commissioner is directed by the court to convey land sold at a judicial sale subject to the lien of a judgment, reserving a vendor's lien in the conveyance to secure sums due assignees of different parts of the judgment, such liens are of equal dignity, if there is no supervening equity growing out of the order of assignment which disturbs the equity of the rights between the assignees. (Va.) *Davis v. Roller*, 977.

Limitation of Actions.

10. LIMITATION OF ACTION on Dormant Domestic Judgment. An action may be brought upon a dormant judgment, and the provisions of the statute of limitations do not apply to actions upon domestic judgments. (Neb.) *Snell v. Rue*, 813.

Collateral Attack.

11. JUDGMENTS—Collateral Attack—Tax Deeds.—A suit against the holder of a tax deed to restrain an action of ejectment brought thereon, on the ground of the payment of the tax upon which the decree of sale is based, is a collateral attack upon such decree, and cannot prevail, when no suit has been brought to set aside the sale. (Mich.) *Shaaf v. O'Connor*, 652.

Relief in Equity.

12. JUDGMENT, Relief from in Equity, Denial of for Laches.—A judgment will not be relieved against in equity when its rendition might have been prevented by the production of evidence which for five years before the commencement of the action for relief had been a matter of public record, though the complainant seeking relief is a municipal corporation. The allegation in its complaint that it was a difficult matter to locate the papers and records relating to the cause of action sued upon furnishes no sufficient excuse for the delay and the failure to defend. (S. Dak.) *City of Fort Pierre v. Hall*, 972.

13. LACHES in Defending an Action and in Seeking Relief from a Judgment.—Ample means of information is equivalent to knowledge, and courts of equity will not interfere on behalf of an ag-

grieved party who has slumbered on his rights for an unreasonable time in full view of a defense which might have been reasonably known and asserted by the exercise of ordinary diligence. (S. Dak.) City of Fort Pierre v. Hall, 972.

14. **JUDGMENTS, Relief from in Equity.**—A court of equity will not relieve from a judgment unless the party seeking its interference can assail the judgment by facts or on grounds of which he could not avail himself at law, or was prevented from doing so by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part. When a party has once had an opportunity of being heard and neglects to do so, he must abide the consequences of his own neglect. (S. Dak.) City of Fort Pierre v. Hall, 972.

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JUDICIAL SALE.

1. JUDICIAL SALES, Title Presumed to be Sold at.—A person who, in good faith, bids for real property at a judicial sale where the particular interest offered is not expressly stated, has a right to assume that the title is marketable, and that he will receive a conveyance of the fee. (N. Y.) *Wanser v. De Nyse*, 871.

2. JUDICIAL SALES—Purchaser, When Entitled to be Released for Defect in Title.—One who in good faith bids for real property at a judicial sale, where no particular interest or title is expressly offered, is entitled to be released from his bid on showing that the title is not in fee or is not marketable. (N. Y.) *Wanser v. De Nyse*, 871.

3. JUDICIAL SALES—Practice in Compelling Purchaser to Comply with His Bid.—The fact that a person bids upon property at a judicial sale and signs the terms of the sale, by which he agrees to complete his purchase within a specified time, is sufficient on which to move for an order compelling him to perform his agreement. If answering affidavits are read claiming to show that the title is defective, the court may allow the production of such further affidavits relating to title as may be necessary or desirable to present the facts, and the rights of the parties may be fully protected by directing when and upon what conditions further affidavits may be filed. (N. Y.) *Wanser v. De Nyse*, 871.

4. JUDICIAL SALES—Marketable Title, When not so Made as to Require the Purchaser to Complete the Sale.—Where property is sold at a judicial sale, and on motion to compel the purchaser to comply with his bid it appears that, more than seventy years before, one F. O. was the owner of the property, and that, about forty years prior to the sale, a conveyance was procured from thirty-nine persons, who were then assumed to be his heirs, but there is no direct evidence of his death nor the heirship of such persons, and no sufficient evidence of adverse possession, the purchaser cannot be compelled to comply with his purchase. (N. Y.) *Wanser v. De Nyse*, 871.

See Trusts.

JURY.

JURY TRIAL, Challenge for Bias.—If a person under examination respecting his qualification as a juror in a case declares that he has long entertained a prejudice against cases of that class, which, if accepted as a juror, it would take strong and positive evidence to remove, he is not fair and impartial, and a challenge for actual bias should be sustained, especially if he states that he would not be willing, if he were the plaintiff, to have his cause tried by a juror in the same frame of mind as himself. (Cal.) *Fitts v. Southern Pac. Co.*, 130.

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LANDLORD AND TENANT.

LANDLORD AND TENANT—Subletting by Lessee.—If there is no covenant in a lease against subletting, the lessee has a right to sublease all or any part of the premises; and when he does so, he cannot, by a surrender to the lessor, defeat the rights of the under-tenant. (Ark.) *Mitchell v. Young*, 89.

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LARCENY.

LARCENY—Evidence.—A Record Kept by a Stockyards Company of carloads of stock received by it which have been copied from a book or tab of original entries from hearing another person read the waybills of the railroad company, is not admissible in a prosecution for larceny to trace cattle, alleged to have been stolen, to the possession of the accused. (Neb.) Donner v. State, 789.

Note.

Lease of premises for immoral purposes, 506, 511.

LEGACIES.

See Annuities; Wills.

LEGISLATURE.

See Constitutional Law.

LIBEL AND SLANDER.

1. LIBEL—Report by Credit Association—Damages.—A retail grocer, by mistake reported delinquent to a wholesale dealers' association and refused credit, is not entitled to recover more than nominal damages for libel, it appearing that the mistake was corrected and his credit restored at the earliest possible moment, and it not appearing that he suffered from injury to his feelings or to his credit. (Wash.) Woodhouse v. Powles, 1079.

2. LIBEL—Report by Credit Association—Damages.—An agreement between the members of a wholesale dealer's association to report delinquent retailers and refuse them credit until their debt is paid, with notice to all retailers in advance of such agreement, is valid. A mistaken report of such association of the delinquency of a retailer does not render such false report libelous per se, from which malice is presumed, entitling such retailer, in itself, to recover substantial damages without proof of any other facts. (Wash.) Woodhouse v. Powles, 1079.

3. LIBEL—Report by Credit Association—Damages.—If a wholesaler's association reports one of its retail customers as delinquent when in fact he is not, it is liable for the actual or compensatory damages suffered by him, but in determining the amount of damages the question of malice is of no moment in a jurisdiction where punitive or exemplary damages cannot be recovered. (Wash.) Woodhouse v. Powles, 1079.

4. LIBEL—Actionable per se—Damages—Evidence.—It is not necessary, to enable a person to recover general damages for a libel actionable per se, that he show some actual pecuniary loss, or that his injury be capable of some definite money valuation. Injury to feelings, mental suffering, injury to character and reputation, and similar injuries, incapable of definite money valuation, can be recov-

ered for when proven in actions for libel. (Wash.) Woodhouse v. Powles, 1079.

5. **LIBEL, Jurisdiction of Criminal Prosecution, for, Where It is Printed in One County and Circulated in Another.**—If the editor and proprietor of a newspaper prints a libel therein, he is subject to a criminal prosecution in a county of the state other than that in which his printing office is located, but in which he has circulated copies of such paper by mailing it to subscribers residing therein. (S. Dak.) State v. Huston, 970.

LIBERTY OF PRESS.

See Constitutional Law, 8.

LICENSE TAX.

CONSTITUTIONAL LAW—Exemption from License Tax.—A statute exempting all soldiers and sailors of the Confederate states who enlisted from a certain state and who were honorably discharged from paying a license for carrying on any business or profession in any city, town, or village within the state is unconstitutional as unwarranted class legislation, and as not affording to every person the equal protection of the laws. (S. C.) City of Laurens v. Anderson, 885.

LIMITATION OF ACTIONS.

1. **LIMITATION OF ACTIONS.**—The Form of Action, and not the cause thereof, must determine whether it is barred by the statute of limitations. (Mich.) Stringer v. Stevens Estate, 620.

2. **LIMITATION OF ACTIONS—Concealment, Silence is not.**—When the original basis of the action is not fraud, there must be something of an affirmative character designed to prevent, and which does prevent, a discovery of the cause of action. Mere silence by a person liable to an action is not concealment of the cause of action, but such concealment must consist of affirmative acts or representations. (Ill.) Fortune v. English, 253.

3. **LIMITATION OF ACTIONS—Pleading Fraud in Concealing Cause of Action.**—In a replication to the plea of the statute of limitations, it is necessary that the facts constituting the fraud be clearly stated. The replication must set out facts and circumstances which amount, in law, to a fraudulent concealment by the defendant of the cause of action, and, failing so to do, must be adjudged bad on demurrer. (Ill.) Fortune v. English, 253.

4. **LIMITATION OF ACTIONS—Fraud in Concealing Cause of Action, When not Shown.**—If in an action against an attorney at law to recover damages resulting from his negligence as such in examining a title and reporting it to be free from encumbrances, whereas it was subject to an encumbrance which has been enforced against the plaintiff by suit, the statute of limitations is pleaded, a replication averring that the plaintiff employed defendant, as attorney at law, to defend such suit, and that he, after such employment, represented to plaintiff, who was unlearned in the law, and that defendant, well knowing that he had been guilty of the acts stated in the declaration and to prevent plaintiff from bringing an action against him within five years, represented that the property was free from encumbrances, and advised that such suit could be successfully defended, and plaintiff, relying on such advice, defended such suit, and

not until it was decided against him did he become aware of the grievances alleged in his complaint, is not sufficient. It does not show that the defendant misrepresented any matter of fact, nor that he did not believe the advice given by him was incorrect when given. He was not obliged to notify plaintiff of the existence of a cause of action against himself, nor of the acts of negligence giving rise to such cause. (Ill.) *Fortune v. English*, 253.

See Annatities, 2; Judgment, 10; Mortgages, 8.

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MANDAMUS.

1. **MANDAMUS** does not lie to Review the Action of an Inferior Tribunal on account of error therein. (S. Dak.) *Farnham v. Colman*, 944.

2. **MANDAMUS**—Contract Duties.—The duties of a corporation arising wholly out of contract obligations, and not imposed by express law, or by the conditions of its charter, cannot be enforced by a writ of mandamus. (Ind.) *Vandalia R. R. Co. v. State*, 370.

3. **MANDAMUS**—Railroads—Crossings.—A railroad company whose tracks cross any public streets, avenues, or alleys in any town or city may be required by statute to securely "grade and plank or gravel" such crossings, and mandamus will lie to enforce such duty. (Ind.) *Vandalia R. R. Co. v. State*, 370.

4. **MANDAMUS**—Railroads—Street Crossings.—If a municipal ordinance requires a railroad company to make its street crossings convenient, and a statute requires it to "grade and plank or gravel," such crossings, the court may, under a writ of mandamus, upon the refusal of the company to do either, order the crossings to be planked where so asked in the petition for the writ. (Ind.) *Vandalia R. R. Co. v. State*, 370.

5. **MANDAMUS**—Penal Ordinances—Railroad Street Crossings.—Although a municipal corporation could have constructed a railroad street crossing and could have brought an action against the company to recover the cost of the crossing and a penalty as provided by an ordinance, yet it has the right to enforce, by mandamus, the construction of such crossing by the company. (Ind.) *Vandalia R. R. Co. v. State*, 370.

MARRIAGE.

CONTRACTS in Restraint of marriage, or which tend to bring about a separation of husband and wife, are opposed to public policy and utterly void. (Minn.) *Appleby v. Appleby*, 709.

MARRIAGE SETTLEMENT.

See Husband and Wife.

MARTIAL LAW.

See Insurrection.

MASTER AND SERVANT.

Safe Place to Work.

1. **MASTER AND SERVANT**—Safe Place—Assumption of Risk. A servant ordered to work upon and take down a scaffold is not

required to make an examination to see if it is safe, in the absence of apparent danger, nor is he barred from recovering damages if injured while thus engaged, by reason of the faulty construction of such scaffold. (Wash.) *Liedke v. Moran Brothers Co.*, 1058.

2. MASTER AND SERVANT—Safe Place—Assumption of Risk. A laborer, when ordered by his master to work, need not examine the place where he is required to work. He has a right to assume, in the absence of apparent danger, that the master has furnished him a reasonably safe place which to work. (Wash.) *Liedke v. Moran Brothers Co.*, 1058.

3. MASTER AND SERVANT—Assumption of Risk.—A laborer ordered by his master to work upon and take down a scaffold does not assume the risk of injury from its faulty construction, in the absence of apparent danger, nor can knowledge that such scaffold was being taken down because of its faulty construction be imputed to him. (Wash.) *Liedke v. Moran Brothers Co.*, 1058.

Safe Tools and Appliances.

4. MASTER AND SERVANT—Tools and Appliances—Duty of Master.—It is the duty of the master to exercise ordinary care and diligence in providing safe and suitable tools and appliances to servants engaged in his service, and to keep them in a safe condition. The servant has a right to rely upon the master's observance of these requirements and the performance of this duty, and his failure to do so makes him liable to his servant. (Ind. App.) *Columbian Enameling etc. Co. v. Burke*, 337.

5. MASTER AND SERVANT—Defective Machinery.—Notice on the part of the master of defects in machinery or appliances, and want of notice on the part of the servant, may be alleged in general terms, and such allegations will include both actual and constructive knowledge. (Ind. App.) *Columbian Enameling etc. Co. v. Burke*, 337.

6. MASTER AND SERVANT—Latent Defects in Appliances.—Reasonable care on the part of the master demands inspection and search for latent defects in his tools and appliances, while reasonable care on the part of the servant requires only attention and observation of open or obvious defects and perils. (Ind. App.) *Columbian Enameling etc. Co. v. Burke*, 337.

7. MASTER AND SERVANT—Tools and Appliances—Assumption of Risk.—A servant has the right to rely upon the safety of such implements as are provided by the master for his use in the master's service, unless the defectiveness is open to the observation of an ordinarily prudent man. (Ind. App.) *Columbian Enameling etc. Co. v. Burke*, 337.

8. MASTER AND SERVANT—Assumption of Risk—Pleadings.—Special allegations by a servant of injuries caused by the master's negligence will not control general allegations of nonassumption of risk unless it can be held as matter of law that the servant assumed the risk. (Ind. App.) *Columbian Enameling etc. Co. v. Burke*, 337.

9. MASTER AND SERVANT—Negligence—Safe Appliances.—A servant has the right to rely upon the safety of the appliance selected and adjusted by his master, accompanied with assurances as to its sufficiency, the immediate placing and adjustment having been made while the servant was otherwise engaged, and he being immediately thereafter called to action in doing the work directed; and if an injury happens to the servant traceable to such acts of the master,

he is guilty of negligence. This is a question for the jury to determine. (Wash.) *Sullivan v. Wood & Co.*, 1047.

10. MASTER AND SERVANT—Contributory Negligence of Servant.—If a servant assisting in the construction of a gas-tank is required to stand upon a narrow walk-around, twenty-six feet above the ground, and underneath a girder that is being raised, and while thus employed, and while he could not look up all the time, is injured by the falling of a wedge used to adjust the girder, and placed in position by the master, the question of the contributory negligence of the master is for the jury. (Wash.) *Sullivan v. Wood & Co.*, 1047.

11. MASTER AND SERVANT—Assumption of Risk.—The defense of assumption of risk is sustained when it is shown that the danger of the servant was so open, obvious, and apparent that a man of ordinary care and prudence, with the same knowledge and experience as such servant had, surrounded by similar conditions, would not have taken the chance or risk of injury. (Wash.) *Sullivan v. Wood & Co.*, 1047.

Vice-principals.

12. MASTER AND SERVANT—Vice-principal.—If one who occupies the place of a master undertakes to perform an act, it is the act of the master for which he is liable, and his representative is not transformed into a fellow-servant, merely because he assumed to do a thing that might have been done by a fellow-servant. (Wash.) *Sullivan v. Wood & Co.*, 1047.

13. MASTER AND SERVANT—Safe Appliances—Command of Vice-principal.—If, after objection by the servant as to the safety of the appliance in use, he is assured of its safety by a vice-principal, and directed and commanded to do what he was doing at the time he was injured, the master is liable. (Wash.) *Sullivan v. Wood & Co.*, 1047.

14. MASTER AND SERVANT—Safe Appliances—Vice-principal. An instruction that it is the duty of the master to furnish proper and suitable appliances and to see that they are properly adjusted, and that anyone to whom the master delegates such duty becomes for such purpose the vice-principal, for whose negligent act the master is liable, is proper if amply qualified with reference to the facts in the particular case. (Wash.) *Sullivan v. Wood & Co.*, 1047.

See Constitutional Law, 17-24.

MECHANICS' LIENS.

MECHANICS' LIENS—Mortgages—Priority.—A statute making debts due for manual or mechanical labor a preferred claim against the property of the debtor in the hands of an assignee or receiver does not give such debts a preference over a prior mortgage on such property. (Ind.) *McDaniel v. Osborn*, 354.

MILITIA.

See Insurrection.

MISTAKE.

See Cancellation of Instruments.

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MONOPOLIES.

1. **MONOPOLIES—Statutory Construction.**—Chapter 158 of the Laws of Kansas of 1891, prohibiting combinations to prevent competition among persons engaged in buying and selling livestock, is superseded by the general anti-trust act of 1897, and is no longer in force. (Kan.) *State v. Wilson*, 479.

2. **MONOPOLIES—Dealing in Livestock.**—An agreement among the members of an association which practically controls the business of buying and selling cattle at a great commercial center that they will make no purchases or sales for others for a commission less than fifty cents on each head of cattle handled, creates a restriction in the full and free pursuit of a lawful business and constitutes a trust within the terms of chapter 265 of the Laws of 1897 of Kansas; and the exaction of such a commission by a member of the association is a misdemeanor, and a contract to pay it is void. (Kan.) *State v. Wilson*, 479.

MORTGAGES.

Deeds as Security.

1. **DEEDS as Security—Parol Evidence to Show.**—An agreement by a grantee in a sheriff's deed, made at the time the certificate is outstanding to purchase the latter and hold the title to the land as security for the money paid and other debts of the owner, may be shown by parol evidence. (Iowa) *McElroy v. Allfree*, 412.

2. **DEEDS as Mortgages—Parol Evidence.**—A conveyance, absolute upon its face, may be shown by parol to have been intended as security, and if so shown is a mortgage. (Iowa) *McElroy v. Allfree*, 412.

Foreclosures.

3. **MORTGAGE, FORECLOSURE—Effect of Omitting a Grantee.** The foreclosure of a mortgage to which the grantee of the mortgagor is not a party is ineffective, and a sale thereunder does not transfer title to the mortgaged premises. (Cal.) *Burns v. Hiatt*, 157.

4. **MORTGAGE.—An Ineffectual Attempt to Foreclose a Mortgage** does not extinguish the lien, but leaves the parties as they were before. (Cal.) *Burns v. Hiatt*, 157.

5. **MORTGAGE, Assignment of by an Ineffectual Foreclosure.**—One who purchases at a foreclosure sale void because the grantee of the mortgage was not made a party becomes the assignee of the mortgage. (Cal.) *Burns v. Hiatt*, 157.

Mortgagee in Possession.

6. **MORTGAGEE'S RIGHT of Possession Where He Enters Under a Void Foreclosure.**—If a foreclosure and sale thereunder are void because the grantee of the mortgagor was not a party thereto, but the purchaser enters into possession peaceably, though without the consent of the mortgagor, and claiming title under the sale, such purchaser has such right to retain possession that he cannot

be disturbed therein at the suit of the mortgagor or of his successor in title, without first paying, or offering to pay, the mortgage debt, though it is barred by the statute of limitations. (Cal.) *Burns v. Hiatt*, 157.

7. **MORTGAGEE in Possession, Who is and Right of.**—Where for any reason foreclosure proceedings are void, the mortgage continues alive for the benefit of the mortgagee, or the purchaser at the foreclosure sale as his assignee, who, if he peaceably and in good faith, under color of the foreclosure proceedings, though without the consent of the mortgagor, enters into possession of the mortgaged premises, obtains possession thereof in a lawful manner and becomes a mortgagee in possession with all the rights incident thereto, and cannot be dispossessed without payment of the debt. (Cal.) *Burns v. Hiatt*, 157.

Quieting Title Against Mortgages.

8. **A MORTGAGOR or His Successor in Interest cannot Quiet His Title Against the Mortgagee** without paying, or offering to pay, the mortgage debt, though it is barred by the statute of limitations. (Cal.) *Burns v. Hiatt*, 157.

Release of Mortgage.

9. **MORTGAGE.**—A mortgagor has the right to insist that the mortgagee shall not, by releasing the land which should pay the debt, throw upon him a personal liability therefor. (Cal.) *Crisman v. Lanterman*, 167.

10. **MORTGAGE—Release of by Subsequent Trust Deed.**—Whether a trust deed to secure the same indebtedness already secured by a mortgage accomplishes a merger of the mortgage, or, as it may be termed, a novation of securities, is a question of the intention of the parties, to be derived from their acts. (Cal.) *Crisman v. Lanterman*, 167.

11. **MORTGAGE, When not Released by a Subsequent Trust Deed.** If a trust deed given to secure indebtedness already secured by a mortgage provides that in case of a sale under the deed which does not realize enough to pay all the indebtedness, the parties shall have the same remedies to enforce the indebtedness as if the deed of trust had not been executed, the mortgage is not released, nor does it merge in the trust deed. (Cal.) *Crisman v. Lanterman*, 167.

12. **MORTGAGE, Release of, Purporting to Reserve Right to Pursue the Mortgagor.**—Where a paper declares that, without in any manner waiving the right to assert against the estate of a deceased mortgagor the unpaid balance of the principal and interest on a certain promissory note, the undersigned does remise, release, relinquish and discharge from said mortgage and from the lien thereof the mortgaged lands, the persons executing such paper are estopped from denying that it releases the mortgage against a person who had purchased such lands at a sale by the terms of which the purchase price was to be paid only upon a certificate of an abstract company that they were free from encumbrances, and it was paid after receiving such certificate and applied to the satisfaction of indebtedness and for the benefit of the persons executing such release. (Cal.) *Crisman v. Lanterman*, 167.

13. **SALE, Application of Proceeds of—Powers of Executors.**—If a sale is made under a trust deed, and by the terms of the sale the property sold is to be free from encumbrances and the same property

is also subject to a pre-existing mortgage to secure the same debts, and the proceeds of the sale are sufficient to pay the mortgage debts, a release of the mortgage executed by the executors of the mortgagee is binding, although by an agreement not assented to by the purchaser, an application of such proceeds has been so made as to leave part of the mortgage debt unpaid. (Cal.) *Crisman v. Lanterman*, 167.

See Chattel Mortgages; Mechanics' Liens; Subrogation.

MUNICIPAL CORPORATIONS.

Negligence.

1. **MUNICIPAL CORPORATIONS—Negligence of Officers.**—A municipal corporation is not liable under the common law for the loss of private property by fire caused by sparks from a steam roller used by the city officers in repairing street pursuant to a duty imposed upon the city by general law. (Mich.) *Alberts v. City of Muskegon*, 633.

2. **MUNICIPAL CORPORATIONS—Streets—Open Trapdoors.**—A city is liable to a pedestrian for an injury sustained by a fall into an open and unguarded trapdoor situated upon the sidewalk of one of the principal streets of the city in constant use by pedestrians, although such door had been opened but a few moments at the time of the accident. (Wash.) *Hayes v. City of Seattle*, 1062.

Relinquishing Control of Streets.

3. **MUNICIPAL CORPORATIONS—Relinquishing Control of Streets.**—Municipal corporations have no power to barter or contract away the present or future control of their streets, alleys or other public places, and they are under a continuing duty to keep them safe. (Ind.) *Vandalia B. R. Co. v. State*, 370.

4. **MUNICIPAL CORPORATIONS—Power to Contract Away Governmental Power.**—A municipal corporation has no power, by contract, ordinance or by-law, to cede away, limit, or control its legislative or governmental powers, or to disable itself from performing its public duties. (Ind.) *Vandalia B. R. Co. v. State*, 370.

5. **MUNICIPAL CORPORATIONS—Contracts—Streets—Railroad Crossings.**—A contract between a railroad company and a municipal corporation by which the former agrees to construct a viaduct across its tracks at a street crossing in consideration that the latter will construct the abutments and approaches and keep them and the viaduct in repair for all time, is beyond the power of the city and void. (Ind.) *Vandalia B. R. Co. v. State*, 370.

Paving Contracts.

6. **MUNICIPAL CORPORATIONS—Contracts for Street Paving.** A contract made by city officers for paving streets after refusing all bids made after advertisement, and, upon further negotiations with the two lowest bidders, they receiving lower bids from them, will not be set aside, or its performance enjoined at the suit of a taxpayer who is not injured, but in fact benefited thereby. (S. C.) *Dillingham v. City Council of Spartanburg*, 917.

7. **MUNICIPAL CORPORATIONS—Contracts for Street Paving—Indemnity Bond.**—If a city making a contract for street paving in its call for bids, requires that the contractor to whom the award is made shall furnish a bond to guarantee the faithful performance of the work and to defend, indemnify and save harmless the city

against any suit, loss, damage or expense by reason of any negligence or default, want of skill or care on the part of the contractor, and requiring him to guarantee and keep in repair such pavement for one year, and retaining ten per cent of the total amount of such contract for one year, such requirement does not cut off full and free competition in bidding, nor does it render the contract void as tending to cause the contractor to increase the amount of his bid, and thus increase the burden on the taxpayers. (S. C.) *Dillingham v. City Council of Spartanburg*, 917.

8. MUNICIPAL CORPORATIONS—Contracts for Street Paving—Patented Material.—A city may legally advertise for bids and contract for paving streets with patented material if all the competition is permitted of which the situation allows. If a city exercising its power to make public improvements in good faith decides to contract for the use of patented articles, there is created no monopoly and no abatement in competition beyond what necessarily results from the rights and privileges given the patentee under his patent. (S. C.) *Dillingham v. City Council of Spartanburg*, 917.

Waterworks Contracts.

9. MUNICIPAL CORPORATIONS—Waterworks Contracts.—A municipal corporation has incidental power to contract for the construction and operation of a system of waterworks for public and private use, and the making of such a contract is not a delegation of a governmental function, but an exercise by the city of its business or proprietary powers. (Ala.) *City of Gadsden v. Mitchell*, 20.

10. MUNICIPAL CORPORATIONS—Waterworks Contracts—Period of Franchise.—If no limit is fixed by constitution or statute as to the length of time for which a contract made by a city for the construction and operation of a system of waterworks for public and private use shall remain in force, it cannot be said that such contract providing that it shall remain in force for thirty years is unreasonable. (Ala.) *City of Gadsden v. Mitchell*, 20.

11. MUNICIPAL CORPORATIONS—Waterworks Contract—Designation of Streets to be Piped—Injunction.—A contract entered into by a city for the construction of a waterworks system which does not prescribe the order in which the work of constructing such water plant shall be begun, is not a condition precedent to maintaining a bill for a mandatory injunction to require the city to designate the streets in which pipes shall be laid and hydrants located, that the complainants shall have purchased material, located water towers and pumping stations, or otherwise have begun to perform their part of the contract. (Ala.) *City of Gadsden v. Mitchell*, 20.

See Elections, 1; Waters and Watercourses, 7-8.

Note.

Municipal Courts, contempt, power of to punish, 955, 956.

NAVIGABLE WATERS.

1. NAVIGABLE STREAMS—Boundaries.—If a Change in the Position of a navigable river dividing the territory of two states is by gradual and imperceptible encroachment, or insensible recession, so that the process cannot be detected, the boundary follows the shifting thread of the stream; but if from a flood and ice gorge, or other violent natural cause, there is a sudden, visible irruption of the

water, whereby the land upon one side is degraded or submerged, or a new channel is cut for the stream, the boundary remains stationary at its former location, and the boundaries of the riparian owners whose lands have been affected remain unchanged. (Kan.) *Fowler v. Wood*, 534.

2. NAVIGABLE STREAMS—Avulsion—Reappearance of Submerged Land.—If a navigable river suddenly encroaches upon adjoining private land, the title to the submerged portion remains in the former owner. When thereafter such land rises to the surface, whether by the deposit of alluvion or by a change in the channel of the stream, dominion reattaches thereto as if never suspended, and whatever accretions may have been added to the tract belong to its proprietor, as in ordinary cases. (Kan.) *Fowler v. Wood*, 534.

3. NAVIGABLE RIVERS—Avulsion—Reappearance of Submerged Land After Partition.—If a navigable river suddenly submerges a portion of a tract of land owned by tenants in common, and the remainder is then, by judicial proceedings, partitioned under the supposition that the submergence is permanent, the allottees whose shares border on the stream cannot, when the submerged land reappears, claim it to the exclusion of those whose shares do not touch water. The owners are entitled, on the equitable ground of mistake, to a partition of the reclaimed soil with its accretions, if excluded from the former partition. (Kan.) *Fowler v. Wood*, 534.

4. NAVIGABLE RIVERS—Boundaries.—When a Private Grantor bounds the land generally on a river, the presumption is that he does not intend to reserve any land between the upland and the stream and that the grant will carry title as far as he owns. The presumption is rebuttable, the question being purely one of intention; and when the intention is ascertainable from the face of the instrument or a record, other evidence is not admissible. (Kan.) *Fowler v. Wood*, 534.

5. NAVIGABLE RIVERS—Avulsion—Reappearance of Submerged Land After Conveyance.—If the owner of a tract of land, a part of which has suddenly been submerged by an adjoining navigable stream, conveys the upland only, the purchaser, upon the reappearance of the submerged portion, can include it within his boundary only by the process of accretion or reliction. (Kan.) *Fowler v. Wood*, 534.

6. NAVIGABLE RIVER—Rights of Riparian Owners—Deflection of Stream.—The owner of land bounded by a navigable river has the right to secure his soil against inroads of the water, to secure accretions which form against his bank, and to erect improvements to promote commerce and other uses of the stream as navigable water, but he has no right to deflect the stream into a new channel by placing obstructions across the main current. (Kan.) *Fowler v. Wood*, 534.

7. NAVIGABLE RIVERS—Formation of Islands—Accretion.—New formations arising from the bed of a navigable river belong to the owner of the bed, and new formations added to the island or bar by the process of accretion or reliction belong to the owner of the bar or island, although by such growth it extends inward until it reaches the shore. (Kan.) *Fowler v. Wood*, 534.

8. NAVIGABLE RIVERS—Formations by Accretion or reliction must be made to the contiguous land so as to change the portion of the water's margin or edge. (Kan.) *Fowler v. Wood*, 534.

9. NAVIGABLE RIVER—Accretion.—If the Space Between the Mainland and an Island is reduced to a slough which fills up in such a manner that the two bodies of land join, the respective owners are entitled to the accretions to their shores; and if the slough fills up from the bottom, and the accretions do not begin at the sides, the boundary is the center of the slough, as it was before the water left it. (Kan.) *Fowler v. Wood*, 534.

NEGLIGENCE.

In General.

1. NEGLIGENCE—Invasion of Province of Jury.—In cases involving negligence, where the facts are undisputed and the inferences which may be drawn from them are not equivocal, and can lead to but one conclusion, the court may adjudge as matter of law that there is or is not negligence, and may so instruct the jury. (Ind.) *McIntyre v. Orner*, 359.

2. NEGLIGENCE—Conflict of Evidence—Question for Jury.—If a servant sues his master for damages for personal injury alleged to have been caused by the master's negligence, and the facts are controverted and the evidence conflicting, both the question of negligence and of contributory negligence must be submitted to the jury for determination. (Ind. App.) *Columbian Enameling etc. Co. v. Burke*, 337.

3. NEGLIGENCE—Contributory—Sudden Peril.—One who does an act under an impulse, or upon a belief created by a sudden peril attributable to another's negligence, is not to be regarded as guilty of contributory negligence, even though the act would be negligent if performed under circumstances not indicating sudden danger. (Ind.) *McIntyre v. Orner*, 359.

Imputed Negligence.

4. NEGLIGENCE of Parent.—When not Imputed to Child.—Though parents are guilty of negligence, such negligence is not imputed to their child, if it exercises such care as is required of an adult under similar circumstance. (N. Y.) *Serano v. New York Cent. R. R. etc. Co.*, 833.

Operation of Steam Shovel near Highway.

5. NEGLIGENCE—Operation of Steam Shovel.—A railway company operating a steam shovel on its right of way, and near a highway crossing, is bound to use the shovel, whether within the limits of the highway or not, so as not to unreasonably interfere with the rights of the traveling public. (Iowa) *Heinmiller v. Winston Brothers*, 405.

6. NEGLIGENCE—Operation of Steam Shovel.—If a steam shovel belonging to a railway company and operated upon its right of way near a highway crossing is naturally calculated to frighten horses of ordinary gentleness, it is the duty of the company to exercise ordinary care in the use of the shovel so as not to unnecessarily endanger persons lawfully upon the highway. (Iowa) *Heinmiller v. Winston Brothers*, 405.

7. NEGLIGENCE—Operation of Steam Shovel.—The question as to whether the operation of a steam shovel owned by a railway company, and in use near a public highway, requires the company to warn travelers of the danger from its operation, is for the jury to determine

under all the circumstances proved. (Iowa) *Heinmiller v. Winston Bros.*, 405.

Fall of Awning.

8. **NEGLIGENCE**—**Fall of Awning**—**Res Ipsa Loquitur**.—The liability of the owner of a building for damages to a traveler upon the highway caused by the falling of an awning attached to such building is to be determined upon the principle of negligence in accordance with the maxim "*res ipsa loquitur*," and not upon the doctrine of insurance of safety, when there is no issue as to nuisance in the case. (Minn.) *Waller v. Ross*, 661.

9. **NEGLIGENCE**—**Fall of Awning**.—If a traveler upon the highway is injured by the fall of an awning attached to a building, the owner of such building is *prima facie*, guilty of negligence. (Minn.) *Waller v. Ross*, 661.

Injury to Children in Street.

10. **NUISANCE**—**Private Sewer Across Public Street**—**Liability of Constructor**.—If a sewer constructed in a public alley without the consent of the city, by the owner of a lot adjoining such alley for his own convenience, is by him allowed to become in such a defective condition as to constitute a nuisance, he, and not the city, is liable for an injury to a child caused by her jumping from a pile of lumber and breaking into such sewer. In such case it is the duty of the constructor of the sewer or his successor in interest to keep it in a safe condition for those who are entitled to use the alleyway. (Ky.) *Covington Sawmill and Mfg. Co. v. Drexilius*, 593.

11. **STREETS**—**Rights of Children**—**Negligence**.—The fact that a child was playing in a public alleyway when injured through the negligence of another is no defense to an action to recover for the injury. (Ky.) *Covington Sawmill and Mfg. Co. v. Drexilius*, 593.

12. **NEGLIGENCE**—**Parent and Child**.—It is not Negligence, as a Matter of Law, for parents to permit a child, six years of age, to go unattended on a public street which is crossed by two lines of tracks of a steam railway running nearly at a right angle to the street. (N. Y.) *Serano v. New York Cent. etc. R. R. Co.*, 833.

13. **NEGLIGENCE**.—**A Child of Tender Years** is not Required to Exercise the Same Degree of Care and Prudence in the presence of danger which is expected of an adult under like circumstances, but she should exercise such care and prudence as is commensurate with one of her age and intelligence. (N. Y.) *Serano v. New York Cent. etc. R. R. Co.*, 833.

See Damages.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

NEW TRIAL—**Weight of Evidence**.—A motion for a new trial on the ground of insufficiency of the evidence sufficiently presents the question of the weight of the evidence on appeal. (Ind. App.) *Unger v. Mellinger*, 348.

NOTARIES.

See Attorney and Client.

Note.

Notaries Public, contempt, power of to punish, 958.

NUISANCE.

1. **NUISANCE—Noise of Dogs—Injunction.**—The annoyance and inconvenience arising from the barking and howling of dogs and the whining of puppies to such an extent as to greatly annoy and break the rest and sleep of an adjoining family, and seriously disturb them in the reasonable use and enjoyment of their home, constitutes a nuisance which may be enjoined, although a town ordinance may afford an easy and expeditious remedy at law for the inconvenience suffered by such family. (Va.) *Herring v. Wilton*, 997.

2. **NUISANCE—Smoke, Cinders, and Soot.**—People residing in cities are entitled to enjoy their homes free from the damaging results of smoke, soot and cinders, if sufficient to depreciate the value of their property and render its occupancy uncomfortable. (Miss.) *King v. Vicksburg Ry. etc. Co.*, 749.

3. **NUISANCE—Damages—Ownership.**—If damage to private property, resulting from noise, smoke and cinders, was done by an electric plant before it was acquired by the owner against whom suit is brought, and there has been no continuing cause of damage maintaining a depreciation of value, such owner is not liable, but he is liable if the damage was done during a former ownership, and the cause of it is continuing and a restoration of value prevented. (Miss.) *King v. Vicksburg Ry. etc. Co.*, 749.

OFFICERS.*De facto and De jure.*

1. **OFFICERS DE FACTO—Acts of—Collateral Attack.**—If a notary public accepts the office of deputy district attorney, and after the expiration of the latter office swears the prosecuting witness to an affidavit charging a person with the commission of a crime, such official act, whether de jure or de facto, cannot be attacked collaterally. (Ind. App.) *McNulty v. State*, 344.

2. **OFFICERS—De Facto and De Jure—Payment of Salary.**—A municipality which has paid the salary of an officer de facto when it was due and he was in possession of the office, is not liable to the officer de jure for such salary, upon his establishing his right to the office. (Wash.) *Samuels v. Town of Harrington*, 1075.

3. **OFFICERS De Facto and De Jure—Collection of Salary—Election of Remedies.**—An officer de jure who has recovered judgment against an officer de facto for salary of the office paid to the latter has elected his remedy, and cannot recover the amount of such salary from the municipality, on failure to collect such judgment. (Wash.) *Samuels v. Town of Harrington*, 1075.

Contracts against Public Policy.

4. **OFFICERS—Contracts Against Public Policy.**—Any contract by a public officer binding himself to violate his duty to the public, or placing him in a position inconsistent with his duty to the public, and which has a tendency to induce him to violate such duty, is against public policy, and clearly illegal and void. (Ind.) *Cheney v. Unroe*, 391.

5. **OFFICERS—Contracts Against Public Policy.**—A contract by a highway superintendent to labor for the contractors engaged to con-

struct a public highway and accept pay therefor is opposed to public policy and void, though no fraud is shown. (Ind.) *Cheney v. Unroe*, 391.

Official Bonds.

6. A SURETY on an Official Bond is Liable for a statutory penalty incurred by his principal in taking illegal fees. (Neb.) *Eccles v. United States Fidelity etc. Co.*, 830.

PARENT AND CHILD.

In General.

1. PARENT AND CHILD—Advancements.—If a parent furnishes the purchase money and takes a conveyance in the name of his child, the rule which presumes an advancement does not apply. (Iowa) *Moore v. Scruggs*, 437.

2. PARENT AND CHILD—Estoppel Against Creditor of Child.—A parent purchasing land and taking the conveyance thereto in the name of such child may assert title to the land as against a creditor of such child, provided he knew nothing of the extension of such credit. (Iowa) *Moore v. Scruggs*, 437.

Support of Parent.

3. PARENT AND CHILD, Obligation of the Latter to Support the Former.—At the common law, a child is not under any legal obligation to support its parent. (Cal.) *Duffy v. Yordi*, 125.

4. PARENT AND CHILD—Statutory Obligation and Remedies.—The obligation of a child to support its parent and the remedies for its enforcement are both statutory, and no proceeding for its enforcement can be maintained except under the circumstances and in the manner prescribed by statute. (Cal.) *Duffy v. Yordi*, 125.

5. PARENT AND CHILD.—A parent supported by one child cannot maintain an action against another for support. (Cal.) *Duffy v. Yordi*, 125.

See Deeds, 4-7; Guardian and Ward, 2; Negligence.

Note.

Parent and Child, obligation of child to support parent does not exist at the common law, 128.

obligation of child to support parent is statutory only, 128.

obligation of child to support parent, how enforceable when created by statute, 130.

liability of child for necessities furnished to parent, 128.

promise of child to pay for past support of parent is without consideration, 128, 129.

statutory remedies against child for the support of the parent are exclusive, 129.

statutes creating liability of the latter for the support of the former, 129.

PARTITION.

In General.

1. PARTITION—Reversions and Remainders.—Under the Mississippi statute, rights in reversion and remainder cannot be affected by partition proceedings, and it is improper to make reversioners or remaindermen parties thereto. (Miss.) *Lawson v. Bonner*, 738.

2. PARTITION—Waiver of Right of.—The right of partition may be waived or suspended for a limited period by the parties in interest. (Minn.) *Roberts v. Wallace*, 701.

3. PARTITION—Cross-bill.—Cotenants who file no cross-bill praying for partition are not entitled to partition of lands in a suit in equity not contemplating partition. (Miss.) *Scottish-American Mfg. Co. v. Buckley*, 763.

4. PARTITION—Specific Allotment by Decree.—In partition proceedings, it is error for the court to direct, of its own motion, the commissioners to so partition the land as to give to one of the parties a designated portion of the land. The division of the property should be left to the commissioners without instruction. (Miss.) *Lawson v. Bonner*, 738.

5. PARTITION—Appeal.—Decrees in Partition are Entireties, and cannot be reversed in part. (Miss.) *Lawson v. Bonner*, 738.

Partition Sale.

6. PARTITION SALE.—Inadequacy of Price is not, in itself, sufficient to set aside a partition sale, unless it is so grossly inadequate as to establish fraud. (Ill.) *Abbott v. Beebe*, 257.

7. PARTITION SALE.—Courts will not refuse to confirm a partition sale, nor will they order a resale, on motion of an interested party, merely to protect him against the result of his own negligence, where he was under no disability to protect his rights at such sale. (Ill.) *Abbott v. Beebe*, 257.

8. PARTITION SALE—Disability of One of Several Cotenants not Available to the Others.—The fact that one of eighteen cotenants is of unsound mind will not enable the others to obtain an order of resale in partition on account of an advanced bid, where the bidders deposit in court for such insane person his share of the sum which would be realized were the advanced bid accepted. (Ill.) *Abbott v. Beebe*, 257.

9. PARTITION SALE—Setting Aside for an Advance Bid.—Though the chancellor has a broad discretion in approving or disapproving sales made by the master, yet his discretion is not an arbitrary one, but must be exercised in accordance with established principles of law. His order setting aside a sale on account of an advance bid may therefore be reversed. (Ill.) *Abbott v. Beebe*, 257.

10. PARTITION SALE, Error in Vacating on Account of an Advance Bid.—Where two parcels of land sold respectively for three thousand five hundred and fifty dollars and five thousand one hundred dollars, an offer to guarantee, on a resale, a bid of four thousand dollars for the former and six thousand dollars for the latter does not justify the court in vacating the sale and directing a resale, there being no reason why the interested parties did not protect their interests by a higher bidding at the original sale. (Ill.) *Abbott v. Beebe*, 257.

Vacating Award of Commissions.

11. PARTITION—Vacating Award of Commissioners.—The value fixed by commissioners in partition on lands to be divided should be set aside only in extreme cases, as where fraud or misconduct can be imputed to the commissioners. (S. C.) *Aldrich v. Aldrich*, 909.

12. PARTITION—Vacating Award of Commissioners.—The award of commissioners in partition of lands will not be disturbed unless

it is made clearly to appear that they exceeded their authority or were guilty of corruption or partiality. (S. C.) Aldrich v. Aldrich, 909.

13. PARTITION—Vacating Award of Commissioners.—The award of commissioners in partition of lands will not be vacated because of the unsecured bid of one not a party to the record. (S. C.) Aldrich v. Aldrich, 909.

PARTNERSHIP.

PARTNERSHIP—Sale of Interest—Suretyship—Liability of Purchaser.—If one partner in a firm sells his interest to a stranger, who assumes as part of the consideration to pay the partnership debts, he thereby becomes the principal debtor as to such debts and the seller his surety, and if such debts become due and remain unpaid, the seller may maintain a bill in equity to compel the purchaser to pay such debts. (Ala.) Tillis v. Folmar, 31.

See Frauds, Statute of.

Note.

Partnership, retiring partner becomes surety only, 41.

PHONOGRAPHS.

See Evidence, 5.

PHYSICIANS.

See Witnesses, 5-6.

PLEADING.

1. PLEADINGS, Theory of.—A pleading must be judged from its general tenor and scope, and when it assumes to proceed upon a distinct theory, it cannot be made good on some other by casting into it isolated statements, which, if fully pleaded in separate paragraphs, might constitute a cause of action or of defense. (Ind.) Vandalia R. R. Co. v. State, 370.

2. PLEADING—Facts—Conclusions of Law.—A pleading setting forth the facts is not bad for surplusage in setting out the legal conclusions from such facts. (Ind. App.) Hamilton Nat. Bank v. Nye, 333.

3. PLEADING—Answer—Verification.—An answer, in an action by the indorsee of a bank check, that the plaintiff derived title through an unauthorized indorsement by one claiming to be the agent of the payee is sufficient without any verification. (Ind. App.) Hamilton Nat. Bank v. Nye, 333.

4. PLEADINGS—Answer—Confession and Avoidance.—A single paragraph of an answer cannot perform the double function of denying the cause of action, and of confessing and avoiding it, and its theory, in this respect, must be determined from the general scope of its averments. (Ind.) Vandalia R. R. Co. v. State, 370.

5. PLEADINGS—Answer—Denial of Part of Complaint.—A single paragraph of an answer may confess certain allegations of a complaint, and avoid the complaint by affirmative facts and deny all others, and such paragraph will be treated as containing but one ground of defense. (Ind. App.) Unger v. Mellinger, 348.

PRESCRIPTION.

See Easements.

PRINCIPAL AND AGENT.

1. PRINCIPAL AND AGENT—Authority of Commercial Traveler—Drafts on Employer.—Although a commercial traveler has drawn drafts on his employer for a number of years and they have been honored, this does not authorize him to bind his employer by a draft for advances which is cashed largely on his own personal credit. In the absence of express authorization a commercial traveler has no power to bind his employer by a draft for advances. (Wash.) *Seattle Shoe Co. v. Packard*, 1064.

2. PRINCIPAL AND AGENT—Commercial Traveler's Authority. The scope of a commercial traveler's authority as a general rule extends only to the solicitation of orders for goods, and third persons dealing with him are bound at their peril, to ascertain his real powers. (Wash.) *Seattle Shoe Co. v. Packard*, 1064.

See Bills and Notes, 5.

PRINCIPAL AND SURETY.

1. PRINCIPAL AND SURETY—Building Contracts—Discharge of Surety.—If a building contract between the contractor and owner is made part of a contract of suretyship between the contractor and his surety and specifies that payment shall be made as the work progresses upon the certificate of the architect, and estimates for material when delivered, reserving ten per cent to be paid only when the work is completed, and the owner undertakes to pay in a different way, without the consent of the surety, the latter is thereby released. (Ala.) *First Nat. Bank v. Fidelity and Deposit Co.*, 45.

2. PRINCIPAL AND SURETY—Building Contracts—Rights of Surety.—If a contractor enters into a building contract to do certain work on certain terms, and procures a surety to guarantee the faithful performance of the work, the surety necessarily contracts with reference to the contract as made, and its terms become a part of the terms of the bond, and he has a right to insist upon the performance of the terms of the contract as written, and if the principal does something else without his consent, he is released, although the thing actually done is more beneficial to him. (Ala.) *First Nat. Bank v. Fidelity and Deposit Co.*, 45.

3. PRINCIPAL AND SURETY—Building Contracts—Waiver by Surety.—If the obligation of a surety in a building contract is to secure the owner against certain mechanic, materialmen and other liens of like character, and hold him harmless against all such demands, and to release him from the necessity of inquiring into such matters and from the payment of such claims, such obligation does not operate as a waiver by the surety of so much of the building contract as requires payment thereon to be made in a particular manner. (Ala.) *First Nat. Bank v. Fidelity and Deposit Co.*, 45.

4. SURETY'S Accountability to Principal and Cosureties.—Where a surety converts into a judgment notes assigned to himself and cosureties as security for the indebtedness of their principal, and at the execution sale thereunder purchases in his own name the land levied upon, and thereafter he and a cosurety buy notes secured by a trust deed on the land, and purchase the land at the sheriff's sale

under such deed, and then rent and finally sell the land to an innocent purchaser, they must account for the profits of the entire transaction to the principal and another surety, such surety having paid part of the principal indebtedness and both he and the surety having been ignorant of the transactions of the other sureties. (Kan.) Page v. Harper, 465.

5. SURETYSHIP—Right of Surety to Enforce Judgment Against Principal.—One of several defendants in an action on a promissory note, who is found to be a surety, may take an assignment of the judgment therein recovered, and enforce it by the issue of execution against his principal, and this without the necessity of a separate action to establish the relation of principal and surety between the parties. (Neb.) Nelson v. Webster, 799.

See Officers, 6.

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right of surety to resort to equity against his principal, 38, 39.

PROBATE LAW.

See Executors and Administrators; Wills.

Note.

Probate and Surrogate Courts, contempt, power of to punish, 954.

PROHIBITION.

1. PROHIBITION—Estates of Decedents—Other Remedy, When Does not Debar.—If a court assumes to grant letters of administration on the estate of a decedent when another court has acquired exclusive jurisdiction to make such a grant, a writ of prohibition will issue to the court exercising jurisdiction without authority, though the applicant for such writ could maintain proceedings for

the revocation of the order complained of, and appeal from any order refusing such revocation, if such appeal could not stay proceedings nor debar the person to whom letters of administration had been granted from exercising the powers of administrator. (Cal.) *Dungan v. Superior Court*, 119.

2. **PROHIBITION, Who may Apply for.—An Heir and an Applicant for Letters of Administration on the Estate of a Decedent** have a sufficient beneficial interest to entitle them to maintain an application to prohibit a court, having no authority so to do, from exercising jurisdiction of another application for letters of administration on the same estate. (Cal.) *Dungan v. Superior Court*, 119.

RAILROADS.

Trespassers on Train.

1. **RAILROADS—Trespassers, Duty to.**—One who boards the steps of a moving closed vestibule train, where he is compelled to remain, is a trespasser to whom the railroad company owes no duty until his dangerous situation is discovered, and it is then required to act only with reasonable promptness to avoid an injury to him. (Iowa) *Graham v. Chicago etc. Ry. Co.*, 445.

2. **RAILROADS—Trespassers—Negligence.**—If a trespasser is discovered riding on the steps of a closed vestibule railroad train, the failure of the trainmen to apply the emergency brakes is not negligence if it appears that that would involve danger to the passengers, and that he might have been assisted from the steps to the car as speedily and effectively as by applying such brakes. (Iowa) *Graham v. Chicago etc. Ry. Co.*, 445.

Maintaining Safe Crossings.

3. **RAILROADS—Crossings.**—A railroad company may be required to make safe and convenient crossings at the intersections of all highways, whether they were established and opened before or after the construction of the railroad. (Ind.) *Vandalia R. R. Co. v. State*, 370.

4. **RAILROADS—Street Crossings—Contractual Duties.**—A municipal ordinance granting a railroad company the right to use its streets, but requiring it to grade the crossings and maintain them safe and convenient, if merely declaratory of the statute law, does not make the company's duty therein wholly contractual. (Ind.) *Vandalia R. R. Co. v. State*, 370.

Injuries to People at Crossings.

5. **NEGLIGENCE in the Speed of a Railway Train in Cities.**—In the absence of signals or safeguards by way of gates or flagmen, a speed of from fifteen to twenty miles an hour on a very abrupt curve at a much used crossing in a city is some evidence of negligence to submit to a jury. (N. Y.) *Serano v. New York Cent. etc. R. R. Co.*, 833.

6. **NEGLIGENCE, Contributory, When Cannot be Held to Exist as a Matter of Law.**—A plaintiff cannot be held guilty of contributory negligence as a matter of law when, being a child six years of age, she undertook to cross the tracks of a railway in a city at a point near where there was an abrupt curve, after first stopping and

waiting for a train to pass, which produced much noise and confusion, and by its presence and the smoke and steam which it emitted obscured the view of another and approaching train by which she was injured. (N. Y.) *Serano v. New York Cent. etc. R. R. Co.*, 853.

See Carriers; Mandamus; Municipal Corporations, 5; Street Railways.

RAPE.

1. **RAPE**.—Absence of Complaint by the prosecutrix in a rape case is not conclusive against conviction, but the jury must consider that fact in connection with all the facts and circumstances surrounding and connected with the transaction, including the age, intelligence, and experience of the prosecutrix. (Iowa) *Garvik v. Burlington etc. Ry. Co.*, 432.

2. **RAPE**.—Evidence.—In a prosecution for rape the evidence of the accused and of his wife that long prior to, and ever since, the time of the commission of the alleged rape he had been incapable of having an erectio penis or of having sexual intercourse is not conclusive of that fact. (Iowa) *Garvik v. Burlington etc. Ry. Co.*, 432.

3. **RAPE** by Railway Employé—Damages.—In an action against a railroad company to recover for a rape committed by its employé upon a passenger resulting in pregnancy and childbirth, a verdict for eight thousand dollars is grossly excessive, in the absence of proof of physical disability on account of the birth of such child, great loss of time, or great indignation and mental suffering. (Iowa) *Garvik v. Burlington etc. Ry. Co.*, 432.

See Carriers, 2.

Note.

Reformation of Writings. See Mistakes.

RELIGIOUS WORSHIP.

See Schools.

RES JUDICATA.

See Judgments, 1-5.

RESTRAINT OF TRADE.

See Contracts, 11-14.

RIOTS.

1. **RIOTING**, What is.—To a riot it is essential that there be an unlawful assembly of people of threatening attitude, acting in concert with disorder and violence, and determined to accomplish some injury to persons or property in spite of any resistance which may be offered. (N. Y.) *Adamson v. City of New York*, 863.

2. **RIOT**, What is not.—The fact that an unoccupied dwelling-house was, on an election day, practically demolished by a crowd of young men and boys, estimated to number from eight to twenty, each carrying away a parcel as soon as he could detach it, and all running as soon as a policeman appeared, does not establish a riot for which a municipal corporation is liable under a statute making it answer-

able for property destroyed by mob or riot. (N. Y.) *Adamson v. City of New York*, 863.

SALES.

1. **SALES—Delivery “f. o. b.”—Duty to Furnish Cars.**—When a dealer in merchandise agrees to sell twenty carloads thereof, to be delivered to the buyer “f. o. b. cars,” it is his duty, not the duty of the buyer, to furnish the cars to receive the goods. (Kan.) *Hurst v. Altamont Manufacturing Co.*, 525.

2. **SALES.—The Term “f. o. b. Cars” Means** that the seller will, at his own expense, do all that is necessary to accomplish the loading and consignment of the goods to the buyer, including the procurement of cars. (Kan.) *Hurst v. Altamont Mfg. Co.*, 525.

3. **CONTRACTS OF SALE—Amount of Recovery.**—A contract fixing the price and terms of sale of articles specified governs the amount of recovery therefor, in the absence of an exception taking the case out of the general rule to that effect. (Ind. App.) *Over v. Byram Foundry Co.*, 327.

4. **CONTRACTS OF SALE—Manufacture of Goods.**—If a contract to sell all of a certain kind of goods to a certain person, which are manufactured during the period of such contract, reserving the “right to discontinue the making thereof” at any time during such period, the exercise of the right of discontinuance is not a breach of the contract. (Ind. App.) *Over v. Byram Foundry Co.*, 327.

Note.

Sales in violation of inspection laws, 509.

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of several articles, the sale of some of which is illegal, 501.

to public enemies or persons in rebellion, 503.

SALOON-KEEPERS.

See Intoxicating Liquor.

SCHOOLS.

1. **SCHOOLS—Prayer—Sectarianism.**—A prayer offered at the opening of a public school imploring the aid and presence of God in the day's work, and asking for wisdom, strength and patience to teach the children properly, and that teacher and pupil have mutual love and respect, and for a heavenly reunion after death, all of which is asked in Christ's name, is not sectarian in its nature, nor does it make the school a sectarian school within a constitutional provision prohibiting the appropriation of educational funds in aid of sectarian schools. (Ky.) *Hackett v. Brooksville Graded School District*, 599.

2. **SCHOOLS—Prayer—Religious Worship.**—A public school opened with prayer, during which pupils are not required to attend, is not a place of worship, nor are its teachers ministers of religion, within the meaning of a constitutional provision that no person shall be compelled to attend any place of worship or contribute to the

support of a minister of religion. (Ky.) *Hackett v. Brooksville Graded School District*, 599.

3. **SECTARIAN BOOKS—Bibles.**—The King James translation or any other edition of the Bible, though adopted by one or more denominations as authentic, or by them asserted to be inspired, is not a sectarian book. (Ky.) *Hackett v. Brooksville Graded School District*, 599.

4. **BOOKS—Sectarian.**—A book, to be sectarian, must show that it teaches the peculiar dogmas of a sect as such, and not alone that it is so comprehensive as to include them by the partial interpretation of its adherents, nor is a book sectarian merely because it is edited or compiled by those of a particular sect. It is not the authorship, nor mechanical composition of the book, nor the use of it, but its contents, that give it its character. (Ky.) *Hackett v. Brooksville Graded School District*, 599.

5. **SCHOOLS—Sectarian Books—Bibles.**—Any edition of the Bible is not of itself a sectarian book, and, when used merely for reading, in the common schools, without note or comment by teachers, is not sectarian instruction, nor does such use of the Bible make the schoolhouse a house of religious worship, within the meaning of a statute providing that no books of a sectarian nature shall be used in any common school, nor shall any sectarian doctrine be taught therein. (Ky.) *Hackett v. Brooksville Graded School District*, 599.

SECTARIANISM.

See Schools.

SELF-DEFENSE.

See Homicide, 1-3.

Note.

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SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE.—Adverse Possession of Land may be sufficient to make a title which the purchaser at a judicial sale should be compelled to accept, but the evidence of such possession must be clear. (N. Y.) *Wanser v. De Nyse*, 871.

STATE CORPORATION COMMISSION.

See Corporations, 3.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

1. **CONSTITUTIONAL LAW—Title of Act.**—A statute entitled, "An act providing the mode of inflicting the punishment of death, the manner in which the same shall be carried into effect, and declaring a violation of any of the provisions of this act to be a misdemeanor," and providing in the body of the act that "no account of the details of such execution, beyond the statement of the fact that such convict was, on the day in question, duly executed according to law shall be published in any newspaper," is not unconstitutional as embracing more than one subject, not expressed in its title. (Minn.) *State v. Pioneer Press Co.*, 684.

2. **CONSTITUTION, Provisions of, When Mandatory.**—The provision of the constitution of South Dakota that no law shall embrace more than one subject, which shall be expressed in its title, is mandatory. (S. Dak.) *Garrigan v. Kennedy*, 927.

3. **STATUTES Which Contain but One Subject.**—An act purporting to provide for the licensing, regulation, and restriction of the business of the manufacture and sale of spirituous and intoxicating liquor contains but one subject, which is sufficiently expressed in its title, though it imposes penalties and liabilities upon persons engaged in the liquor traffic, and provides proceedings for their enforcement, including the right and remedies of a married woman to recover damages for the selling of intoxicating liquors to her husband. (S. Dak.) *Garrigan v. Kennedy*, 927.

STREET RAILWAYS.

1. **STREET RAILROADS—Franchise—Equipment.**—If a franchise granted to a street railway company provides that its passenger-cars shall be equipped with suitable appliances for a suburban railway, insuring the comfort and convenience of its passengers, a finding of failure to comply with its franchise is proper when the evidence shows that it has not supplied its cars with toilet-rooms or water-tanks. (Mich.) *Township of West Bloomfield v. Detroit United Railway*, 628.

2. **STREET RAILROADS—Franchise—Place of Sale of Tickets.**—If a franchise granted to a suburban street railway company provides that family tickets shall be sold entitling the holder and members of his family to ride from any point in the township to a certain city, such franchise is violated by placing such tickets on sale at a single store in such city, as everyone has a right to purchase a family ticket at a place where he has a right to board the cars with his family for passage. (Mich.) *Township of West Bloomfield v. Detroit United Ry.*, 628.

3. **STREET RAILROADS—Franchise—Rates of Fare.**—A provision in a franchise granted to a suburban street railroad that the rate of fare from any point in a certain township to a certain city shall not at any time exceed the rate then charged by the company granted such franchise from a certain town to such city, not only includes the company named in such franchise but also any line which that company or its assignee may at any time build or purchase. (Mich.) *Township of West Bloomfield v. Detroit United Ry.*, 628.

SUBROGATION.

VENDOR AND PURCHASER—Void Sale Under Mortgage Power—Subrogation.—If a grantee in good faith takes a deed from

a purchaser under a power of sale contained in a mortgage believing his title to be good, and such deed proves ineffectual, such grantee is entitled to be subrogated to the rights of the mortgagee to the amount of the purchase money paid to him, and the mortgagor, or one claiming under him, is entitled to have the mortgage debt credited with the amount bid at the sale under the power. (S. C.) *Griffin v. Griffin*, 899.

See Corporations, 2.

SUICIDE.

See Insurance, 28-33; Intoxicating Liquor, 5-8.

Note.

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SURETYSHIP.

See Principal and Surety.

TAX DEED.

See Judgments, 11.

TAXATION.

Situs of Property.

1. **TAXATION**—The Personal Property of a Nonresident while in use in this state in the construction of a railroad is here subject to taxation. (Ark.) *Eoff v. Kennefick-Hammond Co.*, 79.

Injunction Against Enforcement of Tax.

2. **INJUNCTION** will not lie to Restrain Collection of Taxes in the absence of special circumstances in the case bringing it within some recognized head of equity jurisprudence. (Ala.) *City of Ensley v. McWilliams*, 26.

3. **INJUNCTION to Prevent Cloud on Title**.—A bill for an injunction, alleging that because of the unconstitutionality of a statute extending municipal limits the complainant's land is not therein, that the city has begun proceedings to sell such land for taxes, that such action will work injury for which there is no legal remedy, and that a tax deed issued by the city would cast a cloud on plaintiff's title, is not sufficient as a bill to quiet title, or remove a cloud therefrom, and does not justify an injunction, in the absence of extrinsic facts showing the invalidity of the proceedings. (Ala.) *City of Ensley v. McWilliams*, 26.

4. **CLOUD ON TITLE—Tax Sale**.—A tax against property with no semblance of legality and a sale thereunder constitute no cloud on the title. (Ala.) *City of Ensley v. McWilliams*, 26.

5. **CLOUD ON TITLE—Tax Sale** under an unconstitutional law does not constitute a cloud on the title of the land thus sold. (Ala.) *City of Ensley v. McWilliams*, 26.

6. **CLOUD ON TITLE—Tax Sale—Injunction**.—A threatened sale of land for unpaid and delinquent taxes, alleged to be void because of an unconstitutional law, does not put a cloud upon title, so as to justify injunction against such sale. (Ala.) *City of Ensley v. McWilliams*, 26.

See Constitutional Law, 11; License Tax.

TELEGRAPHS AND TELEPHONES.

1. TELEGRAPH COMPANIES—Damages for Failure to Send Message.—The damages for which a telegraph company is liable for failure to send a message must result from such failure as a proximate cause, and must not be speculative, remote or conjectural. (Ind. App.) *Kagy v. Western Union Tel. Co.*, 278.

2. TELEGRAPH COMPANIES—Damages for Failure to Send Message.—Only Cost of Message can be recovered for failure to send or to transmit a message properly and correctly, unless the telegrapher had notice from the message itself, or from the information furnished with it, that its nondelivery would probably be attended with other damages. (Ind. App.) *Kagy v. Western Union Tel. Co.*, 278.

3. TELEGRAPH COMPANIES—Failure to Deliver Message—Anticipation of Injury.—If a telegraph company fails to deliver a message from child to parent, simply stating to the latter "Come at once prepared to stay. We are both sick," the company is not presumed to have known that its failure to deliver the message would, in the natural course of events, cause a severe personal injury to the sender of the message. (Ind. App.) *Kagy v. Western Union Tel. Co.*, 278.

4. TELEGRAPH COMPANIES—Failure to Deliver Message.—If a telegraph company fails to deliver a message simply informing the sendee that the sender is sick and to come at once, the sender cannot recover on the ground of being deprived of the sendee's nursing, when the company was not informed that the latter was an experienced nurse. (Ind. App.) *Kagy v. Western Union Tel. Co.*, 278.

5. TELEGRAPH COMPANIES—Damages—Mental Anguish.—Damages cannot be recovered against a telegraph company for mental anguish alone, caused through negligent failure to send and deliver a telegraphic message. (Ind. App.) *Kagy v. Western Union Tel. Co.*, 278.

6. TELEGRAPH COMPANIES—Damages—Mental Anguish Followed by Physical Injury.—Damages cannot be recovered against a telegraph company for physical injury sustained as a result of mental anguish arising from the negligent failure of the company to send and deliver a telegraphic message. (Ind. App.) *Kagy v. Western Union Tel. Co.*, 278.

Note.

Telegraph Corporations are not insurers of the correctness of messages, 287.

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- damages for delay or error in messages relating to gambling contracts, 300.**
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- damages for failure to transmit message respecting entering into contracts, 293, 294.**
- damages for failure to transmit money with reasonable dispatch, 298.**
- damages, injury to credit as an element of, 295.**
- damages, mental anguish or suffering as elements of, 302-305.**
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- damages, recovery of must be of such only as were reasonably within the contemplation of the parties, 288.**
- damages, remote, speculative, or contingent, instances of, 293-295.**
- damages, special importance of messages, sustaining recovery for, 290, 291.**
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- liability of is founded on a breach of contract, 288.**
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- mental anguish, recovery with respect to messages summoning physicians, 319.
- mental anguish, remote, contingent, or speculative damages cannot be recovered for, 319-321.
- mental suffering and anguish as elements of damages in actions against, 302, 303.
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- mental suffering, relationship of parties necessary to support recovery for, 315.
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- physicians, messages summoning, damages recoverable for delay in, 319.
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- relationship between parties to a telegram which will support recovery for mental suffering, 315.
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TENANCY IN COMMON.

1. **COTENANCY—Conveyance—Rents.**—If one cotenant conveys his interest in land to another cotenant without assigning the rents due at the time, and the grantee succeeds thereafter in a suit to remove a cloud from the title, he is not entitled to the rents which were due prior to the conveyance. (Miss.) *Scottish-American Mtg. Co. v. Buckley*, 763.
2. **COTENANCY—Limitations—Ouster.**—A mortgage of the whole estate executed by one cotenant alone, possession not being taken under it, does not constitute an ouster nor start the statute of limitations to running against the other cotenants. (Miss.) *Scottish-American Mtg. Co. v. Buckley*, 763.
3. **COTENANCY—Ouster—Adverse Possession.**—A sheriff's deed of the interest of one cotenant followed by possession does not amount to an ouster of the other cotenant so that title by adverse possession can be acquired against him, even though the grantee of the sheriff had no knowledge of the cotenant's interest. (Iowa) *Curtis v. Barber*, 425.
4. **COTENANCY—Ouster.**—As between cotenants, actual notice of claim of title and hostile acts done under such claim are prime requirements to an ouster. (Iowa) *Curtis v. Barber*, 425.
5. **COTENANCY—Ouster.**—As between cotenants, actual notice on the part of one of a claim of ownership of the whole property cannot

arise from the fact that he, with the knowledge of his cotenant, makes occasional use of the property for storage purposes, and otherwise assumes to rent it for a nominal rental insufficient in amount to pay the taxes. Such conduct does not constitute an ouster. (Iowa) *Curtis v. Barber*, 425.

THEATER TICKETS.

See Constitutional Law, 9.

THREATS.

See Homicide, 5.

TITLE OF STATUTE.

See Statutes.

TRESPASS.

TRESPASS—Extent of Damage.—To constitute trespass to land, neither the extent of the damage nor the form of the instrumentality by which the close is broken is material. (Minn.) *Whitaker v. Stangvick*, 703.

See Animals.

TRIAL.

In General.

1. **JURY TRIAL.**—The Omission of the Court to Instruct upon any given question or issue is not reversible error unless it was first requested to instruct thereon. (S. Dak.) *Garrigan v. Kennedy*, 927.

2. **TRIAL.**—Special Interrogatories requested in a personal injury action which relate solely to the extent of the injury, and are not at all determinative of the case, are properly refused. (Iowa) *Heinmiller v. Winston Bros.*, 405.

3. **TRIAL.**—Reopening Case.—The reopening of a case for further testimony after a motion by defendant for a directed verdict rests in the sound discretion of the court. (Wash.) *State v. Constantine*, 1043.

Disregarding Testimony of Witness.

4. **JURY TRIAL.**—Witnesses, Right to Disregard Testimony of.—A jury may disregard, as not entitled to credit, the uncorroborated testimony of interested witnesses where the circumstances are such as to reasonably allow of suspicion. (S. Dak.) *Iowa National Bank v. Sherman*, 941.

5. **JURY TRIAL.**—Interested Witnesses, Right of Jury to Pass Upon Credibility of Though They are Uncontradicted.—Where a bank sues on a promissory note on which its right to recover depends upon its being a bona fide and innocent holder, and it appears that the president and cashier of the bank are officers and stockholders of the corporation which transferred the note, and that it was discounted by the bank without inquiry, the proceeds being placed to the credit of the transferring corporation against which there was a large overdraft, the question whether the plaintiff was a bona fide purchaser should be submitted to the jury, though the testimony

of its president and cashier to that effect is not contradicted by other witnesses. (S. Dak.) *Iowa National Bank v. Sherman*, 941.

Argument of Counsel.

6. **TRIAL**—Comment on Interrogatories.—Counsel, in argument, have the right to comment upon the interrogatories to be submitted to the jury. (Ind.) *McIntyre v. Orner*, 359.

7. **TRIAL**—Misconduct of Counsel—Abuse of Accused.—It is reversible error for prosecuting counsel in a trial against a mulatto for murder to be allowed to state in his argument to the jury, as true, a material fact not based upon nor warranted by the evidence, and to further greatly abuse the character of the accused on the sole ground that he was a mulatto. (Miss.) *Hampton v. State*, 740.

See Homicide; Damages; Criminal Law.

TRUSTS.

In General.

1. **TRUST**—Stolen Property.—The Conventional Relation of trustee and cestui que trust, or other fiduciary relation, is not essential to the jurisdiction of a court of equity to declare and enforce a trust with respect to property stolen from the beneficial owner. (Neb.) *Lamb v. Rooney*, 795.

2. **TRUSTS**—Parol Evidence to Establish.—An express trust cannot be established by parol evidence, but a resulting or constructive one can. (Iowa) *McElroy v. Allfree*, 412.

Resulting Trusts.

3. **RESULTING TRUST**, Statute Abolishing Applies Only to Personal Property.—The statute declaring that when a conveyance for a valuable consideration is made to one person and the consideration therefor is paid by another, no use or trust shall result in favor of the latter, does not apply to transactions concerning personal property. (Kan.) *Hanrion v. Hanrion*, 453.

4. **RESULTING TRUSTS**.—A Mortgage of Real Estate is not a conveyance within the meaning of a statute which provides that when a conveyance is made to one person upon a consideration paid by another, no use or trust shall result in favor of the latter, but the title shall vest in the former. (Kan.) *Hanrion v. Hanrion*, 453.

Constructive Trusts.

5. **TRUSTS**—Judicial Sales—Statute of Frauds.—If one, pursuant to an oral agreement with another, purchases land for the latter at judicial sale while the latter is in possession of, and has an interest in, such land, a constructive trust arises in his favor, which is not affected by the statute of frauds. (Ky.) *Parker v. Catron*, 575.

6. **TRUSTS**—Judicial Sales—Payment of Consideration.—If one, pursuant to an oral agreement with another, purchases land for the latter at judicial sale while the latter is in possession of and has an interest in such land, a constructive trust arises in favor of the latter, and the fact that such purchaser paid the consideration himself does not destroy the trust, when the one for whom it was really purchased offers to pay such consideration and is kept from paying it by the act

of the purchaser, who refuses to accept it, and takes a deed to himself. (Ky.) *Parker v. Catron*, 575.

7. **CONSTRUCTIVE TRUSTS** Arise whenever the legal title to property is obtained by a person in violation, express or implied, of some duty owed to one who is equitably entitled to such title and when the property thus obtained is held in hostility to his beneficial rights of ownership. (Ky.) *Parker v. Catron*, 575.

8. **CONSTRUCTIVE TRUSTS** are not within the statute of frauds. (Ky.) *Parker v. Catron*, 575.

9. **CONSTRUCTIVE TRUSTS** rest on the doctrine of estoppel, the operation of which is never affected by the statute of frauds. (Ky.) *Parker v. Catron*, 575.

USURY.

1. **USURY Resulting from Mistake.**—An honest mistake in the drafting of notes which results in the reservation of interest in excess of that permitted by law does not make them usurious. (S. Dak.) *Goodale v. Wallace*, 962.

2. **USURY—Question for the Jury.**—The question whether a sum in excess of legal interest was taken through an honest mistake or a corrupt agreement is for the jury or for the court sitting as such in the trial of a cause. (S. Dak.) *Goodale v. Wallace*, 962.

3. **INTEREST, Compound, What is not.**—The provision in a note allowing interest upon interest after maturity is not a provision for compound interest, nor does it make the note usurious. (S. Dak.) *Goodale v. Wallace*, 962.

4. **USURY—Penalty—Making the Whole Debt Become Due upon Default in the Payment of Interest.**—Where several promissory notes are given, which in the aggregate represent the principal and interest of a loan, each note to bear interest after maturity but not before, and all are secured by a mortgage containing a stipulation that if the mortgagors fail to pay any portion of such notes, either principal or interest, promptly at the times they become due, the whole sum of both principal and interest shall at once become due and collectible, the transaction is not thereby rendered usurious, for the reason that the stipulation is in the nature of a penalty from which the mortgagors may relieve themselves by prompt payment of the notes when due. (S. Dak.) *Goodale v. Wallace*, 962.

5. **USURY.—The Fact that Notes are Made Payable Monthly Instead of Annually cannot make them usurious.** (S. Dak.) *Goodale v. Wallace*, 962.

6. **USURY, Grantee of Mortgagor, When Estopped to Plead the Defense of.**—It is only where the grantee of mortgaged property has purchased it on the basis of a clear title, and agreed, as a part of the consideration, to pay the mortgage debt, that he is estopped from questioning the mortgage for usury. (Ill.) *First National Bank v. Drew*, 271.

7. **USURY, Who may Interpose the Defense of.**—A grantee of a mortgagor may interpose the defense of usury where there is no agreement or understanding to the contrary. (Ill.) *First National Bank v. Drew*, 271.

8. **USURY, Defense of by Person Acquiring Title Under a Voluntary Conveyance.**—If the owner of real property which is subject to a usurious mortgage executes a voluntary conveyance thereof to his wife, because he is unable to manage it, and wishes to prevent it

from being further frittered away, she is not estopped, as against the mortgagee, to show that the mortgage is usurious. (Ill.) *First National Bank v. Drew*, 271.

VENDOR AND VENDEE.

1. **VENDOR AND PURCHASER**.—**Marketable Title, What is not.** Title is not marketable if it will not be accepted by an ordinarily prudent man when the property is again offered for sale or as security for a loan. (N. Y.) *Wanser v. De Nyse*, 871.

2. **VENDOR AND PURCHASER**.—**Contract to Sell Land—Extension of Time of Payment.**—A mere naked parol promise by the vendor in a contract for the sale of land to extend the time of payment is not binding upon him. (Mich.) *Bartlett v. Smith*, 625.

3. **VENDOR AND PURCHASER**.—**Contract to Sell Land—Covenants—Breach.**—If a vendor in a contract for the sale of land covenants against encumbrances, and the land is subject to a mortgage, he is not entitled to demand payment and forfeit the contract, until he has satisfied the mortgage and is in a position to perform the contract himself. (Mich.) *Bartlett v. Smith*, 625.

4. **VENDOR AND PURCHASER**.—**Breach of Contract to Convey—Evidence.**—In an action by a purchaser in a contract for the sale of land to recover for a breach thereof by the vendor in conveying to a third person, evidence that the grantee took with a knowledge of such purchaser's rights is admissible. (Mich.) *Bartlett v. Smith*, 625.

5. **VENDOR AND PURCHASER**.—**Breach of Contract to Sell—Possession by Purchaser, Effect of.**—Possession by the purchaser under an unrecorded contract for the sale of land is notice of his rights, and he can suffer no injury by the fact that his vendor deeds away his title, since he can enforce his contract against his vendor's grantee, as well as against his vendor. (Mich.) *Bartlett v. Smith*, 625.

6. **VENDOR AND PURCHASER**.—**Breach of Contract to Sell—Measure of Damages.**—If a vendor in an unrecorded contract for the sale of land conveys the premises to a third person, the measure of the purchaser's damages is his payments, and the reasonable value of the improvements made in good faith, less the value of the use of the premises. (Mich.) *Bartlett v. Smith*, 625.

See Subrogation.

VERDICT.

See Homicide, 7, 8.

WAREHOUSEMEN.

1. **WAREHOUSEMEN**.—**Delivery to Persons Holding Unindorsed Receipt.**—A warehouseman is not protected in delivering property to the holder of unindorsed receipts which on their face show that he is not the owner. (Ark.) *Citizens' Bank v. Arkansas Compress etc. Co.*, 102.

2. **WAREHOUSEMEN**.—**Mingling of Goods as Devesting Title.**—If the holder of a bill of lading for particular bales of cotton delivers them to a compress company and takes its receipt for them, the fact that the compress company mingles the bales with others and thus makes their identification difficult does not divest the owner of title. (Ark.) *Citizens' Bank v. Arkansas Compress etc. Co.*, 102.

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3. WAREHOUSEMEN—Conflicting Claims to Goods.—Where a compress company accepts bills of lading from a bank for cotton and issues its receipts in place thereof, in a suit in equity by the bank and others against the compress company to adjust conflicting claims to the cotton, it is immaterial, as between the bank and the compress company, whether the bank owns the cotton or holds it as collateral security. (Ark.) *Citizens' Bank v. Arkansas Compress etc. Co.*, 102.

4. WAREHOUSEMEN—Transfer of Goods—Assent of Holder of Receipt.—A statute forbidding a warehouseman from removing beyond his control goods for which he has given his receipts, without the written assent of the holder of the receipts, cannot be evaded by showing a custom to treat such receipts as made to bearer. (Ark.) *Citizens' Bank v. Arkansas Compress etc. Co.*, 102.

WATER CHARGES.

See Waters and Watercourses, 7, 8.

WATERWORKS.

See Municipal Corporations, 9-11.

WATERS AND WATERCOURSES.

Riparian Rights.

1. WATERS AND WATERCOURSES—Riparian Rights—Nuisance.—Every riparian proprietor has an equal right to have the stream flow through his land in its natural state without material diminution in quantity or alteration in quality, and any diversion or obstruction of the water which substantially diminishes the volume of the stream, or which defiles or corrupts it to such a degree as essentially to impair its purity and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, creates a continuous actionable nuisance. (Ala.) *Alabama Consolidated Coal etc. Co. v. Turner*, 61.

2. WATERS AND WATERCOURSES—Riparian Rights—Pollution.—If one owns land on a stream and uses the water to wash ore taken from his land, allowing the water to return to the stream so polluted as to be unfit for watering stock or for domestic use, for which it was formerly used by a lower riparian owner and from which there is a deposit of mud or refuse ore on the land of the lower riparian owner impairing its fertility, he is liable to an action for damages to such lower owner. (Ala.) *Alabama Consolidated Coal etc. Co. v. Turner*, 61.

3. WATERS AND WATERCOURSES—Appropriation—Adverse Use.—The exclusive enjoyment of water by a riparian owner in a particular way for the length of time which is the period of the statute of limitations, enjoyed without interruption, is sufficient to raise a presumption of title as against a right in any other person which might have been, but was not, asserted. (Ala.) *Alabama Consolidated Coal etc. Co. v. Turner*, 61.

4. WATERS AND WATERCOURSES—Riparian Rights—Nuisance—Negligence.—If the foundation of a suit by a lower proprietor is the active creation of a private nuisance in maintaining waterways and polluting the stream, and not merely a wrong arising from negligence, the degree of care used by the upper riparian owner in the

construction of such waterways is immaterial in determining the right of the lower owner to recover actual damages. (Ala.) *Alabama Consolidated Coal etc. Co. v. Turner*, 61.

5. WATERS AND WATERCOURSES—Riparian Rights—Diver-sion—Defense.—A defense by an upper riparian owner that he has used the water of a stream for manufacturing purposes in a reason-able manner, returning the water to the stream with no material diminution, is good as against demurrer, in an action by a lower riparian owner for a diversion of the water of the stream. (Ala.) *Alabama Consolidated Coal etc. Co. v. Turner*, 61.

6. WATERS AND WATERCOURSES—Riparian Rights—Con-struction of Dam—Liability for Freshets.—A riparian owner who con-structs a dam so as to hold water coming down in usual and customary freshets is not liable to a lower riparian owner for injury resulting from the failure of such dam to hold the water in time of extra-ordinary flood. (Ala.) *Alabama Consolidated Coal etc. Co. v. Tur-ner*, 61.

Water Charges.

7. MUNICIPAL CORPORATIONS—Water Charges—Delinquen-cies—Encumbrances.—A city has no power to compel a subsequent owner or occupant of property to pay delinquent water charges which he did not contract or incur as a condition precedent to the enjoy-ment of further water service. An ordinance making such a regula-tion is unreasonable and void. (Wash.) *Linne v. Bredes*, 1068.

8. VENDOR AND PURCHASER—Delinquent Water Charges—Encumbrances.—A city has no power to compel a subsequent owner or occupant of property to pay delinquent water charges which he did not contract for, and thereby virtually create a lien or encum-brance upon his property, and if such subsequent owner pays such delinquent water charges, under a void ordinance requiring him to do so to obtain further water service, he cannot recover the amount from his grantor under a promise by the latter to pay all encum-brances upon the property. (Wash.) *Linne v. Bredes*, 1068.

See Navigable Waters.

WAYS.

See Easements.

WILLS.

Form of Instrument.

1. WILLS, Form of.—The law does not prescribe any particular form for a will, except that it must be reduced to writing and signed and attested in the presence of the testator by two or more credible witnesses. (Ill.) *Gump v. Gowans*, 275.

2. WILLS, Deeds, When not Admissible to Probate as.—A con-veyance executed by a married woman, intended to be operative after her death and therefore testamentary in character, and never de-livered, cannot be admitted to probate as a will, though her husband joined in the execution of the conveyance, and there was attached thereto the certificate of a notary by him signed, certifying to its acknowledgment. The signatures so placed on the deed cannot be considered as the signatures of subscribing witnesses. (Ill.) *Gump v. Gowans*, 275.

Testamentary Capacity.

3. **WILLS—Testamentary Capacity—Aversion to Children.**—Although a testator has sufficient mind to know all about his estate and the nature and value of it, but has a fixed purpose to give his children as little interest in it as possible, and his aversion to them is such that he does not know the natural obligation he is under to them he has not sufficient testamentary capacity to make a valid will. (Ky.) *McDonald v. McDonald*, 579.

4. **WILLS—Testamentary Capacity.**—It is necessary in order to have testamentary capacity for one to have such sensibilities as will enable him to know the obligation he owes to the natural objects of his bounty, as it is for him to have the capacity to know the nature and value of his estate and a fixed purpose to dispose of it. (Ky.) *McDonald v. McDonald*, 579.

5. **WILLS—Evidence of Testamentary Capacity.**—A will which disposes of testator's property in a manner consistent with, and such as naturally would be expected from a person in the testator's situation, and in accordance with his privately expressed wishes, is of itself evidence of his testamentary capacity. (Colo.) *In re Shapter's Estate*, 216.

6. **WILLS—Testamentary Capacity—Reading Will—Presumption.** If a will is prepared at the testator's special request and is then left in his possession several hours prior to its execution, and he then signs it in the presence of attesting witnesses, who are present at his request for that purpose, it will be presumed that he read it, or that its contents were in some way made known to him. (Colo.) *In re Shapter's Estate*, 216.

7. **WILLS—Testamentary Capacity—Burden of Proof.**—The law presumes testamentary capacity, due execution, and that the will contains the unrestrained wishes of the testator, and the burden of proof is upon the person attacking it to show otherwise. (Colo.) *In re Shapter's Estate*, 216.

8. **WILLS—Testamentary Capacity—Testimony of an Attesting Witness** that he did not believe that the testator was conscious or knew what he was doing when he made his will, does not impair the efficacy of such witness' attestation. (Colo.) *In re Shapter's Estate*, 216.

Witnesses.

9. **WILLS—Subscribing Witnesses—Time of Signing.**—The fact that subscribing witnesses signed the will before the testator does not invalidate the will. (Colo.) *In re Shapter's Estate*, 216.

10. **WILLS—Subscribing Witnesses Attesting a will** in the presence of the testator thereby impliedly state that he is of sound mind and competent to make a will. (Colo.) *In re Shapter's Estate*, 216.

11. **WILLS—Proof of Execution—Subscribing Witnesses.**—It is not incumbent upon the proponent to prove all the facts constituting due execution of a will by the concurring testimony of the two subscribing witnesses, and while both of such witnesses must be examined, the will may be established even in opposition to the testimony of both of them. (Colo.) *In re Shapter's Estate*, 216.

12. **WILLS—Witnesses—Competency—Interest.**—A party to the contest of the probate of a will is, under the statute, incompetent to testify on the ground of interest. (Colo.) *In re Shapter's Estate*, 216.

13. WILLS—Witnesses—Beneficiary.—If a will provides compensation for legal services rendered, and reimbursement for expenses of an attorney in administering a trust as executor, he is not such a beneficiary under the will as will render him incompetent to testify in proceedings to contest the will. (Colo.) *In re Shapter's Estate*, 216.

14. WILLS Witnessed by Husband or Wife of the Testatrix or Testator.—The incompetency of husband and wife to testify for or against each other applies to the attestation of wills. Neither, therefore, can, as a witness, attest the will of the other. (Ill.) *Gump v. Gowans*, 275.

Election.

15. WILLS—Equitable Election.—If a testatrix devises to her husband certain property constituting the homestead of her mother, if at the time of the death of such testatrix she herself is the owner thereof, and then makes certain bequests to her mother which are accepted and received by the latter upon the death of the testatrix, the doctrine of equitable election does not apply against the mother, and the husband does not take the homestead under the will. (Minn.) *Appleby v. Appleby*, 709.

Lapsed Legacies.

16. WILLS—Lapsed Legacies.—If a will provides for an annual allowance for the care and maintenance of property so long as it shall be rightfully occupied by a person, who, under the will, is to take it upon the happening of a certain contingency, and such contingency does not happen, such provision of the will lapses and becomes inoperative. (Minn.) *Appleby v. Appleby*, 709.

See Annuities; Husband and Wife, 10, 11.

Note.

Wills, beliefs, unjust and unfounded, difference between and insane delusions, 584.

beliefs, unjust and unfounded, whether affect testamentary capacity, 583, 584.

child, prejudice against without sufficient cause does not affect testamentary capacity, 582.

insane delusions, aversions which amount to, 584.

hatred of, or prejudice against, one's relatives, however ill-founded, does not deprive him of testamentary capacity, 582.

right of testator to dispose of his property by does not depend on the justness of his disposition, 582.

testamentary capacity, prejudice, however ill-founded, does not establish want of, 582, 583.

testator, capacity required of to support his disinheriting his relatives, 582.

unnatural dispositions of property as evidence of want of testamentary capacity, 584, 585.

WITNESSES.

Competency.

1. WITNESSES—Competency of Executors.—A statute rendering parties to a proceeding incompetent to testify therein applies to an executor made a party to a proceeding to contest the probate of a will. (Colo.) *In re Shapter's Estate*, 216.

2. **WITNESSES—Competency—Interest.**—A witness cannot testify for himself as to matters occurring with his brother since dead, and thus make evidence for his benefit. (Ky.) *Parker v. Catron*, 575.

3. **WITNESSES—Infants—Competency.**—An intelligent boy, twelve years of age, though not able to define the legal obligation of an oath, but who does know that by being sworn he is required to tell the truth and will be punished for it if he does not, is competent as a witness in a criminal prosecution. (Ky.) *Bright v. Commonwealth*, 590.

4. **WITNESSES—Competency—Religious Belief.**—Whether a person's religious training has been so developed that he comprehends his responsibility to God for lying does not affect his competency as a witness. The question is one of credibility and not of competency. (Ky.) *Bright v. Commonwealth*, 590.

Privileged Communications.

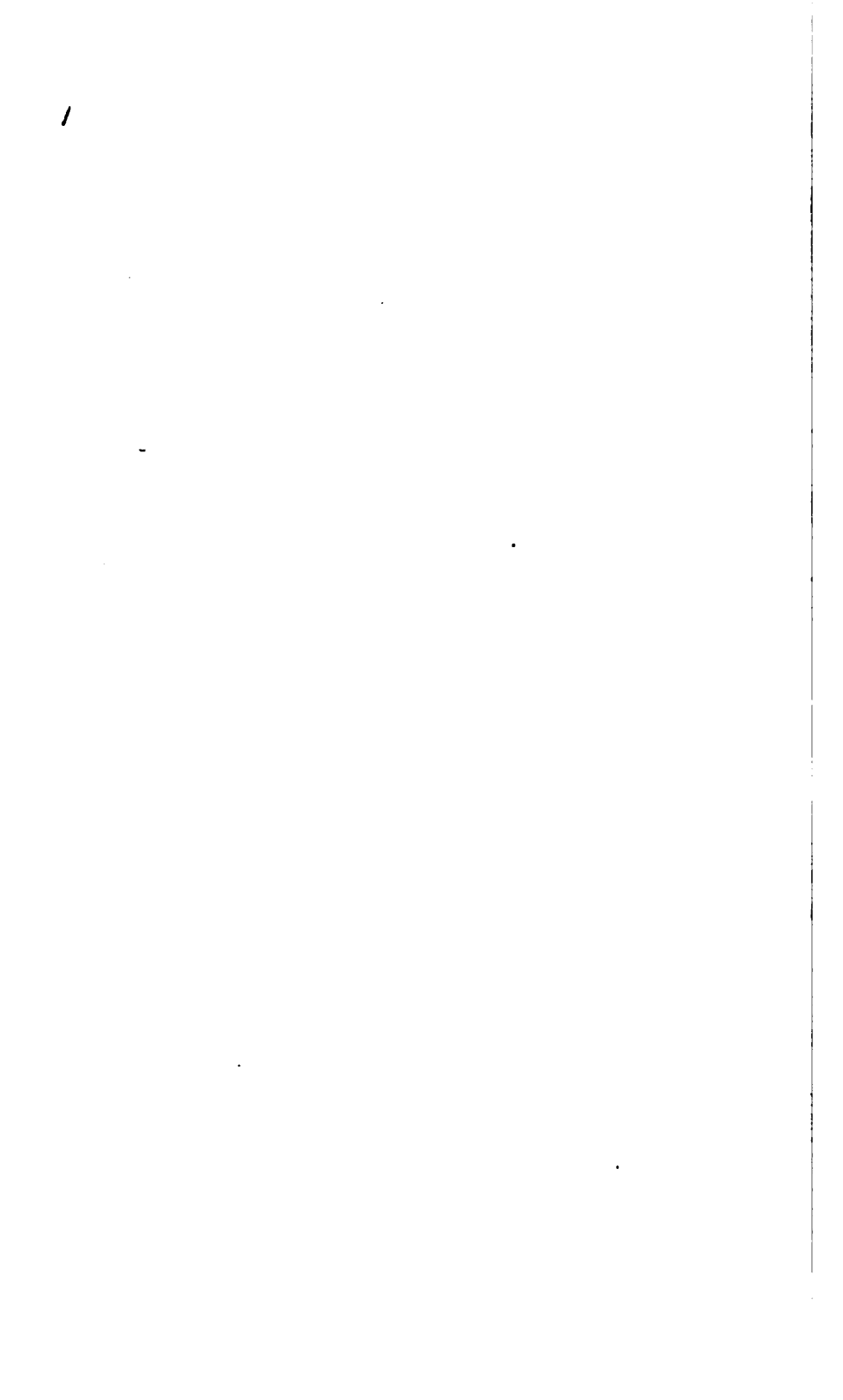
5. **EVIDENCE—Privileged Communication—Physician.**—A statute providing that the testimony of a physician shall not be given without the consent of his patient is for the protection of the latter, and he may waive the privilege if he sees fit, and, as a general rule, those who represent him after his death may also waive it for the protection of interests which they claim under him. (Minn.) *Olson v. Court of Honor*, 676.

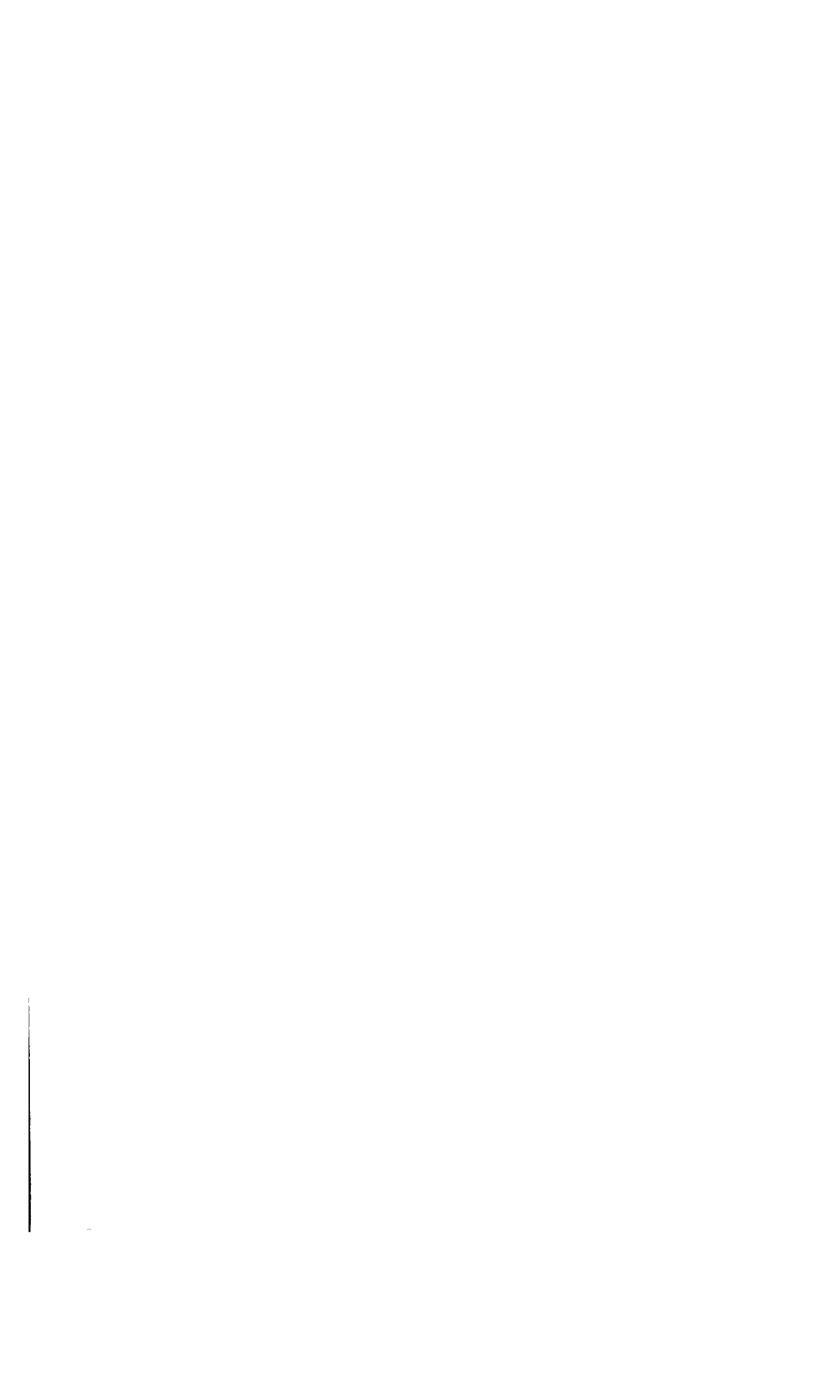
6. **EVIDENCE—Privileged Communications.**—The physician and attorney of a testator are competent to testify in a proceeding to probate his will as to facts ascertained in their attendance upon him in their professional capacity. (Colo.) *In re Shapter's Estate*, 216.

Transactions with One since Deceased.

7. **EVIDENCE—Transaction with One Since Deceased.**—One who asserts ownership of land as against the administrator of a decedent, who at the time of his death held the legal title to such land, is incompetent to testify to any communication or transaction between himself and the decedent. (Iowa) *McElroy v. Allfree*, 412.

See Criminal Law, 2, 3; Trial, 4, 5; Wills, 9-14.







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